

1655.

OFFICES INCOMPATIBLE—JUSTICE OF PEACE AND MARSHAL OF VILLAGE IN SAME COUNTY.

SYLLABUS:

The offices of justice of the peace and marshal of a village in the same county are incompatible.

COLUMBUS, OHIO, March 24, 1930.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your recent communication, which reads:

“Question 1. Are the offices of justice of the peace and marshal of a village in the same county, compatible?”

In determining whether or not one person may hold two or more offices at the same time, it is necessary to examine the constitutional provisions and statutes with reference to the subject, and if there be no constitutional or statutory inhibition against the holding of the several offices by the same person, an examination of their duties must be made to ascertain whether they come within the common law rule of incompatibility. The common law rule is stated in 46 Corpus Juris, 941, as follows:

“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. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other.”

I find nothing by way of constitutional or statutory provision that would prevent a village marshal from being at the same time a justice of the peace in the same county in which the village is situated. However, certain provisions of the new criminal code, which became effective July 21, 1929, should be considered, while having in mind the common law rule above stated.

Section 13422-1, General Code, defining magistrates, reads as follows:

“For the purpose of this title, the word ‘magistrate’ shall be held to include justices of the peace, police judges or justices, mayors of municipal corporations and judges of other courts inferior to the Court of Common Pleas.”

It may be noted that the word “magistrate” includes justice of the peace wherever used in this title.

Section 13432-1, (Section 1 of Chapter XI of the new code), provides as follows:

"A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, herein designated as 'peace officers', shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained."

Section 13432-9, (Section 9 of the same chapter as the last quoted section) reads as follows:

"When an affidavit charging a person with the commission of an offense is filed with the judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused; if the offense charged is a violation of the laws of the state, such warrant may be directed to and executed by any officer named in Section 1 of this chapter (G. C. 13432-1, supra), but if the offense charged is a violation of the ordinance or regulation of the municipal corporation, such process shall be directed to and executed by the officers of such corporation."

(Matter in parenthesis the writer's.)

It is apparent that a justice of the peace, being a magistrate, may direct a warrant to arrest to a village marshal in state cases by the terms of Section 13432-9, supra. In my Opinion No. 1407, rendered to your bureau under date of January 14, 1930, it was held in the first paragraph of the syllabus as follows:

"By virtue of the provisions of Section 13432-9 of the General Code, the mayor of a village may legally issue a warrant of arrest directed to a sheriff or constable of the offense is a violation of the state laws."

The situation in that opinion was just the reverse of the matter now presented, but is applicable for the reason that the opinion recognized the right of a judicial officer of a political subdivision to direct a warrant to a ministerial officer of another political subdivision. Thus the occasion might arise where a justice of the peace would direct a warrant to himself, as village marshal. In such a situation the one office would be a check upon the other, inasmuch as the subordinate ministerial official and the official exercising supervision over him would be the same individual. This would clearly cause such a state of affairs as would render the offices incompatible.

It has been repeatedly held by this office that offices are incompatible if there is the least possibility of a conflict of duty. In fact, in an early English case, *Rex vs. Tizzard*, 9 B. & C., 418, Judge Bailey, in speaking of incompatibility of offices, uses this language:

"I think that the two offices are incompatible when the holder cannot in every instance discharge the duty of each."

In specific answer to your question, I am of the opinion that the offices of justice of the peace and marshal of a village in the same county are incompatible.

Respectfully,

GILBERT BETTMAN,
Attorney General.