

Opinion No. 74-22

June 11, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Robert A. Mondragon Lieutenant Governor State of New Mexico State Capitol Building Santa Fe, New Mexico 87501

QUESTIONS

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Is there any Constitutional or Statutory prohibition against one person holding both the position of Municipal Judge and Magistrate Judge?

CONCLUSION

See Analysis.

OPINION

{*43} ANALYSIS

In **Haymaker v. State ex rel. McCain**, 22 N.M. 400, 168 P.2d 248 (1917) the Supreme Court said:

"The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and an antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both."

As that case indicates, incompatibility may arise because of the physical impossibility of performing the duties of both offices, or it can arise because of the inconsistency of the functions of both offices.

Section 37-1-4, NMSA, 1953 Comp. provides for the election of municipal judges and Section 37-1-2, NMSA, 1953 Comp. defines the jurisdiction of the municipal court as over all offenses and complaints under ordinances of the municipality. Section 37-1-2 also allows a governing body of a municipality and the board of regents of a state educational institution to enter into an agreement granting the municipal court jurisdiction over campus traffic regulations as to areas under control of the board of regents.

Section 36-1-1, NMSA, 1953 Comp. establishes the "magistrate court" as a court of limited jurisdiction within the judicial department of the State of New Mexico. The jurisdiction of this court is limited to civil actions where the amount in controversy does not exceed two thousand dollars (\$ 2000), Section 36-3-3, NMSA, 1953 Comp. (1973 P.S.), and in criminal matters to "misdemeanors," and preliminary examinations in any "criminal action where authorized by law." Section 36-3-4, NMSA, 1953 Comp. (1973 P.S.). The law specifying jurisdiction for "magistrate courts" further limits that jurisdiction as follows:

"C. A magistrate has no jurisdiction in any civil action:

- (1) for malicious prosecution, libel or slander;
- (2) against public officers for misconduct in office;
- (3) for specific performance of contracts for the sale of real property;
- (4) in which the title or boundaries of land may be in dispute or drawn into question;
- (5) affecting domestic relations, including divorce, annulment or separation, or custody, support, guardianship, adoption or dependency of children;
- (6) to grant writs of injunction, habeas corpus or extraordinary writs; or
- (7) where jurisdiction is vested exclusively {⁴⁴} in another court."

As illustrated in Opinion of the Attorney General No. 72-13, dated March 20, 1972, there are occasions where a "magistrate court" may entertain jurisdiction over those matters within the jurisdiction of the "municipal court." However, in most instances, no "functional incompatibility" arises if one person holds both offices.

The question remains, though, as to whether there is a physical impossibility to discharge the duties of both offices. Section 37-1-3, NMSA, 1953 Comp. requires the municipality to set the qualifications, bond and salary of the municipal judge. The "qualifications" of magistrate judges are set at Section 36-2-1, NMSA, 1953 Comp. While a municipality could, by ordinance, limit the employment of its judge to only that position, the law setting forth qualifications for magistrate judges fails to limit persons elected to such positions to only that endeavor.

If, however, each position were a full time position, there might be a "physical incompatibility" between the two offices where one person could not physically discharge the duties of both offices at the same time. Without specific facts before us, we cannot make such a determination.

Since personnel of the magistrate courts are "subject to all laws and regulations applicable to other state offices and agencies and to other state officers and employees

except where otherwise provided by law," (Emphasis provided) Section 36-1-1, **supra**, an examination of New Mexico law relating to limitations on officers and employees is necessary. The New Mexico Personnel Act, which does limit employment of state employees to non-political positions, Section 5-4-42, NMSA, 1953 Comp. (1973 P.S.), excludes from coverage those in the "judicial branch of government" and does not cover municipal employees. Section 5-4-31(G), NMSA, 1953 Comp. (1973 P.S.). Article VI, Section 26 of the New Mexico Constitution leaves the determination of "qualification" of magistrate judges to the legislature. Thus, there appears to be no constitutional or statutory prohibition against one person holding both positions.

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