

Opinion No. 89-10

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OPINION OF: HAL STRATTON, Attorney General

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QUESTIONS

May a full-time county employee hold the position of probate judge?

CONCLUSIONS

Yes, but see analysis.

ANALYSIS

We understand that this question arises from the recent election of a Valencia County maintenance department employee to the office of probate judge. In our opinion, both positions may be held by the same person, as long as his full-time employment with the maintenance department and his duties as probate judge do not physically interfere with each other during the ordinary working hours of each position and the functions of the two positions do not otherwise conflict. In reaching this conclusion, we have examined the applicable statutory and common law standards for determining whether two public positions are compatible so that they may be held contemporaneously.

There are no statutory or constitutional provisions applying specifically to probate judges which prevent them from taking or maintaining other employment during their tenure as judges. The only relevant provisions, therefore, are those that address generally the compatibility of public offices and public employment. Section 10-6-3 NMSA 1978, which describes when public employment is deemed permanently abandoned, provides:

Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized, or who shall accept private employment for compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the

duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment.

(Emphasis added).

Section 10-6-5 NMSA 1978 further provides: "Any public office or service, other than service in the armed forces of the United States of America, and any private employment **of the nature and extent designated in Section 10-6-3 NMSA 1978** is hereby declared to be incompatible with the tenure of public office or employment." (Emphasis added.) The underlined language has been interpreted to modify the phrase "[a]ny public office or service." **See, e.g.,** Att'y Gen. Op. 57-298 (1957). **See also** Att'y Gen. Ops. 70-74 (1970), 65-26 (1965), 64-73 (1964). Thus, there is no violation of Section 10-6-5 unless there is a violation of Section 10-6-3.

For incompatibility to exist between public office or employment and another public position, Section 10-6-3 first requires that a salary or compensation be authorized for the other public position. The second requirement is that, as a result of the subsequent position, the officer or employee fails for thirty days to "devote his time to the usual and normal extent during ordinary working hours to the performance of the duties" of his initial public office or employment. Section 10-6-3 is worded so that both these factors must be present for the second position to be incompatible with or constitute an abandonment of the first. See Att'y Gen. Op. 64-73 (1964) (both criteria must be met for sections on incompatibility and abandonment to become operative).

We assume that both the maintenance department employment and office of probate judge are paid positions and, therefore, the first statutory criterion for abandonment is present. Accordingly, in order for one individual to hold both positions under Sections 10-6-3 and 10-6-5, the second criterion must be absent. Neither position can cause the incumbent to fail for thirty successive days to devote his time to the usual and normal extent during ordinary working hours to performance of the other. As this office has stated, "a person who holds two full-time positions or even a full-time and a part-time position that must be fulfilled during normal working hours is deemed to have resigned from and to have permanently abandoned his public office and employment at the end of 30 days." Att'y Gen. Op. 70-74 (1970) (person cannot hold two salaried positions in county government that must be performed during the same hours).

The office of probate judge is a part-time position. Section 34-7-1 NMSA 1978. Probate courts are required to "be in session and open at such times as are needed for the transaction of any business matters which may properly come before the courts under the laws of the state and upon notice thereof given as required under the laws of the state. Section 34-7-8 NMSA 1978. These provisions suggest that the "ordinary working hours" of a probate judge are sufficiently flexible so that other employment may be held at the same time. In opinions involving similar situations this office has found that, in the absence of evidence that one position actually interferes with another within the meaning of Section 10-6-3, the same person may hold two positions with hours that do not overlap. For example, it was determined that no physical incompatibility existed

where a person served as a municipal judge after his working hours as city clerk. Att'y Gen. Op. 68-111 (1968). See also Att'y Gen. Op. 57-298 (1957) (probate judge may be appointed to act and receive a salary as deputy district court clerk). Accordingly, if the incumbent can successfully perform his duties as probate judge to the usual and normal extent outside his working hours at the maintenance department, or vice versa, the two positions will be compatible under the statutory criteria.

In addition to the factors set forth in Sections 10-6-3 and 10-6-5, it also is necessary to examine the standards for compatible offices developed under common law. These standards were set forth by the New Mexico Supreme Court in *Haymaker v. State*, 22 N.M. 400, 163 P. 248 (1917). Despite the subsequent enactment of the incompatibility and abandonment definitions in Sections 10-6-3 and 10-6-5, opinions issued by this office have applied the Haymaker definition of incompatibility as well as the statutory definitions. See, e.g., Att'y Gen. Op. 70-74 (1970) and 64-73 (1964). But see Att'y Gen. Op. 70-74 (1970) (stating that the Haymaker decision did not apply to determination of whether two non-elective public positions were incompatible).

Haymaker addressed the issue whether an elected member of a board of education could also hold the position of the board's appointed clerk. The court stated the test of incompatibility as follows:

In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must be subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible.

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 antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both.

22 N.M. at 403-04, 163 P. at 249.

The court concluded that the same person could not be both a member of the board and its clerk where it was found that she had cast the deciding vote as a board member on matters pertaining to her interests as clerk, voted herself into the clerk's position, fixed her salary as clerk, and approved warrants for payment of her salary. *Id.* at 404, 163 P. at 249. In other words, by holding both offices, she was able to sit in judgment on her own acts. *Id.* at 405, 163 P. at 249 (quoting *Cotton v. Phillips*, 56 N.H. 220, 223 (1875)). Cf. *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 P. 594 (1930) (applying Haymaker test and finding that offices of district attorney and mayor were compatible).

Under the standards enunciated in Haymaker, the positions of probate judge and maintenance department employee would be incompatible if they have conflicting functions. In the absence of contrary evidence, there is no reason to think that they do.

There is no obvious relationship or interaction between the positions; one position has no administrative or other authority over the other so that the incumbent could use one position to influence his employment in the other or would be improperly motivated in carrying out his judicial responsibilities.

In summary, based on the facts presented, we do not think that employment with the Valencia County maintenance department and service as probate judge are necessarily incompatible under Sections 10-6-3 and 10-6-5 or functionally incompatible under the standards stated in Haymaker.

ATTORNEY GENERAL

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