LETTER OPINION
80-31

March 19, 1980 (OPINION)

Mr. Aloys Wartner III
City Attorney
Harvey, North Dakota 58341

Dear Mr. Wartner:

This is in response to your letter of March 3, 1980, wherein you provide the following information:

> The City of Harvey is located in Wells County. Wells County has a County Court of Increased Jurisdiction. The Wells County Judge of the Court of Increased Jurisdiction has filed a petition to run for the position of the City of Harvey Municipal Judge. If the Judge is successful, he may be elected to both the position of Municipal Judge and the Judge of the County Court of Increased Jurisdiction.
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> My question is, may a person serve in the position of Municipal Judge and Judge of a County Court of Increased Jurisdiction, or does section 40-18-01 only apply to the position of County Justice?

Section 40-18-01 of the North Dakota Century Code sets forth the following information:

> 40-18-01. JURISDICTION OF MUNICIPAL JUDGE. The municipal judge within a city having a population of three thousand or more shall be an attorney licensed to practice law in this state, unless no person so licensed is available in the city, and shall have exclusive jurisdiction of, and shall hear, try, and determine, all offenses against the ordinances of the city. The offices of county justice and municipal judge may not be held by the same person. In a city with a population of less than three thousand, the municipal judge may be, but need not be, an attorney licensed to practice law in this state, nor shall he be required to be a resident of the city in which he is to serve.

A reading of this statute clearly indicates that the offices of county justice and municipal judge cannot be held by the same person. This statute, however, does not prohibit a person from holding the positions of judge of the county court of increased jurisdiction and municipal judge.

In North Dakota, there is a strong line of legal authority for the proposition that a person may not, at one and the same time, rightfully hold two offices which are incompatible. In Tarpo v. Bowman Public School District No. 1, 232 N.W.2d. 67 (N.D. 1975), our Supreme Court held that the common law rule of incompatibility of positions is the law of this state. Furthermore, the Court stated that there is no constitutionally protected right to hold

incompatible offices or employments and that the rule prohibiting the holding of incompatible offices or positions does not result in an unconstitutional infringement of personal and political rights.

According to 63 Am Jur.2d. Public Officers and Employees, section 73 at p. 675,

> ›i!ncompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.

In State v. Lee, 50 N.W.2d. 124 (N.D. 1951), it is stated that the incompatibility of office must be determined from functions and duties of each office and their relation to each other. Furthermore, when one office is subordinate to the other or when performance of functions of the two offices results in antagonism and conflict of duty so that incumbent of one cannot discharge with fidelity and propriety, then the duties of both should be held to be incompatible.

In chapter 27-08, the authority of county courts of increased jurisdiction are set forth. In this chapter there are statutes dealing with the jurisdiction and officers of, and procedures before, the county courts of increased jurisdiction. Chapter 40-18 deals exclusively with municipal judges. In this chapter there are statutes dealing with the jurisdiction, term of office, salary of, and procedures before the municipal judge. In reviewing chapters 27-08 and 40-18, it appears that it is the intent of the Legislature to have the offices of judge of the county court of increased jurisdiction and municipal judge be separate and distinct offices.

In reviewing the proceedings before a municipal judge and a judge of the county court of increased jurisdiction, it is discovered that there is an important area of conflict. This area concerns appeals from determinations of the municipal judge. Sections 40-18-19 and 27-08-21 of the North Dakota Century Code provide as follows:

> 40-18-19. APPEALS FROM DETERMINATIONS OF MUNICIPAL JUDGE. An appeal may be taken to the district court or to the county court of increased jurisdiction as provided for in section 27-08-21 from a judgment of conviction in a municipal judge's court in the same form and manner as appeals are taken and perfected from a judgment of conviction of a defendant in county justice court, and in accordance with sections 33-12-34, 33-12-35, and 33-12-39, and shall be tried in the district court or county court of increased jurisdiction in accordance with sections 33-12-40 and 33-12-41, and bail shall be taken in accordance with sections 33-12-36 and 33-12-37, and witnesses may be placed under bond as provided for in section 33-12-38. On all appeals from a determination in a municipal judge's court, the court shall take judicial notice of all of the

ordinances of the city. No filing fee shall be required for the filing of an appeal from a judgment of conviction for the violation of a municipal ordinance.

27-08-21. APPELLATE JURISDICTION OF COUNTY COURTS OF INCREASED JURISDICTION. County courts having increased jurisdiction shall have concurrent jurisdiction with the district courts in appeals from all final judgments entered in municipal courts, and the proceedings on such appeals shall be the same as those which now are or hereafter may be provided for appeals from judgments of county justices to district courts.

It is clear that there is a statutory right to appeal decisions and determinations of the municipal judge to the county court of increased jurisdiction. Where the judge of the county court of increased jurisdiction is one and the same as the judge of the municipal court, the conflict in interest and antagonism is obvious. It is the opinion of this office that a judge of the county court of increased jurisdiction cannot discharge his duties with "fidelity and propriety" where he is presiding over an appeal taken from his previous determination as a municipal judge. Accordingly, it is our opinion that a person may not hold the position of judge of the county court of increased jurisdiction and the judge of the municipal court as these positions are to be considered incompatible with one another.

This conclusion is a logical extension of an earlier opinion issued by this office on March 29, 1956 (copy enclosed). In that opinion, this office held that the positions of justice of the peace and police magistrate are incompatible with one another and cannot be held by the same individual. Since the writing of that opinion, the justice of the peace has been replaced by the county court of increased jurisdiction (see section 27-08-20) and the police magistrate has been replaced with the municipal judge (see chapter 40-18). In our 1956 opinion, our review of the applicable statutes regarding these offices indicated that it was the legislative intent that these offices be separate and distinct from one another and should not be held by the same individual. We believe the same discussion would be applicable to the question you have posed in your letter of inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General