

Opinion No. 90-14

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OPINION OF: HAL STRATTON, Attorney General

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TO: Honorable Christine A. Donisthorpe, State Senator, P.O. Box 746, Bloomfield, New Mexico 87413

QUESTIONS

Is it constitutional for a Native American to serve as a tribal council member and as a county commissioner at the same time?

CONCLUSIONS

Yes, as long as his duties as tribal council member do not physically interfere with his duties as county commissioner during the ordinary working hours of that position and the functions of the two positions are not otherwise incompatible.

ANALYSIS

No constitutional provision specifically prohibits tribal council members from serving as county commissioners, provided the constitutional prerequisites for holding county office are met. See N.M. Const. art. V, § 13 (county commissioner must be resident of county or district in county from which elected or appointed); art. VII, § 2 (to hold public office, a person must be a citizen of United States, resident of state and a qualified elector). Cf. *Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 84 N.M. 343, 350, 503 P.2d 323, 330 (1972) (observing that Indians in New Mexico are voting citizens of the state and occupy prominent public offices in state and local governments).

Article X, Section 1 of the New Mexico Constitution provides, in part, that "no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law." See also NMSA 1978, § 4-44-21 (Repl. Pamp. 1984) ("no county officer shall accept or receive to his own use, ... or for or on account of his office, any salary, compensation, allowance, fees or emoluments in any form whatsoever, other than [as] authorized by law"). While this prohibition might be interpreted to prevent a county officer from holding any other paid position, this office has stated that it "applies only to those situations where extra compensation is received for performing duties prescribed by law to a particular office and for which a fixed compensation is provided." AG Op. No. 58-238 (1958) (county commissioner can accept salary for teaching in state institution of higher learning). Because the duties of a tribal councilor are not among those prescribed by law for county commissioners, the constitutional provision would not prevent one person from holding and receiving compensation for both positions.

Aside from the constitution, potential barriers to a public officer holding a second position are found in statutory provisions which address the compatibility of public offices and employment generally. NMSA 1978, § 10-6-3 (Repl. Pamp. 1990) describes when public employment is deemed permanently abandoned, and provides:

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.

Also, NMSA 1978, § 10-6-5 (Repl. Pamp. 1990) provides that "[a]ny public office or service, other than service in the armed forces of the United States of America, and any private employment of the nature and extent designated in Section 10-6-3 NMSA 1978 is hereby declared to be incompatible with the tenure of public office or employment." These provisions do not limit other employment held by members of tribal councils. They do, however, effectively prohibit a county officer or employee from simultaneously holding any other employment, whether public or private, for which compensation is received or authorized and which interferes with the duties of the public position for 30 days. Thus, a tribal council member cannot also serve as county commissioner if the two positions are incompatible as contemplated under Sections 10-6-3 and 10-6-5.

For incompatibility to exist between a public office and other employment, Section 10-6-3 first requires that the other position be held for compensation. The second requirement is that, as a result of the subsequent position, the officer fails for thirty days to "devote his time to the usual and normal extent during ordinary working hours to the performance of the duties" of his public office or employment. Section 10-6-3 is worded so that both these factors must be present for the second position to be incompatible with or constitute an abandonment of the first. See AG Op. No. 64-73 (1964) (both criteria must be met for section on incompatibility and abandonment to become operative).

Applying the statutory criteria for incompatibility to the position of tribal councilor, if it is a position for which compensation is not paid or authorized, then, according to the statutory criteria, it would not be incompatible with the office of county commissioner. If, however, the tribal councilor's position is a paid position, it would be incompatible under the statute if it caused the person holding it to fail for thirty successive days to devote his time to the usual and normal extent during ordinary working hours to the duties of county commissioner. As this office has stated, "a person who holds two full-time positions or even a full-time and a part-time position that must be fulfilled during normal working hours is deemed to have resigned from and to have permanently abandoned

his public office and employment at the end of 30 days." AG Op. No. 70-74 (1970) (person cannot hold two salaried positions in county government that must be performed during the same hours). On the other hand, if a person can perform his duties as tribal councilor before or after his ordinary working hours as a county commissioner, then the two positions will be compatible under the statutory criteria. See AG Op. No. 68-111 (1968) (no physical incompatibility existed where a person served as a municipal judge after his working hours as city clerk); AG Op. No. 57-298 (1957) (part-time probate judge may be appointed to act and receive a salary as deputy district court clerk).

Even if two public offices meet the statutory criteria for physical compatibility, they may be functionally incompatible under common law. See AG Op. No. 89-10 (1989) (both statutory and common law definitions are applied to decide compatibility of two public positions). The applicable standards were discussed by the New Mexico Supreme Court in *Haymaker v. State*, 22 N.M. 400, 163 P. 248 (1917), which addressed the compatibility of the offices of board of education member and clerk of the board. The Court adopted the following test of incompatibility:

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.

The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both.

22 N.M. at 403-04, 163 P. at 249. Applying this standard, which emphasizes functional inconsistencies between offices, the court concluded that the same person could not be both a member of the board and its clerk where it was demonstrated that she had, as a board member, cast the deciding vote on matters pertaining to her interests as clerk, voted herself into the clerk's position, fixed her salary, and approved warrants for payment of her salary. In other words, by holding both offices, she was able to sit in judgment on her own acts. *Id.* at 405, 163 P. at 249 (quoting *Cotton v. Phillips*, 56 N.H. 220, 223 (1875)). See also AG Op. No. 60-168 (1960) (regardless of salary, judicial officer could not serve as a law enforcement officer where holding one office could cause some benefit to accrue to the other and would intrude upon the disinterested and impartial disposition of cases in court). Cf. *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 P. 594 (1930) (applying *Haymaker* test and finding that offices of district attorney and mayor were compatible).

Under the standards enunciated in *Haymaker*, the positions of tribal council member and county commissioner do not appear incompatible. There is no apparent relationship or interaction between the positions indicating that one has administrative or other

authority over the other. A county commission has no inherent jurisdiction over a tribal council's activities and vice versa. Absent evidence that a tribe and county have recurring contractual or other relationships with each other, therefore, it seems unlikely that a person would be able to use one position to influence his employment in the other, or would be improperly motivated in carrying out his responsibilities. Cf. *McDonough v. Roach*, 35 N.J. 153, 171 A.2d 307 (1961) (mayor could not simultaneously serve on county board of chosen freeholders where statutes required counties and municipalities to cooperate on various projects and permitted them to contract).

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