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January 11, 1952

Opinion No. 52-9

Mr. Melvyn T. Shelley  
County Attorney  
Navajo County  
Holbrook, Arizona

Dear Mr. Shelley:

This is in answer to your letter of January 5, 1952 in which you request our opinion on these two questions:

1. May a County Assessor sell insurance during office hours.
2. If so, may he use the Assessor's office therefor?

We have been unable to find any specific statute prohibiting a public officer from being privately employed during the hours of his public office. Apparently no Arizona cases touch on the exact situation your question presents. Our Supreme Court has ruled on several cases involving the holding of two public offices by the same individual. In the case of Coleman vs. Lee, 58 Ariz. 506; the court was called upon to discuss the question relative to the case where a person holds two public positions. Here the court applied the test of "incompatibility". The same test was again applied by the court in Perkins vs. Manning, 59 Ariz. 60. The court said in this case:

"We think that public policy requires that anyone accepting and retaining a public office should not place himself by the accepting of another office, in such a position that it is physically impossible for him properly to perform the duties of both offices, and if the nature of the two offices is such that this impossibility does appear, the offices are incompatible and the acceptance of the second, ipso facto, vacates the first."

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The physical compatibility has to do with actual hours of time available to discharge duties of both positions. The prescribed duties incompatibility test has to do with whether proper performance of the duties of one office may render it impossible or unlikely that the prescribed duties of the other office may be performed to best advantage.

In the Perkins case, the court declined to follow the majority rule, which gives a narrow construction to the word "compatibility" and applied the broader meaning. The court said:

"We hold therefore, that the doctrine of incompatibility of offices, depends upon the public policy of the state: that the offices are incompatible not only when the duties thereof are in conflict, but when it is physically impossible that they may be performed properly by the same person."

While realizing that the test applied in these cases involved two public offices, we have no doubt that the same test could be applied to the situation you present, with an obvious answer; that it is physically impossible for the County Assessor to properly perform the duties of his office as prescribed by law during office hours, while engaging in some form of private enterprise during those same hours.

43 American Jurisprudence 81 says:

"It is the duty of public officers to refrain from outside activities which interfere with the proper discharge of their duties. Within reasonable limits, subject to the limitation that it may not abridge any man's constitutional rights, the legislature has power to ascertain and declare what activities are inconsistent with the proper performance of public duties. \* \* \*"

In State ex rel Sanchez, et al vs. Stapleton, the New Mexico Supreme Court, discussing the right of a county assessor to appoint his wife to his job, when the duly elected officer was inducted by the armed forces, said:

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"The policy of the law is that public officers, elected to public office upon their ability to execute the office and upon confidence imposed in them by people, should devote their time and energies to duties of the office to which they have been elected."

We are therefore of the opinion that your first question must be answered in the negative.

The answer to your first question precludes the necessity of answering the second.

Very truly yours,

FRED O. WILSON  
Attorney General

ALFRED C. MARQUEZ  
Assistant Attorney General

ACM:d

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