

Opinion No. 60-86

May 9, 1960

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

TO: Mr. Robert D. Castner State Auditor Santa Fe, New Mexico

QUESTION

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May the same person hold the offices of county commissioner and justice of the peace at the same time?

CONCLUSION

No.

OPINION

{*448} ANALYSIS

Again, the question arises as to whether the holding of two public offices at the same time by the same person is compatible. Again, we must turn to the landmark case in New Mexico on compatibility of office, **Haymaker v. State**, 22 N.M. 400, 163 P. 248, which held that the offices of member of a city board of education and clerk of the same board were incompatible. The test of incompatibility of offices was declared in the **Haymaker** case to be as follows (quoting from 22 N.M. at page 403):

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

See also 42 Am. Jur., public officers, Sec. 70 and Opinion No. 60-18, contain an extended quote from this citation.

Your question is, therefore, whether the offices of county commissioner and justice of the peace are incompatible in view of the test set forth in the **Haymaker** case.

In our opinion, the offices are incompatible. The office of justice of the peace is established pursuant to Sec. 36-1-1, N.M.S.A., 1953 Comp. which states that at each general election, there shall be elected at each precinct one justice of the peace and one constable in the manner now provided by law for the election of state and county officers. This section supplements Art. VI, Sec. 26 of the New Mexico Constitution

providing that justices of the peace, police, legislators and constables shall be elected in and for such precincts or districts as are or may be provided by law. Under Sec. 36-2-8, the jurisdiction of a justice of the peace is coextensive with the limits of the county in which he is elected but, with certain exceptions not important to this question, he must reside and hold his office in the precinct for which he is elected.

A county commissioner is a member of the board of county commissioners, which board exercises the political and corporate powers of the county pursuant to Sec. 15-37-1, et seq. Under Sec. 15-37-17, the county commissioners are given the powers to set off, organize and change the boundaries of any precinct or township in their county, to designate and give the names therefor, and in case of an organization of a new precinct, they shall within thirty (30) days from the time such precinct was organized, order an election for justice of the peace and constable for such precinct as provided {~~*449~~} by law. Under Sec. 15-37-18, no new precinct can be set off or organized unless a petition is presented to the board of county commissioners signed by at least fifty (50) citizens resident within the boundaries of the proposed new precinct. You will note that the county commissioners have the power to set off, organize and change the boundaries of any precinct subject only to the limitation that a precinct may not be set off or organized unless the prescribed petition be presented to them. Thus, it seems clear that the boundaries of a precinct may be changed as distinguished from being set off or organized without the need for such a petition. In accordance with Sec. 15-37-18, the boundaries of set off or organized precincts are to be in a compact form, cover as small an area as practicable and serve the greatest convenience of the people therein, but this does not, by the terms of the section, apply to precincts whose boundaries are "changed."

It can be seen from a perusal of the above cited sections that a justice of the peace who is also a county commissioner could influence and possibly cast the deciding vote at a board meeting to "change" the boundaries of his precinct or the precinct of any other justice of the peace in the county. True, each justice of the peace in the county has coextensive jurisdiction throughout the entire county but it is common knowledge that the location of the precinct and its boundaries may decidedly affect the amount of fees collected by the justice of the peace in the performance of his duties as prescribed by law, since, under Sec. 36-19-1 (P.S.), the justice collects \$ 5.00 for each case docketed before his court. For instance, if the boundaries of a precinct are intersected by a major transcontinental highway and the office of the justice of the peace is located within such precinct and along that highway, it necessarily follows that a vast majority, if not all, of the traffic citations issued against traffic law violators along that highway within the county will be referred to this particular justice of the peace. If this justice, as county commissioner has the potential power to change precinct boundaries so as to exclude the boundaries of any other district from touching upon or being intersected by the highway, he could effectively monopolize the majority of criminal matters brought before justices of the peace in the county.

Further, under Sec. 5-6-8 (P.S.) and 36-19-22 (P.S.), justices of the peace are required to file reports verified under oath with, among other officers, the boards of county

commissioners showing all fines, fees, costs or public moneys received, collected and disbursed each month previous. The board has the duty of auditing such reports. It is axiomatic that a person should not authorize, or assist in authorizing the audit of his own financial affairs. If the same person is a county commissioner and a justice of the peace, such would be the case.

Although we realize this question is not free from conflicting opinion, our opinion is that the dangers present in the exercise of power by the board of county commissioners, one of whom is a justice of the peace in connection with the situation presented above, render the office of county commissioner and justice of the peace incompatible. To put it another way, in the words of the **Haymaker** case, the offices appear to be subordinate, one to the other and they have per se the right to interfere with the other, we conclude that the offices of justice of the peace and county commissioner are incompatible and therefore the same person may not hold both of these offices at the same time.

By: Philip R. Ashby

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