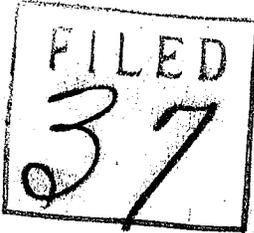


OFFICERS: Offices of mayor of fourth class city and county clerk of third class county are not incompatible and both may be held by same person at same time.

March 12, 1954



Honorable Lane Harlan
Prosecuting Attorney
Cooper County
Beonville, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received, and reads as follows:

"I would appreciate very much if your office could give to me an opinion on the following question: 'Are the offices of mayor of a city of the fourth class and County Clerk in a county of third class incompatible so that one individual cannot hold both offices at the same time?'"

No constitutional or statutory provisions of Missouri prohibit one from holding the offices of mayor of a fourth class city and county clerk of a third class county at the same time.

At common law, incompatible offices could not be held by one person at the same time, and since the common-law doctrine is still in effect in Missouri, we must determine whether the offices mentioned in the opinion request are compatible or incompatible before attempting to answer such inquiry.

The general rule as to when offices are considered to be incompatible has been stated in Am. Jur., Vol. 42, page 936, as follows:

" * * * They are generally considered incompatible where such duties and functions are inherently inconsistent and

repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other."

The common-law doctrine of compatible and incompatible offices was stated and applied in the case of Walker v. Bus, 135 Mo. 325, which appears to be the leading case in Missouri on this subject. In this case it was held that the office of deputy sheriff of the City of St. Louis was not incompatible with that of school director and could be held by the same person at the same time. At l.c. 338 the court said:

"v. 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 officer, 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."

As to whether there is any inconsistency in regard to the duties of mayor of a fourth class city and those of county clerk of a third class county, so that one person cannot hold both offices at the same time, will require a consideration of the statutes relating to the nature and duties of each office. We, therefore, direct your attention to the following sections of the Missouri Revised Statutes, 1949, namely Sections 79.110, 79.120 and 79.200, which sections give the principal duties of the office of mayor of a fourth class city:

Sec. 79.110. "The mayor and board of aldermen of each city governed by this chapter shall have the care, management and control

of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Sec. 79.120. "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."

Sec. 79.200. "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 51.120, RSMo 1949, provides the general duties required of county clerks, and reads as follows:

"Every clerk of a county court shall keep an accurate record of the orders, rules, and proceedings of the county court, and shall make a complete alphabetical index thereto; issue and attest all process, when required by law, and affix the seal of his office thereto; keep an accurate account of all moneys coming into his hands on account of fees, costs or otherwise, and punctually pay over the same to the persons

entitled thereto; provided, that when the clerk of the circuit court of his county is a party, plaintiff or defendant, to a suit or action, the writ of summons and all other process relating thereto shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said clerk of the county court shall, on the trial of such cause, act as temporary clerk of the circuit court and otherwise perform all the duties of the clerk of the circuit court."

From the provisions of the above-quoted statutes pertaining to the office of mayor, it appears that the mayor is the chief executive of a fourth class city. As such officer, he has general supervision and control over all other officers and affairs of the city. The statute also provides that he shall be vigilant in the enforcement of all laws and ordinances for the government of the city. It is noted that the powers and duties of the mayor prescribed by statute are limited to the enforcement of all laws, ordinances, and affairs of the city of which he is mayor and that he has no powers or duties to perform as such, nor does he have any supervision or control over any other officers or political subdivisions of the state.

From the provisions of Section 51.120, supra, it is apparent that the county clerk is a ministerial officer whose chief duty is the keeping of an accurate record of all proceedings had by the county court of which he is clerk. While there are other duties to be performed by the county clerk than those specified in this section, none of such other duties are pertinent to the matter of inquiry, and we believe it is unnecessary to mention them herein.

Long ago the lawmakers of this state saw fit to create the offices of mayor of a fourth class city and county clerk. Each office is separate and distinct from the other, as each is necessarily and fundamentally different from the other insofar as the purpose and duties of each are concerned, and neither has any connection in this respect with the other.

As has been mentioned above, the duties of the former office are concerned only with governmental and other affairs of the city, and that the mayor has no powers or duties to perform with reference to the citizens or over any other political subdivision of the state than that of his own city.

It will also be recalled that the chief duties of the county clerk are the keeping of the records of all county court proceedings,

and that such officer is not required to perform any duties of the nature of those required of the former officer, and that neither officer in his capacity as such has been given any supervisory control over the other by law. It further appears that the duties of one of such offices are not so inconsistent or repugnant or conflicting with those of the other so that one person could not hold both offices and faithfully and efficiently perform the duties of both offices at the same time.

It is, therefore, our thought that the offices of mayor of a fourth class city and county clerk of a third class county are compatible and that one person may legally hold both offices and perform the duties of each at the same time.

CONCLUSION

It is the opinion of this department that the duties of the office of mayor of a city of the fourth class are not repugnant or incompatible with those of clerk of the county court of a county of the third class and that one person may hold both offices at the same time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

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