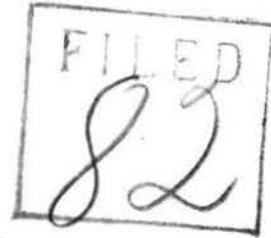


ELECTION: RELATING TO THE RIGHT OF ONE PERSON TO HOLD THE OFFICE OF JUSTICE OF PEACE AND POLICE JUDGE AT THE SAME TIME IN A CITY OF THE THIRD CLASS.

7-16
July 7, 1934.

Hon. H. W. Scott,
Police Judge,
Eldon, Missouri.



Dear Sir:

I wish to acknowledge receipt of your letter dated June 18, 1934, requesting an opinion based on the following communication:

"As I am a candidate for Justice of the Peace here, I am writing you to ask you if a man who holds the office of Police Judge here (population 3600) can qualify as Justice of the Peace in this township and hold that office also? Was elected Police Judge April, 1934.

It seems to me that Section 6462 R. S. No. 1929 very plainly prohibits this holding the two offices, and I am anxious to be right. Will you not kindly set me right on this matter?

Hoping you will answer me, and thanking you in advance for your kindness."

Your communication does not state of what class the City of Eldon happens to be. You do state that its population is 3600, and I, therefore, presume your City is one of the third class, as Section 6092 R. S. No. 1929, reads as follows:

"All cities and towns in this state containing three thousand and less than thirty thousand inhabitants, which shall elect to be a city of the third class, shall be cities of the third class."

If such classification of your City is correct, I find that the section to which you refer, namely Section 6462 R. S. No. 1929, is not applicable, in that it refers only to cities of the first class, which is a classification that does not include the City of Eldon.

I am unable to find any constitutional or statutory prohibition against a person holding the office of Justice of the Peace, and the office of Police Judge at the same time. While constitutional and statutory prohibitions do exist in reference to certain offices, I

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do not believe any of them are directed at the present instance.

This matter has been dealt with at some length by the common law. The common law rule being that the acceptance of one who holds a public office of a second public office incompatible therewith, operates ipso facto as a resignation of the first.

This rule is best set forth in the Case of State ex rel. v. Bus, 135 Mo. 525 l. c. 350, which holds as follows:

"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. State ex rel. v. Musk, 48 Mo. 242; Mochem, Pub. Offices, Secs. 420-426; Throop, Pub. Officers, Secs. 50, 51."

"The rule, it is said, is founded upon the plainest principles of public policy and has obtained from very early times. King v. Patteson, 4 B & Ad. 9."

"The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary." 1 Dill, Mun. Corp. (4 Ed.), Sec. 225; People ex rel. v. Brooklyn, 77 N. Y. 506.

In the same case (supra) on page 538, the following conclusion is found:

"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

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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."

Along the same tenor is the holding in 46 C. J., page 941, Section 46,

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

It is my opinion that there is nothing inconsistent, or incompatible with the same person holding the office of Police Judge, and the office of Justice of Peace. With such a situation existing, I can see no conflict of interest, neither office seems to be subordinate to the other, and neither office has a supervisory control over the other office. The duties of the Police Judge and Justice of Peace are clearly set forth by the statutes, and I am unable to perceive at what point there would ever be a clash or conflict, or a possible subversion of one office to the other.

It is, therefore, my conclusion that one who is now the duly elected and qualified Police Judge of a third class city is not prohibited from holding the office of Justice of the Peace, and that such party can legally hold both offices at one and the same time.

Respectfully submitted,

APPROVED:

ROY McKITTRICK.

JOHN W. HOFFMAN, Jr.
Assistant Attorney General.