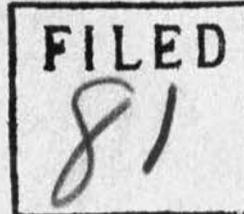


OFFICERS: Same person may hold office of city  
SPECIAL ROAD DISTRICTS: manager and special road district  
MUNICIPAL CORPORATIONS: commissioner.

May 9, 1950

5/15/50

Honorable Samuel E. Semple  
Prosecuting Attorney  
Randolph County  
Moberly, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Mr. H. P. Phelan, City Manager of Moberly, Missouri, has requested me to obtain an opinion from your office concerning his status as city manager of the City of Moberly, Missouri, and also serving on the Board of Commissioners of the Moberly Special Road District. Mr. Phelan was recently appointed city manager and has been on the Board of Commissioners of the Road District since 1948.

"I would like to obtain an opinion of your office as to whether or not he can legally hold both positions at the same time."

At the outset, it must be determined whether the positions of commissioner of a special road district and city manager of a city of the third class are offices because "the question of incompatibility does not arise when one of the positions is an office and the other is merely an employment." (46 C. J. 943.) In State ex rel. Pickett v. Truman, 333 Mo. 1018, 64 S.W. (2d) 105, the Supreme Court of Missouri, en Banc, said at l.c. 106:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2)

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definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. \* \* \*

Applying the above test to a commissioner of a special road district, we find that a commissioner is appointed for a term of three years and takes an oath of office (Section 8675, R.S. Mo. 1939); that the duties imposed by law involve the exercise of the sovereign power (Sections 8682 and 8683, R.S. Mo. 1939); that he has continuing and permanent duties (Section 8682), and his successor in office has the right to his powers, duties and emoluments (Section 8675). Therefore, a commissioner of a special road district is an officer.

In regard to a city manager of a city of the third class under city manager form of government, Section 7089, R. S. Mo. 1939, provides that he shall have a term of office not to exceed one year; that he shall take an official oath; and that he has the duty to see that the laws and ordinances are enforced. Section 8088, R.S. Mo. 1939, provides that certain officers and employees of the city may be employed and discharged by the city manager. In view of these duties, it will be seen that the city manager is a public officer.

The rule in this state as to whether a person may hold two offices at the same time is given in State ex rel. McCaughey v. Grayston, 349 Mo. 700, 163 S.W. (2d) 335, as follows:

" \* \* \* The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

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The principal case in Missouri upon this question is State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, in which the court, through Judge MacFarlane, said at l.c. 338:

" \* \* \* 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."

We must, therefore, look to the duties of the two officers in order to determine whether there is such an incompatibility that one person cannot hold both offices at the same time. Section 7089, supra, provides for a city manager of a city of the third class and sets forth his duties. Said section provides, in part, as follows:

" \* \* \* He shall be the administrative head of the government subject to the direction and supervision of the council  
\* \* \* It shall be his duty - (a) To make all appointments to offices and positions provided for in section 9298j. (b) To see that the laws and ordinances are enforced. (c) To exercise control of all departments and divisions that may hereafter be created by the council. (d) To see that all terms and conditions, imposed in favor of the city on its inhabitants in any public utility franchises are faithfully kept and performed, and upon information of any violation thereof to take such steps as will be necessary to stop or prevent the further violation of the same. (e) To attend all meetings of the council with the privilege of taking part in the discussions but having no vote. (f) To recommend to the council for adoption such measures as he may deem necessary or expedient. (g) To prepare and submit the annual budget and to keep the city council fully advised as to the

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financial conditions, and needs of the city and to perform such other duties as may be prescribed by this article or be required of him by any ordinance or resolution of the council."

Section 8682, supra, sets forth the powers and duties of the board of commissioners of a special road district, and provides as follows:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

Section 8683, supra, imposes the further authority upon the board:

" \* \* \* to expend not more than one-fourth of the revenue which may now or which may hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city within said special road district in conformity with the established grade of said roads and streets in said cities and for the purpose of constructing and maintaining macadam, gravel, rock or paved roads or streets within the corporate limits of any city within the said special road district in conformity with the established grade of said roads and streets in said city:  
\* \* \*"

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From a reading of the above sections relating to the duties of the two officers, the only possible incompatibility which might arise is when the board of commissioners of the special road district must determine how much of the revenue of the road district should be spent in the city of Moberly. However, as pointed out in the Bus case, supra, at l.c. 339:

" \* \* \* We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. State ex rel. v. Goff, 15 R. I. 507."

Therefore, we are of the view that there is no incompatibility between the duties of the two offices and such offices may be held at one time by one person.

CONCLUSION

It is the opinion of this department that there is no incompatibility between the office of city manager of a city of the third class and the office of a commissioner of a special road district, and that such offices may be held by the same person.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

(AMO'K)