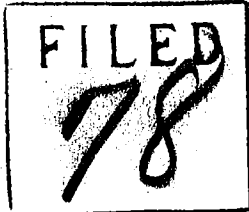


ASSESSORS: Offices of associate county judge and deputy
assessor, though not the subject of positive
COUNTY JUDGES: statutory or constitutional prohibition from
being held by one person, are incompatible and
INCOMPATIBILITY: it is improper for the same person to occupy
both offices.

JOHN M. DALTON
XXXXXXXXXXXX



March 11, 1953

John C. Johnsen
XXXXXXXXXX

Mr. Earl L. Saunders
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Herewith is our opinion based on your request of
February 28, 1953, which request is as follows:

"Enclosed herewith is copy of letter
from Wallace V. Coleman, Clerk of our
County Court, to the undersigned con-
cerning W. J. Hilgert, Associate Judge
of the County Court. We would appre-
ciate having your opinion on the question
presented."

* * * *

"County Court Judge W. J. Hilgert of
the First District is employed by Mr.
Martin E. Burgess as a deputy assessor.

"Judge Hilgert would like to have your
opinion as to the propriety of serving
as said deputy assessor, in view of the
fact that Judgment of Ouster has been
rendered by the Circuit Court of Phelps
County against Martin E. Burgess."

The basic questions here are whether the offices of associate
county judge and deputy assessor are incompatible and whether
there is any positive statutory or constitutional prohibition
against one person's holding both offices.

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No statutory or constitutional provision has been discovered which enjoins the holding of both offices by one man. We therefore proceed to the first question, i.e., whether the two are incompatible.

Incompatibility has been explained as follows:

" * * * They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. * * *" 42 Am. Jur., Public Officers, Sec. 70.

Incompatibility has also been defined in an early Missouri case, *State ex rel. Walker, Attorney General, vs. Bus*, 135 Mo. 327, 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."

Mr. Earl L. Saunders

One of the most important factors in determining incompatibility is the subordination of the one office to the other. Regarding this we quote again from 42 Am. Jur., Public Officers, Sec. 71:

"One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to its revisory power. Thus, two offices are incompatible where the incumbent of the one has the power of appointment to the other office or the power to remove its incumbent, even though the contingency on which the power may be exercised is remote."

With these principles in mind let us examine the relationship between the offices of county judge and deputy assessor. We find that in Section 53.190, RSMo 1949, the assessor may be removed from office by the county court for failure to perform the duties enjoined upon him by law. That section reads, in part, as follows:

"Every assessor who shall knowingly fail to perform any duty enjoined upon him by law, in the time prescribed, shall be removed from office by the county court, who shall appoint another in his stead. * * *"

This power in the county court under the foregoing authorities would render the offices of associate county judge and assessor incompatible. It would logically follow that the offices of associate county judge and deputy assessor are also incompatible in that the removal of the assessor would automatically terminate the authority of his deputy, 43 Am. Jur., Public Officers, Sec. 460.

The fact that two other judges of the county court may vote and that the power of removal is not vested in the one associate judge alone makes no difference. The rule has been applied in similar situations to the offices of city marshal and city councilman, State vs. Hoyt, 2 Ore. 246. In that case the court said at l.c. 249:

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" * * * As to the other point, that the offices of councilman and marshal are incompatible and cannot be held by the same person, we think admits of no question. The marshal is the executive officer of the council, and has to settle his accounts for fees and services with that body; and it would not be competent for him to pass on his own accounts, and vote money out of the city treasury into his own pocket. * * *"

In that case the council consisted of nine members.

The rule has been applied with respect to the office of school trustee (one of three trustees) and school teacher of the same school, Ferguson vs. True and Walker, 3 Bush (Ky.) 255. In that case the court said:

"The only consequence attached to Ferguson's being a trustee, when this agreement was made, would be the vacation of his office as such, the duties of trustee and teacher being incompatible; * * *"

Assuming that the deputy assessor stands in the shoes of the assessor, there are other factors, in addition to the power of removal, contributing to incompatibility in this situation. The amount of the assessor's bond is fixed by the clerk or county court, Section 53.040, RSMo 1949. If the assessor fails to consolidate lands owned by one person, in compliance with Section 137.215, RSMo 1949, the county court is required to deduct ten cents from his account for each tract not so consolidated. If the papers and documents of the assessor are not returned to the clerk in time, or if they are returned in a mutilated condition, the county court shall withhold so much of his compensation as will be sufficient to pay for the procurement of new copies thereof, Section 137.255, RSMo 1949. Both the county assessor and members of the county court are members of the board of equalization, Section 138.010, RSMo 1949. Such board has power to revise and equalize tax assessments involving reviewing and changing assessments made by the assessor or his deputies, Section 130.030, RSMo 1949. The county court also approves and revises the budget of each county official, with the power, after a hearing, to decrease the same, Section 50.740, RSMo 1949.

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Even assuming that the deputy would not stand in the shoes of the assessor and be legally identical with him so far as incompatibility is concerned, still the deputy would be under some obligation to him and would be as associate county judge in an inconsistent position in matters where the interests of the county and of the assessor might be in conflict. It should not be assumed that one in such a position could or would completely divorce himself from self interest.

This supervisory power of the county court over the assessor, as given by these statutes, and the possibility of conflict between the interests of county and that of the assessor set up the sort of situation which the incompatibility doctrine strikes at. The member of the court could not fairly, impartially and with consistency sit in judgment over the assessor and his acts in the matters wherein he is required by law to do so.

CONCLUSION

It is the opinion of this office, for the reasons hereinbefore set out, that the offices of the associate county judge and of deputy assessor, though not the subject of positive statutory or constitutional prohibition from being held by one person, are incompatible and that it is improper for the same person to occupy both offices.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON
Attorney General

WDK:ml