

Opinion No. 45-4735

June 7, 1945

BY: C. C. McCULLOH, Attorney General

TO: Honorable William J. Barker Judge of the District Court Santa Fe, New Mexico

{*86} I have your letter of May 31, 1945, wherein you request an opinion of this office concerning whether the office of District Judge is incompatible with membership on the State Game Commission.

The general duties of the State Game Commission are provided in Section 43-108 of the 1941 Compilation. In addition to these powers, the State Game Commission is given the power to make rules and regulations as provided in Sections 43-111, 43-112, 43-201, 43-205, 43-504, 43-113, and 43-508. It is further noted that violations of certain regulations made by the State Game Commission are declared to be criminal offenses under our statutes. See sections 43-207, 43-209, and 43-510 of the 1941 Compilation. The duty, however, of enforcing the rules and regulations relating to game and fish is placed on the State Game Warden and such deputy wardens, clerks and other employees as the State Game Commission shall employ. See Section 43-105, also Sections 43-224 and 43-509.

Original jurisdiction concerning violations of the rules and regulations of the State Game Commission, insofar as the same may pertain to criminal violations, is in the Justices {*87} of the Peace, and a District Judge only has jurisdiction of most cases which concern the State Game Commission when on appeal from a Justice of the Peace court. However, certain types of cases may be brought in the state or federal district courts by or against the State Game Commission, as for example, cases of the nature of the matter now pending in the Supreme Court concerning the right of the public to fish in a certain part of the Conchas Reservoir.

This office takes notice of the fact that whereas it is possible to have cases on appeal from a Justice court as well as original cases filed in the district court, such matters are very rare occurrences. A check of the docket for Santa Fe and Rio Arriba Counties, for example, has shown that there has been only one case filed of this nature in the district court during the last three years, and a further check has indicated that there have been no cases filed in the remaining two counties of this district, to-wit, McKinley and San Juan Counties. It is therefore clear that matters concerning regulations of the State Game Commission rarely come before the judge of the First Judicial District Court or other District Judges.

Numerous cases have involved the question of incompatibility of offices. See cases cited in Annotation beginning on page 216 of L. R. A. 1917 A. Also, see subsequent annotations in 26, A. L. R., 142; 40 A. L. R. 654; and 132 A. L. R. 254. Upon a careful examination, however, of the numerous cases which may be cited, it is noted that

practically all cases involving judges have in effect been decided under constitutional or statutory provisions prohibiting various types of employment by judges which are not applicable in this state or have been decided under situations which are not involved by this question. See, for example, Howard v. Harrington, 114 Me. 433, 96 Atl. 769 L.R.A. 1917 A, 211. In this case it was held that the office of judge of the police court was incompatible with the office of Mayor. A police court, of course, considers almost exclusively matters arising under city ordinances. It was the duty of the Mayor in the particular case to enforce the ordinances that such cases would be brought under. There was no question concerning the power of disqualification involved in this case, and apparently the police judge would, of necessity, have had to consider all cases arising under the ordinances of the town that he had the duty of enforcing regardless of his interest. Clearly the offices were incompatible and it was so held.

An entirely different question is presented here, wherein instead of most cases considered by the Judge coming within the interest of another office, a very few cases are involved and in such instances the District Judge may clearly disqualify himself or be disqualified by any interested party and another District Judge may hear the case.

Our Supreme Court has never ruled upon a case involving what duties or types of offices are incompatible to the duties of a District Judge. The question could have been involved in the case of State v. Blanchett, 24 N.M. 433. However, this decision turned upon the question of de facto and de jure officers and the question herein involved was not ruled upon.

Our Supreme Court has only passed upon the question of incompatibility in the case of Haymaker v. State, 22 N.M. 400, which case, however, did not involve a judicial office. Incompatibility in this case was defined as follows:

"Incompatibility between offices is an inconsistency between the functions thereof, 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."

It is submitted that a contrariety and antagonism could not result in the attempt of the district judge to perform duties of both offices in his case for the reason that if any {88} case arose wherein the State Game Commission would be interested, the District Judge would of necessity be disqualified, or could disqualify if such a situation should arise under any fact situation.

See In re Opinion of the Justices (Mass.) 29 N. E. 2d 738. The Supreme Court of Massachusetts stated in this case:

"The office and the position are in no way related. It may be that it would be possible for a case to come before the Superior Court involving the action of such a board. But this possibility seems remote and the result would be merely the **disqualification of the judge to hear the case**. See Edwards v. Cockburn, 257 Mass. 153, 157, 153 N. E.,

796. And an occasional disqualification of a judge to hear a case pending in the court of which he is a member does not preclude his continuing to hold the office, particularly where, as in the Superior Court * * * there are other judges qualified to hear the case." (Emphasis ours.)

This case appears to be directly in point in principle and this office, therefore, feels governed by this authority upon a thorough search of the cases which discloses in the opinion of this office that the above is the leading case upon this subject.

It is further pointed out that a member of the State Game Commission has been a Federal District Judge for the past number of years. The same arguments concerning incompatibility which can be made to a state District Judge can be made to a Federal District Judge. However, no one, to the knowledge of this office, has ever suggested that the office of Federal District Judge was incompatible with the holding of a membership on a State Game Commission.

In view of the foregoing, it is our opinion that the holding of the office of District Judge and membership on the State Game Commission does not involve the holding of an incompatible office.

By HARRY L. BIGBEE,

Asst. Atty. General