

OPINION
63-68

April 29, 1963 (OPINION)

COUNTIES

RE: Officer of County Commissioner and Township Supervisor - Incompa

Your letter of March 19, 1963, has been received. You wish an opinion from this office to determine if the same person may hold the office of township supervisor and county commissioner at the same time.

There is no general statute in North Dakota prohibiting the holding of two offices by the same person. As you know, we do have statutory provisions to allow the offices of the county judge, clerk of court and register of deeds to be held by the same person, in less populous counties. There are also statutory provisions that the holders of some offices cannot hold any other office, but there are not such statutes concerning the offices of township supervisor and county commissioner.

However, it is a well-settled rule of the common law that a person may not at one and the same time rightfully hold two offices which are incompatible. It is also apparently well-settled that the acceptance of a second office incompatible with the first vacates the first office.

It is difficult to set out any hard and fast rule or to form a general definition as to what constitutes incompatibility. Each case must be decided on its particular set of facts. The functions and duties of the offices are determinative as to whether they are incompatible or not. One of the main issues to be decided in all the cases on the incompatibility is the determination of whether or not the holding of one or more offices at the same time is injurious to public policy. Incompatibility of offices exists where there is a conflict in duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than the physical impossibility to discharge the duties of both offices at the same time. In cases where there is physical impossibility, it might be that a deputy would perform the duties of the officer.

The duties of the members of the board of township supervisor and the members of the county commissioners are administrative and legislative in character. A member must exercise his best judgment in behalf of the board of which he is a part. A member common to both boards is not in a position to render such service as the law demands. It is the opinion of this office that these duties at times might be in conflict and consequently such offices are incompatible. It should be noted in 42 Am. Jur., Public Officers, Section 71, it is stated that "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 one has the power of appointment to the other office, or the power to remove its incumbent even though the contingency in which the power may be exercised is remote."

Thus, you will note that it is not necessary for the two offices to be in continual conflict but should the occasion arise only rarely, the offices still may be incompatible. We believe the following instances would serve to illustrate the possibility of conflicts arising between the same person holding both such offices: (1) In cases where the townships and counties enter into contracts, as for instance under section 24-06-09 of the North Dakota Century Code, whereby the board of supervisors and commissioners may enter into a contract without the necessity of advertising for bids; (2) the township board sits as a board of tax equalization and the county board reviews the township board's work; (3) in section 57-12-07, the township officers are to advise the county commissioners sitting as the board of equalization; (4) in Chapter 58-02, the county commissioner have various duties relating to the creation, consolidation and dissolution of townships; and (5) in section 58-04-20, the board of county commissioners may designate the township supervisors in certain instances.

You will note that most of the principles of law stated in the foregoing are found in the 1951 N.D. decisions of State v. Lee, 50 N.W.2d., 124. This case held that the office of justice of peace and the office of clerk of district court were not inconsistent or conflicting. It should be noted that the question of determining compatibility is one of fact and one on which this office cannot make an absolute determination, but it is our opinion that the offices of township supervisor and county commissioner are incompatible. Of course, any proper interested party might secure a court test on this question should the officer in question attempt to hold both offices.

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