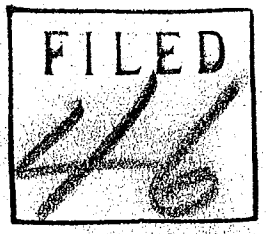
MUNICIPAL CORPORATIONS: Office of police judge in city of
POLICE JUDGE: fourth class incompatible with
COURTS: office of deputy sheriff.
SHERIFFS:
OFFICERS:



August 19, 1955

Honorable John A. Johnson
Senator, 24th District
Ellington, Missouri

Dear Senator Johnson:

This is in response to your request for opinion dated July 15, 1955, which reads as follows:

> "It has come to my attention that a recently elected Police Judge who has assumed the duties of his office is still acting in his former position as a Deputy Sheriff.
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> "I am of the opinion that this is very much out of order, however I thought your office may have some old opinion or information on this matter. In the event you do not have anything that would cover this point, I would like to hereby request an opinion on this matter.
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> "The name of this person is Austin Graves, Thayer, Mo., and I am reliably informed that he has been acting as a Deputy Sheriff in addition to Police Judge. He was formerly Marshal of Thayer, Mo., and Deputy Sheriff.
>
> "I trust that your office may be able to furnish me with some information on this matter at an early date."

The precise question presented is whether the office of police judge is incompatible with that of deputy sheriff. To determine that it is necessary to inquire into the duties of the two offices.

It was said in State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616, at Mo. l.c. 338:

> " * * * 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.
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> "It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

The judicial power of the state is vested in municipal courts among others (Sec. 1, Art. V, Const. of Mo. 1945). The judges thereof are commonly called police judges. Among the powers granted to a police judge of a city of the fourth class, into which class we are informed the city of Thayer falls, is that of issuing warrants. Section 98.540, RSMo 1949, provides that such warrants may

be directed to the sheriff of the county among others therein named. That section reads as follows:

> "All warrants issued by the mayor or police judge shall be directed to the city marshal, the sheriff or any constable of the county, and such warrant shall be executed by the marshal or any policeman of the city, or by the sheriff or any constable of the county, at any place within the limits of said county, and not elsewhere, unless said warrants are endorsed in the manner provided for warrants in criminal cases, and, when so endorsed, shall be served in other counties, as provided for warrants in criminal cases."

Section 57.270, RSMo 1949, with regard to the powers of deputy sheriffs, reads as follows:

> "Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

In State ex rel. Walker v. Bus, supra, the court said, Mo. l.c. 332:

> "Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualification they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' R.S. 1889, secs. 8181 and 8182.
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> * * * * *
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> " * * * The deputy sheriff is certainly a public officer under the laws of this state, and his power and authority is coextensive with that of sheriff. State v. Dierberger, 90 Mo. 369."

By virtue of Section 57.100, RSMo 1949, the sheriff is required to "execute all process directed to him by legal authority."

Therefore, there could arise the anomalous situation of the police judge issuing a warrant of arrest to be served by himself as deputy sheriff. He would have the power of passing upon the sufficiency of the return and to allow or disallow his own fees, etc.

An analogous case was presented in State ex rel. Metcalf v. Goff, 15 R. I. 505, 9 A. 226. That case involved the compatibility of the judge of the district court and deputy sheriff. The court said, A. l.c. 227:

> " * * * But the incongruity of such offices in one person is manifest. To say nothing of the breach of dignity and propriety which would result from an attempt to perform the duties of judge and officer together, the power of a judge to pass upon the sufficiency of an officer's return, and to allow or to disallow his fees, are quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office and the accountability of the other. Moreover, in this state, an officer is required to serve any process duly tendered to him, and thus a judge of a district court might have the process of his own court tendered to him to be served, and become liable to a penalty if he did not do it. * * *
>
> "It may be said, however, that the respondent need not, and probably will not, undertake to act in both offices at the same time; but, in the words of Ames, C.J., in State v. Brown, 5 R.I. 1: 'The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices,' and 'the question of incompatibility is to be determined from the nature of the duties of the two offices, and not from a possibility, or even a probability, that the defendant might duly perform the duties of both.'"

Therefore, considering the powers and duties of the two offices and upon the authority of State ex rel. Walker v. Bus, supra, and State ex rel. Metcalf v. Goff, supra, we are of the opinion that the offices of police judge in a city of the fourth class and deputy sheriff are incompatible and may not be held by the same person at the same time.

CONCLUSION

It is the opinion of this office that the office of police judge in a city of the fourth class is incompatible with the office of deputy sheriff and that the two offices may not be held by the same person at the same time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml