

OFFICERS: One person may not hold the office of recorder of deeds and city collector at the same time, nor may one person hold the office of magistrate and police judge of a city at the same time.

December 19, 1946



Honorable Robert M. Buerkle
Prosecuting Attorney
Cape Girardeau County
Exchange Bank Building
Jackson, Missouri

Attention: Mr. Raymond H. Vogel,
Assistant Prosecuting
Attorney

Dear Sir:

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

"On May 1st, 1945, Arthur Schade after being duly elected took office as the City Collector of Jackson, Missouri, a city of the fourth class. The term of this office expires May 1st, 1947. In the general election on November 5th, 1946, Mr. Schade was elected to the office of Recorder of Deeds of the County of Cape Girardeau. This term will begin January 1st, 1947. Therefore, unless his entering upon the duties of the latter office causes a vacancy in the office of the City Collector Mr. Schade will hold both offices from January 1st, 1947, to May 1st, 1947. Inasmuch as the heaviest collections made by the City Collector of Jackson, Missouri, are made just prior to January 1st it would be preferable from the standpoint of the City of Jackson if the present City Collector could hold the City Collector's office

until the new City Collector is elected.

"Clyde Baugh was elected Police Judge of the City of Jackson, Missouri, on May 1st, 1945, and his term as such Police Judge expires May 1st, 1947. On November 5th, 1946, Mr. Baugh was elected Magistrate of the County of Cape Girardeau. He will enter on the duties of this office January 1st, 1947.

"I have been unable to locate any constitutional or statutory prohibitions against the simultaneous tenure in the two cases above described. However, it appears that there is a general rule against the holding of 'incompatible offices' at the same time. The question as to which are 'incompatible offices' appears to be involved here."

The first question we will consider in this opinion is whether or not a person can serve as police judge of the City of Jackson and Magistrate of Cape Girardeau County at the same time.

Section 3 of Senate Bill 207 of the 63rd General Assembly, provides in part as follows:

"* * * No magistrate shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate."

We assume that the police judge of the City of Jackson receives compensation. With this in mind, and in view of the above provision of Senate Bill 207, one person could not serve as police judge and magistrate at the same time.

You have also presented the question of whether or not one person may hold the job of recorder of deeds of Cape Girardeau County and city collector of the City of Jackson at the same time.

There are no statutory or constitutional provisions prohibiting a person from holding these two offices. However, the

common law rule is that if two offices are incompatible a person may not hold said offices at the same time. A leading case in Missouri on this point is State ex rel. Walker v. Bus., 135 Mo. 325, wherein the court stated at l. c. 339:

"We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. 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. *"

We are unable to find anything inherently inconsistent in the functions of these two offices, and therefore the holding of said offices by one person would not violate the common law rule. However, Section 12828, R. S. Mo. 1939, provides:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

In a proceeding brought under the above section by the Prosecuting Attorney of Pike County to remove the sheriff from office, the Supreme Court in the case of State v. Yager, 250 Mo. 388, stated at l. c. 403:

"* * * It was his duty under the law to be and remain in attendance upon the circuit court of his county when the same was in session (Sec. 11212, R. S. 1909),

unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom. * * *

You have stated in your letter that the City Collector makes his heaviest collections just prior to January 1st and for this reason we assume the City Collector would be performing very heavy duties in the next few months. We believe this would necessitate that he spend most of his time performing the duties of city collector and would cause him to be absent from his office of recorder of deeds. This, in our opinion, would not be personally devoting his time to the performance of his duties as recorder of deeds as required under Section 12828, supra. It is our belief that he should be in his office during regular office hours, unless he absent himself for a lawful reason, so that he could serve the public whenever they request such service.

CONCLUSION

It is, therefore, the opinion of this department that a person may not hold the office of Recorder of Deeds of Cape Girardeau County and City Collector of the City of Jackson at the same time, and it is further our opinion that a person may not hold the office of Magistrate of Cape Girardeau County and Police Judge of the City of Jackson at the same time.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:EG