

Opinion No. 44-4625

December 19, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. Fred J. Federici, District Attorney, Raton, New Mexico

In your letter dated December 18, 1944, you state that a person who is at present the Water Master in a water district has been elected a member of the board of county commissioners, and you inquire whether the two offices are incompatible.

Under Section 77-304 of the New Mexico 1941 Compilation it is provided that funds to meet the Water Master's salary and administrative expenses shall be levied and collected from the water users in the same manner as other taxes, and that the salary and expenses of the Water Master shall be paid by the board of county commissioners out of the special fund so created.

Section 10-301, Sub-section 8 of the New Mexico 1941 Compilation provides as follows:

"Any office belonging to the class mentioned in Section 10-303 becomes vacant under any of the following circumstances; * * * (8) By an officer accepting and undertaking to discharge the duties of another incompatible office."

Section 10-303 of the New Mexico 1941 Compilation lists the officers subject to removal as being "any county, precinct, district, city, town or village officer elected by the people." If a person should hold the office of county commissioner and accept an incompatible office, he would be subject to removal under Section 10-301. However, where a person is holding the other office at the time he qualifies as the county commissioner, there may be some doubt whether continuing to hold the other office would subject him to removal as county commissioner since he is not accepting and undertaking to discharge the duties of another incompatible office subsequent to the time he qualifies as county commissioner. Holding the office of water commissioner would not disqualify the person from becoming county commissioner and the only question involved is whether after qualifying as county commissioner the person can continue to hold the other office if the same is incompatible.

In *Haymaker vs. State* 22 N.M. 400, the court cites with approval the case of *Cotten vs. Phillips*, 56 N. H. 220 where this language is used:

"The duties of an auditor are to examine the accounts of the prudential committee, and their vouchers, and report whether they are properly cast and supported, and whether the money has been legally expended. If the same person could hold both offices, he would in fact sit in judgment on his own acts."

Since the county commissioners pay the salary and expenses of the Water Master, and also the county commissioner would be paying himself, he would in effect be passing judgment upon his own acts. For that reason, I am of the opinion that the offices are incompatible. However, as above stated, there is a question whether the county commissioner would be subject to removal in view of the fact that he already holds the incompatible office at the time he qualifies as county commissioner and could not be said to be accepting and undertaking to discharge the duties of water commissioner subsequent to the time he qualifies as county commissioner.

Since the matter is very questionable, it is my opinion that if the person desires to hold his position as water commissioner he should not qualify as county commissioner.