

OPINION
67-146

April 24, 1967 (OPINION)

Mr. Robert L. Eckert

State's Attorney

Richland County

RE: Officers - City and State's Attorney - Compatibility

This is in response to your letter in which you ask for an opinion whether or not the offices of state's attorney and city attorney may be held by the same person at the same time.

The duties of a state's attorney are set forth in chapter 11-06 of the North Dakota Century Code and the duties of the city attorney are set forth in section 40-20-01 of the North Dakota Century Code. By reviewing the various statutory provisions pertaining to the respective offices, we do not find that a statutory prohibition exists preventing any person from holding both offices at the same time.

The North Dakota Supreme Court had under consideration the question of incompatibility between the offices of justice of the peace and clerk of court. In *State v. Lee*, 50 N.W.2d. 124, in disposing of the question the court recognized the difficulty in promulgating a general definition as to what constitutes incompatibility. It recognized that each case must be decided on its own particular facts. The functions and duties of the offices are determinative whether they are incompatible or not. The Court then quoted extensively from 42 Am. Jur., PUBLIC OFFICES, section 70, Page 935.

We might summarize the pertinent points by saying the incompatibility exists where there is a conflict of duties, or where one office is superior to the other in the sense that one directs the activities of the other. They are also considered to be incompatible if their duties and functions are inherently inconsistent and repugnant, and because of contrariety and antagonism would prevent one from faithfully and impartially performing the duties of the other.

The various duties and functions of the two offices involved do not disclose that one is in a position to direct the activities of the other, nor is one dependent upon the other as to the courses of actions to be followed. Neither the constitution of the state of North Dakota nor the statutes prohibit any one person from holding the offices of state's attorney and city attorney at the same time. Neither do we have a general statute prohibiting the holding of two offices by the same person.

After having examined the various duties and functions of the state's attorney and the city attorney, it is our opinion that the two offices are not incompatible and may be held by the same person at the same time.

However, the office of state's attorney will occasionally find that the position of the county might be contrary to the position of a municipality, particularly with reference to interests in real estate or its share of taxes. Also, in other instances a conflict can exist between a county and a municipality as to special assessments and remedies available to both the county and the city in foreclosing on property for special assessments and general taxes. It is thus recognized that there are instances where a conflict exists between the offices of a state's attorney and a city attorney.

The office of state's attorney is a constitutional office (section 173, North Dakota Constitution). The term of the office is provided for by the constitution. The salary and specific duties are set forth by statute, whereas the office of city attorney is only provided for by statute and no specific term is designated by statute for such office. Thus, it is our further opinion that when a conflict arises, the office of state's attorney must prevail. The duties and functions of the office of state's attorney must be given priority and preference where a conflict appears, and it will be necessary for the state's attorney to discharge his duties according to statute in the event of conflict.

The city would, in such instances, be required to secure the services of another attorney and the city would be authorized to take into consideration such additional expenditure in fixing or determining the salary or fees paid to the city attorney and make proper adjustment therefor.

HELGI JOHANNESON

Attorney General