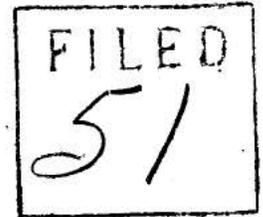


MAGISTRATES: Magistrate to act in temporary absence of police judge, but not entitled to additional compensation.

August 5, 1947

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Honorable Howard B. Lang, Jr.
Prosecuting Attorney
Boone County
Columbia, Missouri

Attention: Mr. J. Robert Tull,
Assistant Prosecuting Attorney

Dear Sir:

This is in reply to your letter of July 31, 1947, requesting an official opinion from this department, which reads as follows:

"In accordance with our conversation of yesterday, I am writing you this letter, requesting an opinion as to whether or not the Magistrate of this county is the person qualified to serve as Police Judge during the sickness of that elected officer.

"I would appreciate it very much if, in your opinion, it is possible for the Mayor to appoint anyone other than the Magistrate to serve in this capacity. I am making this request since the Magistrate of this county may be too busy to handle this additional work over any extended period of time."

At the outset, we will call your attention to two opinions on this subject previously rendered by this department.

In an opinion to Honorable Robert M. Buerkle, Prosecuting Attorney of Cape Girardeau County, dated December 19, 1946, the question was presented as to whether or not one person could hold the offices of magistrate and police judge

at the same time. It was held that such an arrangement was in violation of Section 3 of the Magistrate Law, found on page 768, Laws of 1945, which prohibits magistrates from receiving additional compensation. This ruling contemplated permanent offices with compensation, and was based solely on the compensation factor.

In an opinion rendered to Honorable Edwin W. Mills, Prosecuting Attorney of St. Clair County, dated December 6, 1946, it was held that a magistrate could not hold the position of mayor of the city even though he received no compensation as mayor. This ruling also contemplated permanent offices, but was based on the fact that these two offices were inherently incompatible and within the rule that one person cannot hold two incompatible offices at the same time.

The questions presented in your request concern the situation where a police judge is sick or otherwise temporarily absent from his office. Your attention is directed to Section 6905, Mo. R.S.A., which reads in part as follows:

" * * * If the police judge be absent, sick or disqualified from acting, the mayor shall designate a justice of the peace of the said city to act as police judge until such absence or disqualification shall cease: Provided, however, that should a vacancy happen in the office of police judge at a greater time than six months before a general municipal election, then a special election shall be held to fill such vacancy; and in case of vacancy in said office of police judge within less than six months of a general municipal election, the same shall be filled by some justice of the peace or other competent, eligible person of the city, to be appointed by the mayor."

Senate Bill No. 281 of the 63rd General Assembly, found at page 1079 of the Laws of 1945, provides that:

"Whenever, in any statute, the word 'justice' (referring to justice of the peace) or the words 'justice of the peace' appear, said word or words shall

hereafter be deemed to include and refer to 'magistrate,' unless there be something in the subject or context repugnant to such construction."

In view of the above provisions, the mayor of a city of the third class may designate a magistrate to act as police judge in the temporary absence, sickness or disqualification of the regular police judge. However, under the provisions of Section 3 of the Magistrate Law, supra, a magistrate so designated cannot receive compensation for such additional services. This conclusion does not conflict with those reached in the opinions previously discussed because there is no incompatibility between the two offices since appeals from the police court go directly to the circuit court and the magistrate will not receive compensation for his service as acting police judge.

Now with regard to your further question as to whether or not the mayor is authorized to appoint anyone other than a magistrate to serve as acting police judge, we again call your attention to Section 6905, supra. If the police judge be absent, sick or disqualified from acting, the mayor shall designate a justice of the peace (magistrate) to act. The only alternative is in the case of a vacancy in the office of the police judge within six months of a general municipal election, and then the vacancy may be filled either by the magistrate or some other eligible, competent person of the city, to be appointed by the mayor. Therefore, it is clear that only a magistrate may fill a temporary vacancy in said office, and this provision has been strictly construed in the case of *City of Cape Girardeau v. Goehring*, 12 S.W. (2nd) 761, where the court said at page 762:

"The first question presented is whether or not John I. Sample, who was acting as police judge at the time, had any jurisdiction or authority to act in the premises in any manner. Section 8246, R.S. of Mo. 1919, provides, among other things, that if the police judge be absent, sick, or disqualified from acting, the mayor shall designate a justice of the peace of the said city to act as police judge until such absence or disqualification shall cease. If the office

of the police judge is vacated, then any suitable person may be appointed to fill this office. In this case there was no vacancy in the office of police judge. The evidence clearly discloses that there was an absence from office of the police judge. In such case the appointing power has the authority, under the statute, to designate a justice of the peace, only, to act. In this case the record clearly discloses that no such action was taken and that Mr. Sample, who was not a justice of the peace, was appointed to perform the office of the police judge. This statute (section 8246, R.S. of Mo. 1919) applies to cities of the class in question."

We realize that this conclusion will result in a hardship on the magistrates in counties having only one magistrate, not only because of the time required in exercising the functions of the police court but that an added compensation is prohibited by statute. However, in view of the fact that this situation has arisen in other counties, and will undoubtedly again arise in the future, we submit that it is one for legislative consideration and action.

Conclusion.

Therefore, it is the opinion of this department that a magistrate of the county is the only person qualified to act in the temporary absence or sickness of the judge of the police court in cities of the third class. Magistrates acting in this capacity are not entitled to receive additional compensation.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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