

**OPINION**  
**63-87**

June 10, 1963 (OPINION)

COUNTY JUSTICE

RE: Police Magistrate - Compatibility of Offices

This is in reply to your letter of June 4, 1963, concerning the offices of county justice and police magistrate of city or village. The question presented is whether these offices may be held simultaneously by the same person.

As you have noted in your letter, Senate Bill No. 304, enacted by the recent Legislative Assembly, provides in part that the offices of county justice and police magistrate may not be held by the same person. This law becomes effective July 1, 1963. The question then arises as to whether the enactment of Senate Bill No. 304 can have the effect of terminating an existing term of office and, if so, which of the two offices would a person presently holding two offices be required to vacate.

It has been the position of this office since the passage of the County Justice Act that the positions of county justice and police magistrate are incompatible and cannot be held by the same person. As you know, it is a general rule of law that the same person cannot hold two offices which are patently incompatible even though there is no specific statute prohibiting the same person from holding such offices simultaneously.

Our conclusion that the offices of county justice and police magistrate are incompatible is based partially on section 29-07-06 of the North Dakota Century Code which permits a defendant one change of place of preliminary examination. The change must be to the county justice of the same county. If the police magistrate and county justice are one and the same person, the defendant would be denied his right under the cited section. We believe this situation is sufficient to create a conflict between the two offices which would, in turn, cause the offices to be incompatible.

In view of the position that the offices are presently incompatible, Senate Bill No. 304 does no more in this regard than to affirm and codify existing law. It could not therefore be construed as divesting of an office a person who is presently holding the offices of police magistrate and county justice, since it appears such person is presently not entitled to hold both offices.

We would also note that this office, on March 29, 1956, issued an opinion addressed to Mr. Everett E. Palmer, City Attorney, Williston, North Dakota, holding that the office of county justice of the peace and police magistrate were incompatible. While the office of justice of the peace was abolished at the time the office of county justice was created, the duties and powers previously vested in the justices of the peace were vested in the county justice and the criminal

powers were also vested in the police magistrates. While the 1956 opinion does not concern exactly the same offices, we believe the conclusion contained therein is applicable to the present situation.

With regard to the question of which of the offices should be vacated, we believe the holder of the two offices could elect to resign from one office of his choosing and hold the other office. It would appear that person who holds both offices simultaneously would be a de facto officer and his acts while holding the office would be legal. However, it would also appear he would be subject to removal from either office under the provisions of Chapter 32-13 should he refuse to resign from one of the offices.

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