

Opinion No. 57-23

February 8, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Mr. Reuben E. Nieves, Assistant District Attorney, Clovis, New Mexico

QUESTIONS

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"May a person serve as a qualified, elected constable in a precinct in this city (Clovis), and at the same time hold down a position with the City Police Department as an officer?"

CONCLUSION

Yes, but subject to receiving a salary, or fees, from only one of the two offices held.

OPINION

ANALYSIS

The question here considered brings to light the theory of incompatibility of offices or a conflict of officially imposed duties.

In 42 Am. Jur. 926 the rule is stated:

"Even in the absence of express prohibitions against the holding by one person of more than one office at the same time, there is a well-established limitation on the right so to do. This limitation operates upon offices that are in their nature incompatible, for it is a settled rule of the common law that **a public officer** cannot hold two incompatible offices at the same time. The rule is founded upon the plainest principles of public policy. . . . However, at common law it extends no farther than incompatible offices. There are no inhibitions, except constitutional and statutory ones, against the holding by the same person of more than one compatible office, . . ."

and continuing, it is stated:

"The prohibition against one person holding more than one office at the same time has reference to offices, as distinguishing from positions in the public service that do not use to the dignity of offices. It does not extend to a position which is a mere agency of employment, . . . , or other position which constitutes an employment as distinguished from a public office."

Considering the instant situation in light of a general statement of the law, we discover an immediate need to resolve two fundamental premises prime in arriving at a sound conclusion. First, do the **public offices**, herein considered, fall within the meaning of that afore contemplated, or may one be identified as a position of agency or employment?

In Section 14-15-1, New Mexico Statutes Annotated, 1953 Compilation, "The corporate authority of cities organized under this chapter shall be vested in a mayor and a board of aldermen, to be denominated the **city council**, together with such officers as are in this chapter mentioned or may be created under its authority." In Section 14-15-5, ". . . . The appointive officers of cities are a city marshal, members of the police, . . ." And in Section 14-17-2, "The mayor of any incorporated city, town or village shall be the chief executive officer thereof. He shall, subject to approval of a majority of the city council, . . ., appoint all officers except those who may be required by law to be elected by the voters . . ." And finally looking to the duties and authority imposed upon the office of a municipal policeman, we find in Section 14-17-6, "The marshal and other peace officer of officers of cities, towns and villages shall execute and return all writs and processes to them directed by the mayor, police judge or justice of the peace as the case may be, . . .; They shall have in the discharge of their proper duties, like powers, and be subject to like responsibilities, as sheriffs or constables in similar cases."

In reviewing momentarily the afore stated statutory provisions, we find the delegated authority to municipalities is vested in the mayor and city council; that the mayor with the approval of said council shall appoint members of the police, and that such appointed police officers shall carry out duties as directed by the mayor or as otherwise provided.

Based upon the rule set down in *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P. 2d 1197, wherein the Court said:

"After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) It must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) The powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) It must have some permanency and continuity, and not be only temporary or occasional."

it may be concluded that a city or municipal policeman is not a public official in the constitutional sense, but rather a public or civil employee.

The second fundamental premise to be resolved turns upon the question of emoluments of office where there exists a duplication in certain areas of responsibility provided for two positions.

In the instant case, it must be assumed that a person hired by the municipal government, as a policeman, is paid a salary for the performance of duties provided by law or as directed by the governing authority and also that the responsibility of performance extends to the entire realm delegated to said governing body. With reference to the question first put, we find that the precinct in which the herein considered constable has been elected falls within the area of responsibility also covered by the position of hire and accordingly raises the question as to a conflict of officially imposed duties. Responsibility and jurisdiction of constables may be found in Article IV, Section 26, New Mexico Constitution, and in Sections 39-1-1, 39-1-4 and 36-4-3, New Mexico Statutes Annotated, 1953 Compilation. Like powers and responsibilities are provided for policemen in Section 14-15-5, *supra*.

Attorney General's Opinion No. 6033 reviews thoroughly the question of the incompatibility between the officers of Constable and deputy sheriff and states that:

' . . . a salaried deputy sheriff should not undertake to recover for himself fees for the performance of duties in connection with the service of civil and criminal papers, and that the performance, by such a deputy sheriff, of the duties of a constable, in such a manner, will cause a vacancy to arise by operation of the statute in his office of deputy sheriff."

Opinion No. 4781, dealing with the same subject, states:

". . . it would seem that the deputy sheriff, even though appointed as constable, could not retain fees for performing services which come under his jurisdiction and for the performance of which he is paid a salary."

It is our opinion that the afore stated conclusion is true also in the instant case.

The opinions considered *supra* deal, admittedly, with situations involving incompatible offices. Such is not the case here. However, it is our opinion that where there is a conflict of officially imposed duties, as provided by law or supervisory direction, and where, in one instance, a salary or other compensation is being paid for the performance of these duties, it would be highly improper for a person receiving such compensation to also accept or retain fees provided for the same performance while serving in a second official capacity.

It is our further opinion that there is no prohibition against a city policeman serving in a dual capacity, which as a matter of law is provided, Section 14-17-6 *supra*, subject to the restriction afore stated relative to receiving compensation twice for the same performance.