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Opinion No. 07-145

One Person Serving Simultaneously as City Attorney and City Judge of Town of Livingston

QUESTION

May an individual serve simultaneously as City Judge and City Attorney for the Town of Livingston?

OPINION

No. The offices of Livingston City Judge and Livingston City Attorney are incompatible under the common law.

ANALYSIS

This opinion concerns whether the Livingston City Judge may also serve as the Livingston City Attorney. Livingston is an incorporated municipality under a mayor-aldermanic charter. 1907 Tenn.Priv.Acts ch. 130. Livingston's charter provides for the appointment of a City Attorney and a Recorder. Specifically, Section 5(21) of Livingston's charter gives the Mayor and Aldermen the power:

> To appoint a City Marshall, with sufficient police force; a Health Officer; a City Attorney; a Recorder, who shall be ex-officio Treasurer; a Building Inspector; a Street Superintendent; and all such other officers an [sic] agents as the necessities of the corporation may require and as the Board of Aldermen shall determine are needed, and fix and declare their pay and compensation; Provided, that the City Attorney and Recorder shall be compensated for their services by fees and commissions on taxes and other revenue, to be fixed by the Board of Mayor and Aldermen, and such fees to be collected in each case from the defendant in all cases where the defendant is found guilty, but in no case shall the town by [sic] liable for any such fees.

With respect to Recorder, Section 7 of Livingston's charter provides as follows:

> [T]he Board of Aldermen shall have power and authority, in the event the Mayor shall decline in writing to perform the duties thereof,[1] to elect and appoint a Recorder, who shall be invested with the powers of a Justice of the Peace, and hold his office for two years, and until his successor shall be elected and qualified. He shall have jurisdiction in all cases for violations of the criminal laws of the State, as other Justices of the Peace, and shall have jurisdiction over and shall hear and determine all breaches of the law and violations of the ordinances of the town, and be empowered to impose fines and costs in all cases of violations of the ordinances of the town, whether the defendant plead guilty or not guilty, and preserve and enforce order in his court as other Justices of the Peace may now do. The Recorder shall take the oath of office as prescribed for Justices of the Peace before entering the duties of his office. The Recorder, if not the Mayor, may be an Aldermen [Alderman], a Justice of the Peace, or other person the Aldermen may elect. All fines imposed by the Recorder for violations of the ordinances of the town shall be paid into the town treasury, to be appropriated in such manner and for such purposes as the Board of Mayor and Aldermen may determine. Appeal shall lie from the judgments of the Recorder as are now allowed by law from Justices of the Peace.

Consistent with this charter provision, Chapter 6 of Livingston's municipal code provides for a city court, and Section 1-601 of that chapter provides that "[t]he officer designated by the municipal charter to handle judicial matters within the municipality shall preside over the city court, and shall be known as the city judge."

In considering whether the Livingston Recorder (or City Judge) may serve simultaneously as the Livingston City Attorney, we first consider whether Article VI, Section 7, of the Tennessee Constitution applies. This constitutional provision prohibits certain judges from holding any other office of trust or profit. Article VI, Section 7, provides:

> Compensation of judges.-- The Judges of the Supreme or Inferior Courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any other office of trust or profit under this State or the United States.

By its express language, Article VI, Section 7, applies only to judges of "the Supreme or Inferior Courts." Municipal courts that exercise purely municipal authority are neither supreme nor inferior courts. *See Newsom v. Biggers*, 911 S.W.2d 715, 717 (Tenn. 1995); *Town of South Carthage v. Barrett*, 840 S.W.2d 895, 897-98 (Tenn. 1992); *Summers v. Thompson*, 764 S.W.2d 182, 184 (Tenn. 1988). However, the Tennessee Supreme Court has found that the judge of a municipal

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[1] Section 3 of Livingston's charter provides that "[t]he Mayor shall be ex-officio Recorder, but may decline to perform the duties of Recorder, in which case a Recorder shall be appointed as hereafter provided."

court is subject to the requirements of Article VI when that judge exercises concurrent jurisdiction with an inferior court. *See Summers*, 764 S.W.2d at 185-86; *see, e.g.*, *Barrett*, 840 S.W.2d at 899 (statute bestowing appointed recorder of municipality with concurrent jurisdiction with judges of the court of general sessions was found unconstitutional because Article VI, Section 4, of Tennessee Constitution requires judges exercising inferior court jurisdiction to be elected).

Section 7 of Livingston's charter initially invests its Recorder with the powers of a justice of the peace, and then goes on to more particularly state:

> [The Recorder] shall have jurisdiction in all cases for violations of the criminal laws of the State, as other Justices of the Peace, and shall have jurisdiction over and shall hear and determine all breaches of the law and violations of the ordinances of the town, and be empowered to impose fines and costs in all cases of violations of the ordinances of the town, whether the defendant plead guilty or not guilty, and preserve and enforce order in his court as other Justices of the Peace may now do.

Livingston's charter primarily bestows the Recorder with jurisdiction to hear and determine matters involving municipal law and ordinances. This is clearly municipal court authority. The charter, however, also provides that the Recorder shall have jurisdiction in all cases for violations of the criminal law of the State. This type of jurisdiction is exercised by an inferior court. *See Newsom*, 911 S.W.2d at 717. Nevertheless, Livingston's charter expressly limits this grant of jurisdiction to only such jurisdiction "as other Justices of the Peace" have. In *City of Elizabethton v. Carter County*, 321 S.W.2d 822 (Tenn. 1958), the Tennessee Supreme Court examined a very similar charter provision. Elizabethton's charter provided that its municipal court "shall be vested with the power, authority, and jurisdiction of the office of the Justice of the Peace, as to the violation of the criminal laws of the State of Tennessee within the corporate limits of the City of Elizabethton." *City of Elizabethton*, 321 S.W.2d at 824. The Court determined that the City of Elizabethton municipal court judge exercised the limited power of a justice of the peace and was consequently not exercising inferior court jurisdiction. *Id*. at 827-28.

Notably, the Tennessee Supreme Court has continued to recognize the distinction between inferior courts and justices of the peace. Over thirty years after it rendered its opinion in *City of Elizabethton*, the Court distinguished that opinion in *Barrett*, expressly noting that *City of Elizabethton* dealt with the conferring of a limited power of a justice of the peace upon a city judge or recorder, rather than inferior court jurisdiction.[2] *Barrett*, 840 S.W.2d at 898. Accordingly, it does

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[2] Earlier in the opinion, the Court also noted Article VI, Section 1, of the Tennessee Constitution, which distinguishes between judges of inferior courts and justices of the peace. *Barrett*, 840 S.W.2d at 897. Article VI, Section 1, provides:

> The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by Justices of the Peace
> (footnote 2, continued) may also be established.

not appear that Article VI, Section 7, which prohibits judges of "the Supreme or Inferior Courts" from holding any other office of trust or profit, applies to the Livingston Recorder because Livingston's charter bestows only the limited power of a justice of the peace upon its Recorder. *See City of Elizabethton*, 321 S.W.2d at 824, 827-28. Consequently, we do not believe that Article VI, Section 7, prohibits the Livingston Recorder (or City Judge) from serving simultaneously as City Attorney; however, this does not end the inquiry.

While Article VI, Section 7, does not appear to prohibit the Livingston Recorder from serving simultaneously as City Attorney, we are of the opinion that these two positions are incompatible under the common law. There is a well recognized common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 115 Tenn. 336, 327, 89 S.W. 316 (1905) (citing *State ex rel. Bergshicher v. Grace*, 113 Tenn. 9, 82 S.W. 485 (1904)). As explained below, the Livingston City Attorney and the Livingston Recorder are public officers, and their offices are incompatible.

In *Frazier v. Elmore*, 180 Tenn. 232, 173 S.W.2d 563 (1943), the Tennessee Supreme Court examined the meaning of "office," stating:

> Webster defines "office" as an "assigned duty or function." Synonyms are post, appointment, situation, place, position; and "office commonly suggests a position of (especially public) trust or authority." Bouvier defines "office" as "a right to exercise a public function or employment, and to take the fees and emoluments belonging to it"; again, "a public charge or employment." 2 Bouv. Law Dict., Rawles Third Revision, p. 2401. The opinion of this Court in *Jones, Purvis & Co. v. Hobbs*, 63 Tenn. 113, at page 120, quotes Blackstone's definition of office as "a right to exercise a public or private employment, and to take the fees and emoluments thereto belonging."

Frazier, 180 Tenn. 232, 173 S.W.2d at 565. Similarly, a "public officer" has been broadly defined as "an incumbent of a public office; an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law." *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (citing 67 C.J.S. *Officers*, § 2).

Under these broad definitions, it is our opinion that the Livingston City Attorney and Recorder are "offices" and that the individuals holding those positions are "officers." Additionally, we note that Tennessee courts have found city attorneys and city recorders to be officers, especially when a municipal charter provides for their appointment or election. *See, e.g.*, *Gamblin v. Town of Bruceton*, 803 S.W.2d 690, 692-93 (Tenn. Ct. App. 1990) (city recorder); *Sitton*, 566 S.W.2d at 889 (city attorney).

Assuming the Livingston City Attorney and Livingston Recorder are offices, we next examine the compatibility of these two offices. The common law prohibition against a public officer holding two incompatible offices at the same time generally applies when an individual occupies

two inherently inconsistent offices. 63C Am.Jur.2d *Public Officers and Employees* § 62 (2007). The question of incompatibility of necessity depends on the circumstances of the individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. *Officers* § 38 (2007).

> Incompatibility, therefore, arises from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where 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. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them.

3 *McQuillin Mun.Corp.*, § 12.67 (3rd ed.).

A city attorney represents the city in legal matters in which the city is a party or interested, or in which its officers are officially interested. 56 Am.Jur.2d *Municipal Corporations* § 198 (2007). A city attorney therefore must act as an advocate for the city's interests in court. By contrast, a city judge must act as a neutral arbitrator. This requirement is clearly set forth throughout the Tennessee Code of Judicial Conduct. Rule 10, Canon 2A of the Rules of the Tennessee Supreme Court provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Under Section 7 of Livingston's charter, the Recorder has jurisdiction over and is to hear and determine all breaches of the law and violations of the ordinances of the town and is empowered to impose fines and costs in all cases of violations of the ordinances of the town. The City Attorney prosecutes these cases on behalf of Livingston. A Livingston City Judge who is also employed as City Attorney could not be a neutral arbitrator when hearing such cases. Thus, the offices of Livingston City Attorney and Recorder are inherently inconsistent and therefore incompatible.

Due to the incompatibility of the offices of city judge and city attorney, we have opined in the past that the same person may not simultaneously hold these offices in other municipalities. [3] We are of the same opinion with respect to Livingston. We also note that courts in other jurisdictions have determined that the offices of city judge and city attorney are incompatible. *See, e.g., In re Klaisz*, 115 A.2d 537 (N.J. 1955); *People v Rapsey*, 107 P.2d 388 (Cal. 1940); *State ex rel. Stark v. Hines*, 215 N.W. 447 (Wis. 1927).

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[3] This office has concluded that the same person may not serve as the Collinwood City Judge and the Collinwood City Attorney. Op. Tenn. Att'y Gen. 02-106 (October 1, 2002). Similarly, this office has concluded that the same person may not serve as city attorney and city judge for New Johnsonville. Op. Tenn. Att'y Gen. U97-047 (October 14, 1997).

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