

## **Opinion No. 71-35**

February 26, 1971

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Honorable Lee Coker New Mexico State Representative Executive Legislative Building Santa Fe, New Mexico 87501

### **QUESTIONS**

#### **FACTS**

The facts as set out in your inquiry are as follows: A man was elected to the office of county clerk. He appointed his wife as deputy county clerk. He, while still serving as county clerk, was appointed by the county assessor as deputy county assessor and is now holding both offices or positions. He has now been appointed to the board of the Office of Economic Opportunity for two counties while he is still serving as county clerk and deputy county assessor.

#### **QUESTIONS**

1. Can the county clerk's wife legally serve as deputy county clerk?
2. Can the county clerk simultaneously hold that office and the office of deputy county assessor?
3. Can the county clerk simultaneously hold the office of county clerk and board member of the Office of Economic Opportunity for Catron and Socorro Counties?

#### **CONCLUSIONS**

1. Only if the board of county commissioners approved this hiring.
2. No. At the very least there is a physical incompatibility of office.
3. See analysis.

### **OPINION**

#### **{\*51} ANALYSIS**

The statute prohibiting nepotism is Section 5-1-10, N.M.S.A., 1953 Compilation which provides in pertinent part that:

"It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this . . . to employ as **clerk, deputy or assistant in such office or position**, whose compensation is to be paid out of public funds, any person related by **consanguinity or affinity** within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, **whose duty it is to approve the bond of the person giving such employment . . .**" (Emphasis added)

The office of county clerk is, of course, covered by this statute; a wife is an affinity relationship within the prohibited degree; and unless the board of county commissioners approved the hiring, the county clerk could not legally hire his wife at more than \$ 600 per **year** to serve as his clerk, deputy or assistant. This is true since the board of county commissioners fixes the amount of the county clerk's bond and has other duties in connection therewith. Section 5-1-13, N.M.S.A., 1953 Compilation (1969 P.S.).

Therefore, the appointment by the county clerk of his wife as deputy county clerk was void **ab initio** unless the board of county commissioners had approved the appointment pursuant to the requirement of Section 5-1-10, **supra**. If the board did not approve this hiring, then payment for her services cannot legally be made.

Your second question involves the compatibility of the dual offices of county clerk and deputy county assessor. There are two types of incompatibility of office. The first is functional -- where there is an inconsistency between the functions of the two offices. One is or can be subservient to the other. The second is physical incompatibility of the two offices. **Haymaker v. McCain**, 22 N.M. 400. As this office said in Opinion No. 65-26 "physical incompatibility is illustrated by one individual attempting to perform two full time positions or one full time and one part time position." Certainly the office of county clerk is a full time one; so is the office of deputy county assessor. Section 5-1-13, N.M.S.A., 1953 Compilation (1969 P.S.) provides as follows:

"Each county officer **shall appoint a deputy or clerk**, as allowed by law, who shall take the oath of office required of the appointing officer. And **shall receive salary** as provided by law. In case of the death of the appointing county officer, the deputy shall continue in office and perform the duties of the county officer until a new county officer is appointed and qualified as required by law." (Emphasis added)

Section 15-43-24, N.M.S.A., 1953 Compilation, as amended in 1969, provides:

"Unless otherwise provided, the salaries of all county officers and the salaries of **deputies**, and the expenses, as fixed by law, shall be paid monthly out of the county salary fund, upon warrants drawn by the county commissioners and shall be paid from the respective dates upon which the several county officers qualified." (Emphasis added)

The two offices being physically incompatible, the official in question must vacate one or the other.

Whether the office of county clerk is incompatible with membership on a board of the Office of Economic Opportunity depends on a number of factors. We would have to know all of the powers and duties of such a board in order to determine functional compatibility. We doubt they are physically incompatible since a person presumably could serve his regular eight-hour day as county clerk and still be able to handle economic opportunity board duties.

By: Oliver E. Payne

Deputy Attorney General