

OFFICERS - COUNTY SURVEYORS: A person can hold the office of county surveyor and city surveyor in the same county at the same time.

November 9, 1942

11-25

Mr. B. F. Walther
County Surveyor and Engineer
St. Francois County
Farmington, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of November 5, 1942, which reads as follows:

"I would appreciate very much having your opinion regarding some questions under Section 8660 in which the County Surveyor became ex officio County Highway Engineer as of January 1, 1941 in counties over 20,000 population. In the consideration of these questions I wish to state the fact that the county has no special road districts, township organization or road overseers.

"The questions are as follows:

"1. Does Sections 8655 to 8672 apply to the ex officio County Highway Engineer acting as stated above?

"2. What powers are delegated to the ex officio County Highway Engineer under Sections 8661 and 8662?

"3. There being no road overseers as under Section 8666, does the employees or operators of equipment under Section 8661 become classified as being road over-

Mr. E. F. Walther

(2)

November 9, 1942

seers and the same subject to appointment or removal by the County Court?

"4. Can a County Surveyor and ex officio County Highway Engineer be appointed and accept compensation therefor as a City Engineer for a municipality within said county? "

In answer to your first three questions, we are enclosing a copy of an opinion rendered by this office, on December 9, 1941, to Hon. David E. Blanton, Prosecuting Attorney of Scott County, Missouri, in regard to the county surveyors and ex officio county highway engineers in counties of not less than 20,000 inhabitants, nor more than 50,000 inhabitants.

In answer to your fourth question, we are submitting the following:

In a careful research, we fail to find any statute, or any section under the Constitution, which prohibits a person from holding a county office and a city office in counties having a population such as your county has. The Constitution does prohibit a state officer holding office under the United States, as appears in Section IV, Article XIV, of the Constitution of Missouri, but your office is not a state office, but is merely a county office for the reason that your jurisdiction is limited to the county. It was so held in reference to a sheriff in the case of State v. Williams, 144 S. W. (2d) 98, l. c. 103, where the court said:

"* * * We hold he is a 'county officer' within the meaning of this section. The statements in State v. Finn, 4 Mo. App. 347 and State ex rel. Attorney Genera v. McKee, 69 Mo. 504, to the

effect that a sheriff is a state officer are mere obiter dicta. In State ex rel. Holmes v. Dillon, 90 Mo. 229, 2 S. W. 417, we held that the words 'state officer' as used in the constitution were intended to refer to such officers whose official duties and functions are co-extensive with the boundaries of the state and were never intended to refer to a sheriff whose functions are confined to his county and who is commonly known and called a county officer. * * * * *

The Constitution of Missouri also prohibits, in counties or cities having more than 200,000 inhabitants, the holding, by anyone, of a state office and an office in any county, city or other municipality. This is set out in Sec. 18, Article IX of the Constitution of Missouri.

Since there is no constitutional prohibition, under the Constitution, or any statute, preventing a person, in a county having the population of your county, from holding a county and city office, we must refer to the common law. In the case of State ex rel. Walker, Attorney General v. Bus, 135 Mo. 325, which was passed upon by the Supreme Court of this State June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold a county and city office should depend on whether or not the two offices were incompatible. This case held that a deputy sheriff of the city of St. Louis could also hold the position of school director in the city of St. Louis.

In the case of State ex rel. Langford v. Kansas City, et al., 261 S. W. 115, the court, in following the case of State ex rel v. Bus, supra, said, at l. c. 116:

" * * * In State ex rel. v. Lusk, 48 Mo. 242, the court held that the offices of clerk of the county court and clerk of the circuit court of Cole county were not incompatible, and one person could hold both offices at the same time, because the clerk could act by deputy in one or both courts. But the court added:

"Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible."

"In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. * *"

Also, in the case of State ex rel. v. Bus, 135 Mo. 325, l. c. 338, the court said:

"It follows from what has been said that the right to hold at the same time the office of deputy sheriff and school director is not forbidden by either section 1 of the Acts of 1845, or by section 18, article 9, of the constitution.

"V. 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."

In that case the court held that the duties of the office of deputy sheriff and those of school director are not inconsistent and incompatible.

Since the matter set out in your fourth question must be considered according to the common law, it results that the ruling must be made in accordance with the facts in each separate case. Therefore, the fourth question in your request is whether or not the duties of the county surveyor are incompatible with the duties of a city surveyor in the same county. There is no question but that a county surveyor's duties and the duties of a city surveyor are in common; their duties are not antagonistic and in no way are their duties inconsistent or incompatible.

Mr. B. F. Walther

(6)

November 9, 1942

CONCLUSION

In view of the above authorities, it is the opinion of this department that since the duties of a county surveyor and the duties of a city surveyor in the same county are not incompatible and are not inconsistent, a person can hold the office of county surveyor and city surveyor at the same time and receive compensation from both the county and the city.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW
ENC (1)