OFFICERS:

A public administrator in a county of the third class may also serve as deputy to county collector.

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Honorable LeRoy Snodgrass
Prosecuting Attorney
Miller County
Tuscumbia, Missouri

Dear Sir:

This is in reply to your request for an opinion which reads as follows:

> "I would like to have your opinion on the question whether or not a Public Administrator upon being appointed deputy to County Collector and assumes duties of deputy collector is thereby disqualified to retain his office as Public Administrator in a county of the Third Class.
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> "This question has come before me and it is my opinion that section 52.310, Revised Statutes, 1949, precludes the acceptance of appointment as Deputy Collector and retention of the office of Public Administrator."

Section 52.310, RSMo 1949, provides as follows:

> "No collector or holder of public moneys, or any assistant or deputy of such holder or collector of public moneys, shall be eligible or appointed to any office of trust or profit until he shall have accounted for and paid over all sums for which he may be accountable."

The Supreme Court of Missouri in the case of State ex inf. v. Breuer, 235 Mo. 240, in holding that a County Collector could

be elected to the office of circuit judge before he had accounted for and paid over all sums of money for which he was accountable construed Section 19, article 2 of the Constitution of 1875 and Section 11446, R. S. Mo. 1909:

> "Section 19, article 2 of the Constitution of this State is as follows: 'Collectors, Receivers, etc., in Default, Ineligible to Office. That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or such receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable.'
>
> "And section 11446, Revised Statutes 1909, provides: 'No collector or holder of public moneys, or any assistant or deputy of such holder or collector of public moneys, shall be eligible or appointed to any office of trust or profit until he shall have accounted for and paid over all sums for which he may be accountable.'"

It is noted that Section 11446, R. S. Mo. 1909 is identical to Section 52.310, RSMo 1949.

In the above cited case, at l.c. 249, the court said:

> "It will be noticed that the catch-words of the section of the Constitution are: 'Collectors, receivers etc., in default, ineligible to office.' And the general rule of law upon the subject, as stated in 29 Cyc. 1385, is as follows: 'Statutes frequently disqualify for public office those who, having in their possession public funds, are in default. Such statutes disqualify only those who have been determined by legal authority to be in default, or admit that they are in default, and appear generally to be liberally construed in favor of eligibility to office. Thus "default" is said to mean a willful and corrupt omission to pay over funds.'

> "The reasonable and salutary interpretation given to the Constitution and statutory provisions under consideration, by this court, is not that those holding the offices mentioned shall be treated as in default and denied further political preferment while occupying such office, but rather that the door of the same office for another term, or of another office, shall be barred to them until, and only until, they shall have shown themselves eligible and worthy by a full settlement and payment of all public funds in their hands."

Although Section 52.310 RSMo 1949 must be construed without the aid of a constitutional provision similar to the one quoted, it is felt that its interpretation and effect should be the same.

The general principle of law relating to whether a person may at the same time hold two public offices is found in Corpus Juris, Volume 46, page 941, et seq:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

The leading case in Missouri is State ex rel. v. Bus, 135 Mo. 325, l. c. 338, wherein the court in discussing this question said:

> "The remaining inquiry is whether the duties of the office of deputy sheriff and those

> of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. 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."

We have examined the statutes relative to the duties of a public administrator and deputy collector in counties of the third class and we are of the opinion that the duties are not incompatible and do not conflict so as to prevent the same person from acting as deputy county collector and also as public administrator.

Honorable LeRoy Snodgrass

CONCLUSION

Therefore, it is the opinion of this department that a public administrator in a county of the third class may also serve as deputy to county collector.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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