

## **Opinion No. 65-33**

February 24, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Mr. Cayetano Sanchez, Probate Judge, McKinley County, 3406 Church Rock, Gallup, New Mexico

### **QUESTION**

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1. May an individual who is serving as a probate judge be appointed to the office of justice of the peace and exercise the duties thereof simultaneously?
2. Must that person be a resident of the precinct to which he is appointed justice of the peace?

#### **CONCLUSIONS**

1. Yes.
2. Yes.

### **OPINION**

#### **{\*58} ANALYSIS**

Attorney General Opinion No. 4555 dated August 1, 1944, provides the answer to your question No. 1 above, since it was concluded therein that the offices of probate judge and justice of the peace are not incompatible. We adhere to this previous ruling and in addition call to your attention Section 5-3-40, N.M.S.A., 1953 Compilation which provides as follows:

"5-3-40. Permanent abandonment of office, what constitutes. -- Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public

office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment."

Section 5-3-42, N.M.S.A., 1953 Compilation defines incompatible office with reference to the above quoted statute, and Section 5-3-43, N.M.S.A., 1953 Compilation is the applicable penalty provision.

Your second question relates merely to the qualifications for holding public office prescribed by our state constitution. Article VII, Section 2, New Mexico Constitution provides in part that:

"Every citizen of the United States who is a legal resident of the state **and is a qualified elector therein**, shall be qualified to hold any public office in the state **except as otherwise provided in this Constitution.. .**" (Emphasis supplied).

To be a "qualified elector" in New Mexico a person must meet the qualifications prescribed in Article VII, Section 1, New Mexico Constitution, as follows:

"Every . . . citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, **and in the precinct in which he offers to vote thirty days**, next preceding the election, except idiots, insane persons, persons convicted of a felonious or infamous crime unless restored to political rights, . . . shall be qualified to vote at all elections for public officers . . ." (Emphasis supplied).

Without regard to the above, Article V, Section 13, New Mexico Constitution, (P.S.) firmly establishes that a justice of the peace must be a resident of the precinct for which he is elected or appointed, as follows:

"All district, county, **precinct** and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed. The legislature is authorized to enact laws permitting division of counties of this state into county commission districts. The legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts." (As Amended November 6, 1960). (Emphasis supplied.)

In **Territory ex rel. Welter v. Witt**, 16 N.M. 335, 117 P. 860, it was held that justices of the peace are recognized as precinct officers therefore there is no question that {\*59} they are subject to the provisions of the above Section 13 requiring them to be residents of the political subdivisions, i.e., the county and precinct, to which they are elected or appointed.