

OFFICERS: A county clerk or county treasurer of  
COUNTY OFFICERS: a third or fourth class county may  
COUNTY CLERKS: act in the capacity of and receive  
COUNTY HIGHWAY ENGINEERS: additional compensation from county  
HIGHWAYS: revenue funds for: (A) Serving as a  
COUNTY ROAD FUNDS: duly appointed assistant highway  
engineer, (B) Clerical or stenographic  
assistant to the county superintendent  
of schools, (C) Stenographic or clerical  
assistant to the prosecuting attorney, (D) Bookkeeper and  
stenographic assistant to the magistrate, (E) Clerical assistant  
to the highway engineer.

The county court of a third or fourth class county may, pursuant to Section 61.610, create the office of County Highway Engineer and appoint the county clerk to fill that office; however the term "ex-officio highway engineer" would be improper terminology for designating the title of such officer.

County clerks of third and fourth class counties are not entitled to compensation in addition to statutory amounts for the office of county clerk for keeping records and accounts of and preparing forms for county road programs formulated by the county court and financed by the County Aid Road Trust Fund.

A county judge may not serve as extra help in the office of the county highway engineer or perform labor or other service in connection with county roads or bridges.

Opinion No. 152

November 4, 1965

Honorable Haskell Holman  
State Auditor  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

You have directed four inquiries to this office upon which you request the official opinion of the Attorney General. You have stated your first question as follows:

"1. May any elected and duly qualified county clerk or county treasurer of third and fourth class counties, in addition to the official duties of his office and the compensation provided by statute for the performance of such duties, be appointed, act in the capacity of or receive addi-

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tional compensation from county funds for the following?

- A. Be appointed assistant highway engineer?
- B. Clerical or stenographic assistant to the county superintendent of schools?
- C. Stenographic or clerical assistant to the prosecuting attorney?
- D. Bookkeeper and stenographic assistant to the magistrate?
- E. Clerical assistant to the highway engineer?"

1. A county clerk or county treasurer of a third or a fourth class county may be appointed assistant highway engineer under the circumstances and for the reasons stated hereinafter in dealing with the propriety of appointing the county clerk to be highway engineer.

The superintendent of schools is authorized by Section 179.130, RSMo. Cum. Supp. 1963, Appendix, to employ clerical assistance. The prosecuting attorney in class three and four counties is authorized to employ stenographic and clerical help by Section 56.245, RSMo Cum. Supp. 1963. Magistrate courts are authorized by Section 483.485, RSMo, to appoint deputies and employees, including stenographic assistants. Section 61.200, RSMo, authorizes the county highway engineer to appoint one or more assistants.

Section 106.220, RSMo, reads:

"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

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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 provided in Sections 106.230 to 106.290."

Section 54.100, relating to county treasurers, has similar provisions.

Sections 106.220 and 54.100, supra, were construed by the Missouri Supreme Court in *State v. Cumpton, Mo.*, 240 S.W. 2d 877, which held that those statutes should be given a reasonable interpretation and do not necessarily require a county officer to devote his entire time to the office. If he sees to it that the duties of his office are properly discharged, he complies with the statutes.

Subject to the provisions of Sections 106.220 and 54.100 supra, requiring county officers to personally devote their time to their duties and to perform them in a proper manner there are no statutory or constitutional prohibitions against elected county clerks or county treasurers of third and fourth class counties acting in the capacities enumerated or receiving additional compensation therefor. Such elected officials may occupy other employment, such as those enumerated in your inquiry, unless the office and positions are incompatible. It was held in the case of *State ex rel. McAllister v. Dunn*, 277 Mo. 38, 209 S.W. 110, that an individual cannot hold two offices, the duties of which are incompatible. In accord are the cases of *State ex rel. McGaughey v. Grayston*, 349 Mo. 700, 163 S.W. 2d 335, and *State ex rel. Gragg v. Barrett*, 352 Mo. 1076, 180 S.W. 2d 730. The clerical, stenographic and book-keeping positions involved in your question are not incompatible with the positions of either county clerk or county treasurer and would not present questions of conflict of interest.

2. Your second question is stated as follows:

"Would it be permissible for the county clerk of any third or fourth class county to be designated by the county court as 'ex officio highway engineer' where such

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county has no duly appointed highway engineer and receive additional compensation from county funds for preparing plans, specifications and other forms in connection with county road programs financed by funds received by the county from the state motor vehicle fuel tax?"

Sections 51.120 to 51.165 RSMo, set forth the duties of the county clerk. In outline, such duties consist of keeping records of orders, rules and proceedings of the county court, the issuance, attestation and sealing of process, accounting for moneys coming into his hands, keeping official court reports, administering oaths and affirmations, keeping accounts between the county on the one hand and the treasurer and all persons, bodies politic and corporate on the other, filing and preserving accounts, vouchers and other papers pertaining to county transactions, issuance of warrants pursuant to orders of the county court, keeping of the county ward-book, handling social security transactions of the county, making reports to the State Board of Education, inspecting the buildings and personal property of the county, and keeping and filing salary and fee lists.

The duties of the county highway engineer in third and fourth class counties, set out in Sections 61.160 to 61.310 RSMo, consist of custody of tools, material and machinery belonging to road districts and to the county, supervision of public roads of the county and of road overseers, supervision over the construction and maintenance of roads, culverts and bridges, inspection of roads, culverts and bridges and filing reports concerning roads and bridges with the county court and with the State Highway Engineer.

Thus, the duties of the county clerk and the county highway engineer of third and fourth class counties impinge upon each other only insofar as the clerk's issuance of warrants to the highway engineer and the highway engineer's filing of reports with the clerk. The duties of the county clerk do not place him in any way in a position subordinate to the county highway engineer or place the county highway engineer in any respect subordinate to the county clerk. There is no conflict between the powers and duties of the respective offices.

We enclose the opinion of the Attorney General to John A.

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Johnson, dated November 19, 1948, holding that a deputy county clerk in a fourth class county may also serve as a county highway engineer. Our present holding is consistent therewith.

It would be improper however to designate the clerk as "ex-officio highway engineer" because this implies the clerk is highway engineer by virtue of his office as clerk, when in fact, he could be highway engineer only by appointment as such by the county court.

3. Your third question is stated as follows:

"Are county clerks of third and fourth class counties entitled to compensation, in addition to the statutory amounts allowable for the office of county clerk, for keeping records and accounts of and preparing forms for county road programs formulated by the county court and financed by funds received from the state from the County Aid Road Trust Fund?"

Insofar as "keeping records and accounts of . . . county road programs" is concerned, those duties belong to the office of county clerk, and he would not be entitled to additional recompense for such work.

Section 51.120 RSMo 1959, reads:

"Every clerk of a county court shall keep an accurate record of the orders, rules, and proceedings of the county court, and shall make a complete alphabetical index thereto; issue and attest all process, when required by law, and affix the seal of his office thereto; keep an accurate account of all moneys coming into his hands on account of fees, costs or otherwise, and punctually pay over the same to persons entitled thereto; provided, that when the clerk of the circuit court of his county is a party, plaintiff or defendant, to a suit or action, the writ of summons and all other process relating thereto shall be issued by the clerk of the

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county court, the reason therefor being noted on said process, and said clerk of the county court shall, on the trial of such cause, act as temporary clerk of the circuit court and otherwise perform all the duties of the clerk of the circuit court."

Section 51.150, RSMo 1959, reads:

"It shall be the duty of the clerk of the county court:

"(1) To keep regular accounts between the treasurer and the county, charging him therein with all moneys paid into the treasury, and crediting him with the amount he may have disbursed between the periods of his respective settlements with the court;

"(2) To keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; (sic).

"(3) To file and preserve in his office all accounts, vouchers and other papers pertaining to the settlement of any account to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk, shall be admitted in evidence in all courts of law and elsewhere;

"(4) To issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection of the same, or any judge thereof."

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It is clear that the above quoted provisions embrace the work of keeping records and accounts in county road programs formulated by the county court.

With respect to "preparing forms for county road programs" we understand that the forms involved would be those set out in the "Operational Procedure Manual for Expenditures from County Road Trust Fund," prepared by the Missouri State Highway Department. The manual describes various forms that are to be attested by the county clerk. All these forms are no more nor less than itemized orders of the county court, embodying reports to the Highway Commission of estimates, requests and progress reports. These forms are clearly covered in Sections 51.120 and 51.150, supra, as "orders, rules, and proceedings of the county court." (Section 51.120, supra), and accounts between the county and . . . bodies politic . . . chargeable with moneys payable into the county treasury," (Section 51.150, supra). Therefore, the county clerk is not entitled to extra compensation for preparing such forms.

4. Your fourth question is stated as follows:

"May any member of the county court of third or fourth class counties serve in the capacity of or receive compensation from county funds for services as follows:

"A. Extra help in office of county highway engineer,

"B. For labor or any other service in connection with the construction, maintenance or repair of any county roads and bridges?"

We hold that a member of a county court is disqualified to work in either the office of county highway engineer or in connection with county roads and bridges, on the ground of incompatibility. State ex rel. McGaughey v. Grayston, supra, 349 Mo. 700, 163 S.W. 2d 335, states the rule thus:

"The settled rule of the common law prohibiting a public officer from holding two incompatible offices at

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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."

The county court in counties of class two, three and four, appoint the highway engineer, pursuant to Section 61.160 RSMo. Section 61.190 RSMo, provides that the county court fix the salary of the highway engineer. Under Section 61.200 RSMo, the highway engineer may in certain circumstances appoint assistants with the approval of the county court, which sets the salaries of such assistants. The county court establishes and changes roads subject to the approval of the highway engineer under Section 61.220 RSMo. Under Sections 61.270 and 61.280 RSMo, the highway engineer files statements of the condition of the roads and the amount of money available for each district, and recommends what action he considers advisable to be taken by the county court for the repair and improvement of roads.

Thus, the highway engineer is subordinate to the county court and accountable to it. Also, in some respects the county court is dependent upon the county highway engineer. The position of county judge is clearly incompatible with that of an employee of the county highway engineer.

Likewise, the statutes cited in the last paragraph above and other statutes provide that the county court is in charge of the county roads and bridges. Anyone performing a service in connection with county roads and bridges is subordinate and accountable to the county court. An employee performing such service is in a position incompatible with that of a county judge. In *Nodaway County v. Kidder, Mo.*, 129 S.W. 2d 857, the Supreme Court held that the employment of a county judge as an employer and employee is incompatible and prohibited by law. The Court also held that the contracting by a county judge for employment by the county is void as against public policy.

We enclose copies of opinions of the Attorney General

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rendered under date of March 7, 1933, to Honorable Virgil L. Rathburn; February 11, 1933, to Honorable T. J. Hager; and May 3, 1937, to Mr. C. E. Jeffries. These opinions require a negative answer to the question whether a county judge can be employed to work on county roads and bridges.

#### CONCLUSION

It is the opinion of this office that:

1. A county clerk or county treasurer of a third or fourth class county may act in the capacity of and receive additional compensation from county revenue funds for:
  - A. Serving as a duly appointed assistant highway engineer;
  - B. Clerical or stenographic assistant to the county superintendent of schools;
  - C. Stenographic or clerical assistant to the prosecuting attorney;
  - D. Bookkeeper and stenographic assistant to the magistrate;
  - E. Clerical assistant to the highway engineer.
2. The county clerk in a third or fourth class county may not be designated by the county court "ex-officio highway engineer," but the county court could, pursuant to Section 61.610, create the office of County Highway Engineer and appoint the county clerk to fill that office.
3. County clerks of third and fourth class counties are not entitled to compensation in addition to statutory amounts for the office of county clerk for keeping records and accounts of and preparing forms for county road programs formulated by the county court and financed by the County Aid Road Trust Fund.
4. A county judge may not serve as extra help in the office of the county highway engineer or perform labor or other service in connection with county roads or bridges.

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The foregoing opinion, which I hereby approve was prepared by my assistant, Donald L. Randolph.

Yours very truly,

*Norman H. Anderson*  
NORMAN H. ANDERSON  
Attorney General

Enclosures