

Opinion No. 127

Sheriffs—Police Officers—Compat- ibility of Offices—Cities and Towns.

HELD: A county sheriff may not also serve as chief of police officer of an incorporated city within his county at one and the same time.

March 31, 1933.

You have requested an opinion from this office as to whether a sheriff of a county may also serve as a chief of police or a police officer of an incorporated city within his county, at one and the same time. "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." 46 C. J. 941, 942. The common law, insofar as it does not conflict with the Constitution of the United States, the Constitution and statutes of this state, has been adopted. (Sec-5672 R. C. M. 1921.

"Incompatibility of office * * * exists only as prescribed by the constitution or laws or by reason of incompatibility of duties". Coleman v.

Hurst, 11 S. W. (2) 133. There is no constitutional nor statutory provision in this state prohibiting the sheriff of a county from serving at the same time as chief of police of a city in the same county. This reduces your proposition to the question of whether or not "incompatibility of office" is involved.

"The offices must be subordinate, one to the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law". People v. Green, 58 N. Y. 295. "Offices are incompatible * * * when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both". State v. Wittmer, 50 Mont. 22. In the above case Wittmer, while a member of the city council, was appointed by the council to the position of purchasing agent of the city. As councilman he would have more or less supervision over the purchasing agent and authority to pass upon and allow claims of the latter against the city. That was clearly an instance of incompatibility as well as a case against public policy.

The case of State v. Bobst, 218 N. W. 253 (Iowa) rather closely applies to the question you submit. The court said in that case:

"Gathering its ideas from the early forms of government in America, this state adopted the township and city systems as separate and distinct jurisdictions for the administration of justice and the preservation of peace. * * * Within the purview of the legislative purpose under the enactments referred to, is a city marshal, in addition to two constables. * * * Less than three was not contemplated. Moreover, it is part of the theory that each court should have an officer immediately at its command all the time * * *. Perhaps at the same moment civil writs or criminal warrants from both courts would demand service at the identical time. Answer to this proposition does not exist in the assertions that under the authorities cited mere physical absence does not create the incompatibility. As a matter of fact, bodily, the appellant in this instance is present within the city and township, but

he cannot serve the justice court because he owes allegiance to the mayor's court. Permission for him to do this means minimization of the public service, abrogating of the statutory requirements, and departure from our original governmental forms. Public policy, and not physical absence, causes the incompatibility".

The Supreme Court of Iowa based its decision upon Section 5657 defining the duties of a city marshal and Section 10629, defining the duties of a constable. (1924 Iowa code.)

Nothing in either of said sections refers to either of the incumbents holding any other office, but each merely outlines the respective duties, and no reference is made in the decision to any other constitutional or statutory provision.

Because of the pressing necessity of economy under present conditions, our natural inclination has been to try to find convincing authority to authorize the sheriff of your county to act as chief of police of the city of Havre at the same time, but the authorities are to the contrary.