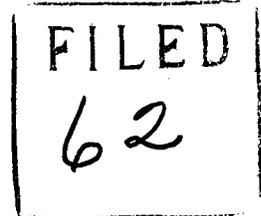


MAGISTRATES:
PROBATE JUDGES:
OFFICERS:

Person may not hold the position of
probate judge and magistrate and
mayor of a city at the same time.

February 5, 1947



Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an official opinion of this department, reading as follows:

"Our Probate Judge, George Anderson of Osceola, who has served as Mayor of Osceola this year, 1946, without compensation, and who has just been re-elected Probate Judge and Magistrate, asks if he can continue to act as Mayor of Osceola after the first of next year.

"He will appreciate your opinion as to whether he can hold the three offices simultaneously or whether he should resign as mayor."

Section 18, Article V, Constitution of Missouri, 1945, provides in part as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. * * *"

Since St. Clair County has a population of less than 30,000 it is proper that one person perform the duties of Probate Judge and Magistrate.

As to the question of whether the same person may also hold the office of mayor of a municipality, we quote from 42 Am. Jur., Section 59, page 926:

"Even in the absence of express prohibitions against the holding by one person of more than one office at the same time, there is a well-established limitation on the right so to do. This limitation operates upon offices that are in their nature incompatible, for it is a settled rule of the common law that a public officer cannot hold two incompatible offices at the same time.
* * *"

This general rule has been adopted by our Supreme Court in the case of State ex rel. Walker, Attorney General vs. Bus, 135 Mo. 325, wherein they stated, at l.c. 330:

"The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. * * *"

We have been unable to find any cases in this jurisdiction holding specifically the offices of probate judge and mayor of municipalities incompatible. However, in State ex rel. Walker, Attorney General vs. Bus, supra, the court stated at l.c. 338:

"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." (Emphasis ours.)

The mayor of a city of the fourth class may also act as police judge. Section 7122, R. S. Mo. 1939, provides:

"The mayor and board of aldermen of cities of the fourth class may, by ordinance, provide for the election of police judges in such cities, who shall be elected at the regular city elections, and who shall, when so elected, have exclusive jurisdiction to hear and determine all offenses against the ordinances of the city in which he was elected: Provided, that when such police judges shall be so elected, then the jurisdiction in this article hereinafter conferred on the mayor to hear and determine cases for the violation of city ordinances shall be held to refer to the police judge elected under this section: Provided further, that in case of the absence, sickness, or disability in anywise of such police judge, or in case of vacancy in such office, the mayor shall perform all such duties until the disability is removed or the vacancy is filled."

It is noted that even though the board of aldermen does provide for a separate police judge, in case of any absence or disability the mayor performs all his duties. In performing the duties of the police judge and also judge of the magistrate court there would be certain instances where it would be necessary for the same person to review, when he was acting as magistrate, action taken by him as the police judge. Section 9017 of Senate Bill 217 of the 63rd General Assembly, provides:

"Before any sentence made by a police court or police magistrate under this article shall be executed, it shall be approved by the judge of the circuit court or magistrate of the county and his approval indorsed on the commitment, and if such sentence shall be disapproved, the police court or magistrate shall have power to pronounce the ordinary sentence prescribed by law."

Section 9029 of Senate Bill 218 of the 63rd General Assembly, provides:

"Before any sentence made by a police court or police magistrate under this article shall be executed it shall be approved by the judge of the circuit court or magistrate of the county, and his approval indorsed on the commitment, and if such sentence shall be disapproved, the police court or magistrate shall have power to pronounce the ordinary sentence prescribed by law."

This clearly makes the two offices incompatible since the office of magistrate has some supervision over the office of mayor.

CONCLUSION

Therefore, it is the opinion of this department that one person may not hold the offices of magistrate and probate judge and mayor of a municipality at the same time.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General