

## Opinion No. 60-168

September 21, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Hon. Fabian Chavez, Jr. Chairman, State Judicial System Study Committee 201 State Capitol Santa Fe, New Mexico

### QUESTION

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May a justice of the peace act and receive a salary as a deputy sheriff or special (part-time) deputy sheriff?

#### CONCLUSION

No.

### OPINION

#### {\*559} ANALYSIS

We are of the opinion that the office of justice of the peace and that of deputy sheriff or special deputy sheriff are hopelessly incompatible. Opinion of the Attorney General No. 5955, May 25, 1954 dealt with an analogous situation. It was there held that a probate judge could not act as an assistant district attorney, because his duties as an assistant district attorney might require him to practice before the probate court of which he was judge, and he would be unable to perform the judicial function in an impartial and disinterested manner.

A justice of the peace is a judicial officer. See Constitution of New Mexico, Art. VI, § 26, and N.M.S.A., 1953 Comp., §§ 36-1-1, et seq. Sheriffs, their deputies and special deputies, are law enforcement officers with power, among other things, to conserve the peace, make arrests, cause offenders to appear in court, attend on courts, including justice of the peace courts, and to serve process issuing out of justice of the peace courts. See N.M.S.A., 1953 Comp., §§ 15-40-2, 15-40-11, 15-40-12, and 15-40-18. We are faced, then, with the compatibility of a judicial office and a law enforcement office.

Two offices are incompatible where they are inconsistent in their functions, as where one is subordinate to the other, or may interfere with the other, or there exists an antagonism or contrariety between them. **Haymaker v. State ex rel. McCain**, 22 N.M. 400, 163 Pac. 248 (1917). A few examples will suffice to show the inconsistency between the office of justice of the peace and that of deputy sheriff or special deputy sheriff.

§§ 55-6-12, N.M.S.A., 1953 Compilation empowers sheriffs and their deputies to arrest for violation of certain highway laws, and to bring such violators before a justice of the peace. If conviction results, the sheriff or his deputy is allowed a fee for the arrest. The justice of the peace collects a fee from the county for the trial of such causes. See § 36-19-18, N.M.S.A., 1953 Compilation. {\*560} Here in one court room we have the same person acting as arresting officer, prosecuting witness, jury, and judge. In addition, this same person collects a fee for the trial of all such cases, and collects an additional fee if the accused is found guilty. No situation could be more repugnant to our fundamental concepts of due process of law. The desire of a judge to enhance his fees might lead him to make questionable arrests in his capacity as deputy sheriff. The desire of the deputy sheriff to enhance his fees might lead him, in his capacity as justice of the peace, to render verdicts of guilty, so that such fees would be payable. Each office is obviously antagonistic and inconsistent with the proper functioning of the other.

§ 39-1-3, N.M.S.A., 1953 Compilation imposes on sheriffs and their deputies the duty to arrest escaped prisoners. § 39-1-5, N.M.S.A., 1953 Compilation provides that the justice of the peace shall fine the sheriff for failing to perform this duty. No sheriff would be compelled to perform his duty if he were his own judge in an action against himself. Again, there is a clear inconsistency in the functions of the two offices.

§ 36-4-1 provides that process of justice of the peace courts may be directed to the sheriff for service or execution. Thus, the office of sheriff is made subordinate to the orders of the justice of the peace. Even a special deputy sheriff empowered only to serve process is subordinate to a justice of the peace in this respect. Such subordination renders the offices incompatible. See the **Haymaker** case, supra.

It is useless to prolong the list of inconsistencies. Regardless of salary, a judicial officer may never serve as a law enforcement officer in any situation where holding one office may cause some benefit to accrue to the other, or would intrude upon the disinterested and impartial disposition of civil or criminal cases in court. So long as a sheriff or his deputy may benefit from the process or orders of a justice of the peace court, or a justice of the peace may receive fees for the trial of cases where the arrest is made by a sheriff or his deputy, no person may hold both offices.

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