

## Opinion No. 60-82

May 4, 1960

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

**TO:** Mr. John A. Anderson City Attorney Lordsburg, New Mexico

### QUESTION

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Where the same person holds the office of justice of the peace and police judge, may such an individual be compensated for both positions?

#### CONCLUSION

Yes, subject to the limitations set out in the analysis below.

### OPINION

#### {\*443} ANALYSIS

The question of incompatibility in public office has been dealt with by the Attorney General on numerous occasions in the past. Most of these occasions concerned county officers, and may be found in the Opinions of the Attorney General Nos. 4169, 4199, 4254, 4314, 4365, 4781, 5069, 5665, 6033, 6281, 6291, and 57-23. The problem has also been considered in the case of **Haymaker v. State**, 22 N.M. 400, 163 Pac. 249.

The question of the application of Article X, Sec. 1 of the Constitution, is not here involved. The justice of the peace is a precinct officer and the municipal judge is, of course, a municipal officer. However, incompatibility can exist between offices without the question of additional compensation being involved, (see § 5-3-40, N.M.S.A., 1953 Comp.), and, consequently, it is possible that because of the compensation given the justice of the peace and the municipal judge, those offices may become incompatible.

The office of municipal judge is created and defined under Secs. 37-1-1 to 37-1-9, N.M.S.A., 1953 Comp. (PS). A very important limitation is contained in Sec. 37-1-2, supra, which grants to the municipal judge the jurisdictional authority to hear offenses and complaints arising under ordinances and laws of cities and towns. The municipal judge has no jurisdiction other than that prescribed therein. The justice of the peace, on the other hand, has general jurisdiction and the limitations on the jurisdiction of the justice of the peace are set out in Chapter 36, Volume 6, N.M.S.A., 1953 Comp.

The most important distinction between the jurisdiction of the justice of the peace and the municipal judge is that the municipal judge has no civil jurisdiction whatsoever.

Therefore, the objection insofar as salary is concerned would arise only in the instance of a violation of a municipal ordinance. It is to be noted that Section 38-1-15, N.M.S.A., 1953 Comp. (PS), seems to give the justice of the peace jurisdiction over violations of ordinances. However, read together with the two sections following, it is clear that the justice of the peace who hears violations of municipal ordinances must do so as a municipal judge and not in his capacity as a justice of the peace. The possibility of receiving compensation twice for the performance of one duty thus disappears under this interpretation.

More specifically, we hold that whether the judge hearing the violation of the municipal ordinance is a duly elected or appointed municipal judge or a justice of the peace sitting as a municipal judge, the duty thus performed is that of a municipal judge and not of a justice of the peace. On the other hand, a municipal judge may not exercise any of the remaining jurisdictional authority given to a justice of the peace and, therefore, when the justice who holds the two offices simultaneously acts as a judge in any other matter, he must act as a justice of the peace {*\*444*} and may not sit as a municipal judge. Again, it can be seen, that the justice of the peace would not be receiving compensation twice for the performance of a specific duty.

A justice of the peace receives his compensation by virtue of fees for the performance of duties which the municipal judge cannot perform and the municipal judge receives his compensation in the form of a salary for duties which can be performed only by a person sitting as a municipal judge. Under the statute, this can be either an attorney, a justice of the peace, or a duly elected or appointed municipal judge. We see no conflict in the practice of a justice of the peace being compensated for duties performed as a justice and during the same term receiving compensation in the form of a salary for duties performed as a municipal judge.

We have read the **Haymaker** case, *supra*, and do not feel that these two offices are incompatible under the test set out therein. In addition to the reasoning set out above, wherein we hold that a justice of the peace, hearing violations of municipal ordinances under Secs. 38-1-15 to 38-1-17, *supra*, must sit as a municipal judge, we should also point out that a justice of the peace is specifically created by the Constitution and the Constitution specifically provides that all fines and forfeitures collected by him must be paid into the current school fund. Consequently, if we held that the justice of the peace hearing violations of municipal ordinances under Sec. 38-1-15, was sitting in the capacity of a justice of the peace, we would have grave doubts as to the constitutionality of the two succeeding sections which provide for the fines and forfeitures to be paid into the municipal treasury.

The question presented in your inquiry is answered in the affirmative subject to the above holding.

By: B. J. Baggett

Assistant Attorney General