

## Opinion No. 45-4781

August 27, 1945

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Ray C. Cowan Assistant District Attorney Fifth Judicial District Carlsbad, New Mexico

{\*126} We are in receipt of your letter of August 7, 1945 in which you state that a vacancy arose in the office of constable in Precinct One of Eddy County, and that the county commissioners appointed a full time deputy to the position of constable. In view of these facts, you ask our opinion as to whether or not the person so appointed is entitled to retain the statutory fees allowed constables in civil and in criminal cases.

Many of the duties of sheriffs are the same as the duties imposed upon constables within a given precinct. As an example see Section 38-403 of the 1941 Compilation. By Section 38-1902 of the 1941 Compilation constables are allowed for their own use certain specified fees for performing the various duties of their office. If a deputy sheriff, for example, serves a summons as deputy sheriff, he is obliged to remit the fees pursuant to Section 15-4113, his only compensation being his salary. If, on the other hand, the constable serves a summons, he may retain the fee provided. Thus, if the sheriff acted both as constable and deputy sheriff, he would receive a salary for performing many of the same duties as are imposed upon constables. If he were permitted to receive a fee as constable, for serving a summons, he would then be getting both his salary and the fee of the constable.

Some duties may only be performed by a constable but if the office is vacant, then the sheriff is required to perform such duties under section 15-3816. On the face of this section, it might appear that under such circumstances the sheriff is authorized to retain the constable's fee. However, you will note that this section was enacted prior to the Constitution which prohibits county officers from accepting fees for their own use. Section 15-4113, prohibiting the retention of fees, was enacted subsequently.

In view of the foregoing, it would seem that the deputy sheriff, even though appointed as constable, could not retain fees for performing services which come under his jurisdiction and for the performance of which he is paid a salary.

It also appears that the offices of deputy sheriff and constable are necessarily incompatible so that a vacancy would arise in the office of deputy sheriff under Section 10-301 (8) of the 1941 Compilation in the event a deputy sheriff accepted the office and fees of a constable.

In *Haymaker v. State*, 22 N.M. 400, 163 P. 249, the court said:

"Incompatibility between offices is an inconsistency between functions thereof 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."

Upon examination of the cases, it appears that the doctrine of incompatibility of offices is rested on public {\*127} policy. See Perkins v. Manning, 122 P. 2d 857, 59 Ariz. 60, and the case of People v. Rapsey, 107 P. 2d 388, 16 Cal. 2d 636, where the court held that offices are incompatible if the nature and duties thereof are such as to render it improper from the consideration of public policy for one incumbent to retain both. In my opinion, not only would an antagonism exist between the offices of deputy sheriff and constable, but certainly public policy would prohibit an officer from receiving both a salary and fees for the same functions.

Further, the fee schedule set up by Section 38-1902 for constables and the fees that deputy sheriffs are required to collect by section 15-3813 are different. The constable is allowed 75 [cents] for serving a summons. A deputy sheriff is required to collect \$ 1.00. Thus, a conflict immediately arises upon the service of the summons over the amount of the fee to be charged the party.

In view of the foregoing, it is my opinion that a deputy sheriff appointed as constable could not retain the fees of such.

Insofar as this opinion conflicts with Opinion No. 3768, written by a former member of this office on April 21, 1941, the same is overruled.

By ROBERT W. WARD,

Asst. Atty. General