

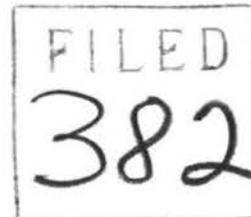
OFFICERS:
OFFICE OF PROFIT:
PROBATE JUDGE:
MAGISTRATE:

Probate Judge/ex officio Magistrate
may not simultaneously serve as
United States Commissioner pursuant
to 28 USCA, Section 631.

Opinion No. 382

October 29, 1968

The Honorable Winston V. Buford
Prosecuting Attorney
Shannon County
Eminence, Missouri 65466



Dear Mr. Buford:

With reference to your recent request for an opinion as to whether a Missouri lawyer can serve as a duly elected magistrate and probate judge of a fourth class county and also accept an appointment as a United States Commissioner, it is our opinion that such dual office holding is prohibited.

We believe the following constitutional provision to be the principal objection to a person simultaneously occupying the position of probate judge/ex officio magistrate and that of a United States Commissioner:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted."
Article VII, Section 9, Constitution of Missouri.

The Supreme Court of Wisconsin had occasion to construe a similar constitutional provision on a nearly identical set of facts. Their constitution reads in part:

"No member of Congress, nor any person holding any office of profit, or trust under the United States (postmasters excepted), * * * shall be eligible to any office of trust, profit or honor in this state."

The Wisconsin Court accordingly ruled that a person accepting appointment as a United States Commissioner had thereby vacated the office of Circuit Court Commissioner. The Court noted that a United States Court Commissioner was clearly an office of profit or trust under the United States (citing therefore, United States v.

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Mouat, 124 U.S. 303, 31 L.Ed. 463; United States v. Germaiur, 99 U.S. 508, 25 L.Ed. 482; United States v. Smith, 124 U.S. 525, 31 L.Ed. 534) and concluded as follows:

"The relator seeks to escape the plain language of the constitutional provision referred to on the ground that the two offices are not incompatible, and also on the ground of practical construction. The question of incompatibility of the two offices is foreclosed by the constitutional provision referred to, and not open for consideration. This provision of the Constitution is clear, and no room is left for practical construction. * * *" State ex rel. Hazelton v. Turner, 169 NW 304, (Wis., 1918).

We are persuaded that the same result must obtain in Missouri.

This office earlier construed Section 9, Article VII to mean that the mayor of a third class city would be prevented from serving as an officer in the Small Business Administration of the Federal Government, although we therein indicated that a civil servant employee of the Federal Government would not necessarily be a holder of an "office of profit under the United States." However we believe there can be no doubt but that a United States Commissioner appointed pursuant to 28 USCA, Section 631, must be considered a holder of an "office of profit under the United States." (Go-bart Importing Company v. United States, 282 US 344, 75 L.Ed. 374 (N.Y., 1931); Jaben v. United States, 381 US 214, 14 L.Ed. 2d 345 (Mo., 1965)). Certainly a probate judge/ex officio magistrate is the holder of an "office of profit in this state." (Section 482.150, RSMo 1967 Cum. Supp.)

CONCLUSION

It is the opinion of this office that a person elected to the office of probate judge/ex officio magistrate (Article V, Section 18, Constitution of Missouri) cannot simultaneously occupy the position of United States Commissioner (28 USCA, § 631).

The foregoing opinion, which I hereby approve, was prepared by my assistant Louren R. Wood.

Yours very truly,



NORMAN H. ANDERSON
Attorney General