

OFFICERS - The office of mayor of the city of the fourth class and the office of presiding judge of the county court may not at the same time be held by one person. The acceptance of the latter office will forfeit the former

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Honorable J. P. Campbell
State Representative
Doniphan, Missouri



Dear Sir:

This will acknowledge your letter of recent date requesting an opinion from this Department, reading as follows:

"The mayor of this city of the fourth class has been elected presiding judge of the county court.

"Can he hold both offices, or when he takes the oath of office as judge of the county court will he not automatically cease to be mayor of the city? "

No doubt your request for an opinion was prompted because of your knowledge of the constitutional provision which prohibits the holding of more than one office by the same person at the same time in this state. This is Section 18, of Article IX, of the Constitution of Missouri, and reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city,

or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

In the case of *Nickelson v. City of Hardin*, 282 Mo. 198, 203, the Supreme Court of Missouri had occasion to consider this constitutional provision, and said:

"We are of opinion that the proper construction of the section is that it applies only in counties and cities having more than two hundred thousand inhabitants."

Obviously, the constitutional provision above referred to does not prohibit the holding of more than one office at the same time by the same person, in cities or counties having less than two hundred thousand inhabitants. Thus, in a city of your class and county, a person may hold an office in the county and also an office under the city, the only limitation in this respect is that the holding of the two offices by the same person shall not be incompatible with one another, that is to say; that no conflict in the duties required by the respective offices should arise so as to make such holding of offices incompatible with one another.

As to whether or not the mayor of the city of the fourth class may at the same time hold the office of presiding judge of the county court, to which he has been recently elected, depends upon whether or not the offices are incompatible with one another.

The general rule in this state with respect to incompatibility of offices has been laid down in the case of State ex rel Walker v. Bus, 135 Mo. 325, 338, as follows:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge FOLGER, in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations

to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law. ' "

From these considerations, it necessarily follows that we must examine the duties imposed upon the offices of mayor of the city of the fourth class and presiding judge of the county court, to determine whether or not such offices would be inconsistent with one another and that no incompatibility exists so that the acceptance of the one would vacate the other. In this respect your attention is directed to Section 6953, of Revised Statutes Missouri 1929, relating to the duties of the mayor of the city of the fourth class,

"The mayor shall have a seat in and preside over the board of aldermen, but shall not vote on any question except in case of a tie, nor shall he preside or vote in cases when he is an interested party. He shall exercise a general supervision over all the officers and affairs

of the city, and shall take care that the ordinances of the city, and the state laws relating to such city, are complied with. "

Section 6958, of Revised Statutes Missouri 1929, provides as follows:

"The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, and he shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty; and he is hereby authorized to call on every male inhabitant of the city over eighteen years of age and under fifty, to aid in enforcing the laws."

Section 2089, of Revised Statutes Missouri 1929, provides, in part, as follows:

"No judge of any county court in the state shall, * * * * * act as director in any railroad company in which such county or any township, part of a township, city or incorporated town or village therein is a stockholder, * * * * *."

Attention is also directed to Section 7165, relating to when streets may be vacated in any town or city in this state. This section of the statute is found in Article 10, of Chapter 38, of the Revised Statutes of Missouri 1929 relating to provisions applicable to all

cities, towns and villages in this state. This section of the statute reads as follows:

"Whenever any person or corporation interested in any town or city in this state may desire to vacate any lot, street, alley, common, public square or part thereof, in such town or city, such person or corporation may petition the county court for the proper county, giving a distinct description of the property to be vacated, and the names of the persons to be affected thereby; which petition shall be filed with the clerk of said court thirty days previous to the sitting thereof, and notice of the pendency of said petition shall be given for the same space of time, either in a public newspaper printed in said town, or by written notices thereof set up in three of the most public places in said town or city."

Section 7166, of Revised Statutes Missouri 1929, reads, in part, as follows:

"If no opposition be made to such petition, the county court may vacate the same, with such restrictions as they may deem for the public good; but if opposition be made, such application shall continue until the next term of the court, when, if the objector consent to such vacation, or if two-thirds of all the real estate holders of the town or city petition therefor, the court may grant the prayer of the petition.* * * *"

Section 7076, of Revised Statutes Missouri 1929, relating to cities of the fourth class, provides as follows:

"All real estate owned by a county and situate within the corporate limits of any city of the fourth class shall be subject to the provisions of all ordinances of such city which relate to the erection and maintenance of hitching posts, sidewalks, guttering, curbing, fences along streets and alleys, and the paving and macadamizing of streets to the same extent as that of private citizens of such city."

Section 7077, of Revised Statutes Missouri 1929, provides:

"It shall be the duty of the county court whenever any of the improvements of the property set out in section 7076 is required by ordinance, to forthwith make such improvement fronting or abutting any real estate owned by the county and lying within the corporate limits of the city, and included in the terms of the ordinance, in compliance with the provisions of such ordinance, and pay for such improvements out of the general fund of the county."

Section 7078, of Revised Statutes of Missouri 1929 provides:

"If the county court shall fail, neglect or refuse to comply with the provisions of any ordinance providing for the improvement of property as herein provided, for a period of sixty days after notice has been served on the county clerk, of the requirements of the ordinance and the kind and nature of the improvements to be made, the city shall proceed to make such improvements in the same manner as is provided by ordinance for the making of similar improvements by private citizens, and shall issue special tax bills for the costs of all labor and material necessary in making such improvements, and such special tax bills shall be a valid claim against such county, and it shall be the duty of the county court at its next regular meeting after the completion of said improvements to audit, allow and pay out of the general fund of the county the cost of making said improvements or the special tax bills issued therefor."

From these statutory considerations you will have noticed that many times some inconsistencies can arise in the functions required of the two offices of mayor of the city of the fourth class and of presiding judge of the county court. The relations existing between the two offices in view of the respective duties of such offices would necessarily create an inconsistency and repugnancy, so that the offices, when held by one person, would be incompatible.

Without attempting to detail the numerous inconsistencies that would arise by reason of the holding

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of the two offices of mayor of the city of the fourth class and presiding judge of the county court, it is sufficient to say, from the statutory considerations, it is clearly indicated from the nature and relations of the office of the mayor of the city of the fourth class and presiding judge of the county court to each other that such offices should not be held at the same time by the same person, because, as you will notice from the statutory considerations, it would be impossible for one person to hold the two offices and faithfully and impartially discharge the duties of both offices. Frequently the occasion might arise, from the statutory considerations noticed, where the duties of one office would interfere with the duties imposed upon the other.

CONCLUSION

In view of the above, it is the opinion of this Department that the office of the mayor of the city of the fourth class and the office of presiding judge of the county court may not at the same time be held by one person, and, further, that the acceptance of the latter office will operate as a forfeiture of the first office.

Respectfully submitted

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APPROVED

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