

Opinion No. 71-97

August 5, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. John Jasper Attorney Legislative Council Executive Legislative Building Santa Fe, New Mexico Honorable Edmundo Delgado State Senator 139 South Castillo Santa Fe, New Mexico

QUESTIONS

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May a person appointed and serving as director of the state department of alcoholic beverage control also hold office and serve as an elected city councilman in a municipality having a mayor-council form of government?

CONCLUSION

No, see analysis.

OPINION

{*144} ANALYSIS

Your question involves the compatibility of the offices of director of the State Department of Alcoholic Beverage Control and city councilman.

There are two types of incompatibility of office. The first is functional -- where there is an inconsistency between the functions of the two offices, and the second, not relevant to the discussion here, is physical incompatibility of the two offices. **Haymaker v. McCain**, 22 N.M. 400, 168 P.248 (1917).

The incompatibility between two offices is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety or antagonism {*145} would result in the attempt by one person to faithfully discharge the duties of both. Such an inconsistency exists in the present situation.

The duties of the governing body of a municipality of which a councilman is a member are set forth at 14-11-3, NMSA, 1953 Comp., and include the authority to "possess all power granted by law, and other municipal powers not conferred by law or ordinance on another officer of the municipality," and "adopt rules and regulations necessary to effect the powers granted municipalities."

Pursuant to Subsections 2 and 7 of Section 14-11-3, quoted above, the governing body and thus the members thereof have authority to regulate the sale of alcoholic liquors, Section 46-4-1, NMSA, 1953 Comp., and to approve or disapprove the issuance or transfer of a license. Section 46-4-8, NMSA, 1953 Comp.

The Director of the Department of Alcoholic Beverage Control is:

"to administer and enforce the laws with which the department is charged," Section 46-2-11 (A) (1), NMSA, 1953 Comp.

The Director, who is vested with investigative authority and powers, Section 46-2-13, NMSA, 1953 Comp. (1969 P.S.), is also charged with the duty to issue and file all regulations or orders necessary to implement and enforce any provision of the law administered by the department, Section 46-2-14 (1969 P.S.).

Section 46-4-8, **supra**, further grants discretionary power to the director in matters regarding license issue or transfer.

Thus, it is apparent that Section 46-4-8, **supra**, requires the local governing body, as well as the director, to pass on the issuance of a license. See Opinion of the Attorney General No. 66-66, dated May 24, 1966. Notwithstanding the provisions of Section 14-9-5, NMSA, 1953 Comp., in which a member of a governing body having any possible interest (financial or otherwise) in the outcome of any policy, decision or determination before the governing body shall (1) disclose such interest and (2) refrain from voting on such issue, it is our opinion that a member of the local governing body cannot repeatedly abdicate his duty in regard to such decisions as he would be required to do if he held the two positions discussed in this opinion.

A further and more obvious impediment to one holding both the office of Director of Alcoholic Beverage Control and city councilman is Section 46-2-10, NMSA, 1953 Comp., wherein it is stated that the director shall:

"only be removed from office for the following reasons:

- (1) negligent or inefficient performance; or
- (2) physical unfitness for duty, including addiction to narcotics or excessive use of intoxicating beverages; or
- (3) conviction of any crime involving moral turpitude; or
- (4) careless, negligent, or improper use of state property, equipment, or funds; or
- (5) **engaging in political activities prohibited by the Personnel Act [5-4-28 to 5-4-46]; or**

(6) violation of the provisions of the Conflict of Interest Act [5-12-1 to 5-12-15]."
(Emphasis added).

Section 5-4-42 (B), NMSA, 1953 Comp. states that:

"No person in the personnel office, or employee in the service, **shall hold political office or be an officer of a political organization during his employment.** For the purposes of the Personnel Act [5-4-28 to 5-4-46], being a member of a local school board shall not be construed to be holding political office, and being an election official shall not be construed to be either holding political office, or being an officer of a political organization. Nothing in the Personnel Act shall deny employees the right to vote as they choose or to express {*146} their opinions on political subjects and candidates."
(Emphasis added).

Obviously, if an elected member of the city council, Section 14-9-1, NMSA, 1953 Comp., also held the office of Director of Alcoholic Beverage Control, whether or not "in the service", he would be in contravention of Section 46-2-10 by virtue of express legislative mandate.

However, because the Director of the Alcoholic Beverage Control has declared his intention to resign his office as city councilman, any discussion of recommended remedial action for the above-described situation is unnecessary.

By: Leila Andrews

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