

PUBLIC OFFICERS: Offices of County Judge and Deputy Sheriff incompatible, and one person cannot hold both offices simultaneously.



May 28, 1953

Honorable C. M. Buford
Prosecuting Attorney
Reynolds County
Ellington, Missouri

Dear Mr. Buford:

In your letter of May 23, 1953, you request an official opinion of this department as follows:

"Will you please let me know if a County Judge can legally hold the office of Deputy Sheriff."

An examination of the Constitution and statutory laws of Missouri has disclosed no prohibition against one person holding the offices of County Judge and Deputy Sheriff simultaneously. It is the common law rule that a person may hold two or more public offices at the same time so long as the duties of each are not inconsistent or incompatible. This rule, and a test for determining incompatibility is stated in *State vs. Grayston*, 163 S.W. (2d) 335, l.c. 339:

"* * * The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

Section 57.250, RSMo 1949, provides for appointment of deputy sheriffs in class three and four counties.

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The County Court has no power to approve appointments of deputies or to fix their salaries. Such power is vested with the Circuit Court. The power to appoint deputies is vested with the sheriff. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment. Since the sheriff has the power to appoint and remove his deputies, there can be no question of his control of their activities.

This power of removal would place a deputy who is a county judge in a subordinate position to the sheriff, and, of course, might tend to improperly influence the deputy sheriff in the discharge of his duty as judge of the County Court. That the County Court and the sheriff may in many instances conflict is obvious. One of the more obvious being the settlement which the sheriff is required to make to the County Court by Section 50.390, RSMo 1949:

"All county officers and other persons chargeable with moneys belonging to any county shall render their accounts to and settle with the county court in the manner and at the time prescribed by law."

and by Section 50.370, RSMo 1949:

"In all counties of classes three and four, every county officer who receives any fees or other remuneration for official services which is payable to the county, except recorders of deeds whose offices are separate from that of circuit clerks, shall, at the end of each month file a verified report with the county court of his county showing all fees charged, and accruing to his office and the act or service for which each such fee was charged, together with the names of persons paying or liable for same. Upon the filing of such report, each said county officer shall forthwith pay over to the county treasurer all fees and other moneys collected by him which belong to the county and shall take two receipts therefor, one of which shall be filed with the county court and the other shall be kept on file in his office. Every such officer

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shall be liable personally and on his official bond for all fees collected by him and not accounted for and paid into the county treasury as herein provided."

Another glaring instance where conflict may arise is the reimbursement to the sheriff and his deputies for travel and other expenses as provided by Section 57.430, RSMo 1949:

"In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

The above example indicates the amount of conflict that a person may have who attempts on one hand to collect his expenses from the county, and who on the other hand must determine whether such reimbursements are valid. The Supreme Court of Missouri in *State ex rel. McAllister vs. Dunn*, 209 S.W. 110, l.c. 112, made this comment about the incompatibility of such situations:

"* * * What greater incompatibility could be conceived than the duty of paying and the duty of receiving and granting acquittance for public money?
* * *"

That a county judge is a public officer is so unquestionable that we feel it unnecessary to cite authority. However, to refute any contention that a deputy sheriff is a mere employee, rather than a public officer, the following statement of the Supreme Court of Missouri in *State ex rel. Walker vs. Bus*, 135 Mo. 327, l.c. 332, is quoted:

"* * * he (deputy sheriff) is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers."

(Words in parenthesis ours.)

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In addition to the accounting which the sheriff must make to the County Court, and the payment of money which must be made by the County Court to the sheriff, there is the further incompatibility in that the sheriff's office is subordinate to the County Court on those occasions when the sheriff must execute an order of the County Court.

CONCLUSION

It is, therefore, the opinion of this office that in view of the incompatibility between the offices of county judge and deputy sheriff, one person may not hold both offices at the same time.

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

Yours very truly,

JOHN M. DALTON
Attorney General

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