

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2022-19

TO: Mayor Jordan Hess, City Council, Dale Bickell, Shannon Therriault, Leigh Griffing, Marty Rehbein, Eran Pehan, Donna Gaukler, Ellen Buchanan, Jeremy Keene, Human Resources Dept.

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE September 16, 2022

RE: Legal doctrine of incompatible offices does not allow City/County Health Department staff person to simultaneously serve as a city council member.

FACTS:

An inquiry has arisen concerning whether a City/County Health Department staff person may simultaneously be appointed to fill a vacant city council position.

ISSUE(S):

May a City/County Health Department employee simultaneously serve as a City Council member?

CONCLUSION(S):

No, pursuant to the common law legal doctrine of incompatible offices, a City/County Health Department employee may not simultaneously serve as a city council member.

LEGAL DISCUSSION:

The name of the health department is City/County Health Department. The City Council provides significant funding for the City/County Health Department as well as appoints some members of the City/County Health Board. The City/County Health Department staff enforce the health codes inside the city limits.

In 1998 the Montana Attorney General issued a formal Attorney General Opinion that a city public works employee or director cannot simultaneously be a member of the city council. 47 Op. Att'y Gen. 19 (1998). Pursuant to Mont. Code Ann. § 2-15-501(7) "the attorney general's opinion is controlling unless overruled by a state district court or the supreme court."

In this 1998 opinion, Attorney General Joe Mazurek stated in pertinent part:

Because I conclude that the doctrine of incompatible offices prevents a public works employee or director from serving as a city council member, as well as a hospital employee from serving as a trustee of the hospital district, it is not necessary to further analyze the conflict of interest issue.

The Montana Supreme Court has recognized that two offices are incompatible when one has the power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or 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 ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648 (1914).

The doctrine of incompatible public offices eliminates the public policy concerns inherent in the simultaneous holding of multiple public offices or positions by:

(1) preventing multiple position-holding, so that offices and positions of public trust do not accumulate in a single person; (2) preventing individuals from deriving, directly or indirectly, any pecuniary benefit by virtue of their dual position-holding; (3) avoiding the inherent conflict which occurs when an employee's elected position has revisory power over the employee's superior in another position; and (4) ensuring, generally, that public officeholders and public employees discharge their duties with undivided loyalty.

46 Op. Att'y Gen. No. 26 (1996), citing 43 Op. Att'y Gen. No. 47 at 165 (1989), which cites Acevedo v. City of North Pole, 672 P.2d 130, 134 (Alaska 1983).

In 46 Op. Att'y Gen. No. 26, (1996) I also concluded that the common law doctrine of incompatible public offices applies to public employees, as well as to public office holders, and that a county employee appointed by a board of county commissioners and paid by the county cannot serve on the board of commissioners for the same county.

The common-law doctrine of incompatibility extends to positions of public employment as well as public offices. See, e.g., Otradovec v. City of Green Bay, 347 N.W.2d 614 (Wis. Ct. App. 1984). As the Wyoming Supreme Court has stated, it is "inimical to the public interest for one in public employment to be both the

employer and the employee or the supervisor and the supervised." Thomas v. Dremmel, 868 P.2d 263, 264 (Wyo. 1994), quoting Haskins v. State ex rel. Harrington, 516 P.2d 1171 (Wyo. 1973).

46 Op. Att'y Gen. No. 26.

In State ex rel. Klick v. Wittmer 50 Mont. 22 144 P. 648 (1914) the Montana Supreme Court held that the office of alderman and that of purchasing agent of a city were incompatible and therefore one individual could not fill both at the same time.

CONCLUSION(S):

No, pursuant to the common law legal doctrine of incompatible offices, a City/County Health Department employee may not simultaneously serve as a city council member.

OFFICE OF THE CITY ATTORNEY

A handwritten signature in black ink, appearing to read "Jim Nugent", is enclosed within a thin rectangular border.

Jim Nugent, City Attorney
JN: mcs