

## Opinion 09-02

**OPINION OF: GARY K. KING** Attorney General

July 27, 2009

**BY:** Adrian Terry, Assistant Attorney General

**TO:** The Honorable Jack E. Thomas, New Mexico State Representative, 200 Lisbon Avenue, SE, Rio Rancho, NM 87124

### QUESTION:

If a person currently holding the elected position of Rio Rancho City Councilor is subsequently elected to the office of Sandoval County Assessor, may that person hold both positions simultaneously?

### CONCLUSION:

An individual may hold the office of city councilor and county assessor simultaneously, as long as the duties of the two offices do not physically or functionally interfere with one another and are not otherwise incompatible.

### ANALYSIS:

The New Mexico constitution and statutes do not prohibit a member of a city council from assuming the duties of an elected county officer, such as a county assessor. Therefore, a person seeking to serve in both capacities would only be prohibited by the physical or functional incompatibility of the separate offices.

#### 1. Physical Incompatibility

Physical incompatibility is addressed by state statute. NMSA 1978, § 10-6-3 describes when public employment is deemed permanently abandoned, providing as follows:

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 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.

NMSA 1978, § 10-6-5 defines incompatibility of office in relation to the abandonment of office, providing as follows:

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.

For physical incompatibility to exist between two public offices, NMSA 1978, § 10-6-3 requires: (1) each position to be held for compensation, and; (2) as a result of the subsequent position, the officer 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 public office. See A.G. Op. No. 90-14 (1990). The language of NMSA 1978, § 10-6-3 is constructed to require the presence of both factors for a subsequent position to be incompatible with, or constitute an abandonment of, the first. See id.; see also AG Op. No. 64-73 (1964).

Applying the statutory criteria of physical incompatibility to the circumstances here, the position of city councilor must be a paid position that causes a person holding it to fail for thirty successive days to devote his or her time to the usual and normal extent during ordinary working hours to the duties of county assessor, if elected. If a person can perform his or her duties as a city councilor before or after his or her ordinary working hours as a county assessor, then the two positions will be compatible under the statutory criteria. See A.G. Op. No. 68-111 (1968) (no physical incompatibility existed where a person served as a municipal judge after his working hours as city clerk).

## 2. Functional Incompatibility

The principal case in New Mexico related to incompatibility between offices is Haymaker v. State ex rel. McCain, 22 N.M. 400, 163 P. 248 (1917). The Haymaker case involved an action to remove an elected member of a city board of education who was also serving as the appointed clerk of the board. In defining the incompatibility of office doctrine, the Supreme Court held as follows:

The incompatibility between two offices ... 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.

Haymaker v. State, 22 N.M. at 403-04.

The Haymaker court determined that the office of board of education member and board clerk were incompatible where the member/clerk had on multiple occasions voted in matters pertaining to her own interest, including voting herself into office as clerk,

fixing the amount of her salary, and approving her salary warrants. See Haymaker, 22 N.M. at 404.

As described in Haymaker, functional incompatibility occurs when there is an inconsistency between the functions of two offices:

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

Haymaker, 22 N.M. at 403 (citing People v. Green, 58 N.Y. 295 (1874)).

In State ex rel. Chapman v. Truder, 35 N.M. 49 (1930), the Court found that the office of the district attorney and the mayor of a city are not incompatible and may be held by the same person. The Court found that one office was not subordinate to the other, the district attorney had no power to remove city officers at his discretion, and the district attorney could only present charges based on sworn evidence presented to him. The Court further stated that since the District Court could appoint another person to present charges on behalf of the county or state in the event the district attorney refused to do so, the power to present charges against local officers did not defeat the ability of a person to hold the office of district attorney and mayor simultaneously. See State v. Truder, 35 N.M. 49; see also A.G. Op. No. 85-24. Consequently, each situation involving potential functional incompatibility between offices “must be examined carefully on its facts, with particular attention given to the specific office and responsibilities which are deemed to be in conflict.” See A.G. Op. No. 85-24.

Applying the criteria of functional incompatibility outlined in the Haymaker case and its progeny to the circumstances at issue, the position of city councilor and the office of county assessor must subordinate, one to the other, and they must have the right to interfere with the other, or otherwise be inconsistent to a degree that would result in antagonism by one person attempting to discharge the duties of both.

Considering the standards outlined above, there is no apparent relationship or interaction between the positions indicating a physical or functional incompatibility between the offices of city councilor and county assessor. Although this opinion is not based on an exhaustive assessment of each and every duty of the offices addressed herein, we believe that a comprehensive application of the principles outlined in this opinion, compared with the duties of the respective offices, will aid in any future determination. The factors of whether either office is in any way subordinate, antagonistic, or inconsistent with the other will be paramount to such a review.

GARY K. KING  
Attorney General

ADRIAN TERRY  
Assistant Attorney General