

OFFICE OF THE CITY ATTORNEY

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

Legal Opinion 2021-003

TO: Mayor John Engen, City Council, Dale Bickell, Rob Gannon, Leigh Griffing, Eran Pehan, Jaeson White, Jeff Brandt, Donna Gaukler, Ellen Buchanan, Jeremy Keene, Tiffany Brander, Human Resources Dept.

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 24, 2021

RE: Legal doctrine of incompatible offices does not allow city employees to simultaneously serve as a city council member.

FACTS:

2021 is a municipal election year for municipal offices. Once again, an inquiry has arisen as to whether a city employee may legally be a city employee and city council member simultaneously.

ISSUE:

May a city employee simultaneously serve as a city council member?

CONCLUSION:

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

LEGAL DISCUSSION:

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:

As noted in Mr. Burns' letter, the question of whether a city employee sitting on the city council presents a conflict of interest was previously addressed in 41 Op. Att'y Gen. No. 81 (1986). In that opinion, former Attorney General Mike Greely held that there is no inherent conflict of interest when an employee of the City of Glendive is also an elected member of the city council. That opinion provides the controlling answer to Mr. Burns' initial question regarding a possible conflict of interest.

However, adoption of a conflict-of-interest statute in no way abrogates the common law rule against the holding of incompatible positions. Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67, 71 (N.D. 1975). 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, 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.

47 Op. Att'y Gen. 19 (1998) (copy attached).

CONCLUSION:

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

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:ka

Opinions of the Attorney General

47 Op. Att'y Gen. No. 19

CITIES AND TOWNS - Public works employee or director as city council member;
CONFLICT OF INTEREST - Hospital district employee as hospital district trustee;
CONFLICT OF INTEREST - Public works employee or director as city council member;
COUNTY OFFICERS AND EMPLOYEES - Hospital district employee as hospital district trustee;
HEALTH BOARDS AND DISTRICTS - Hospital district employee as hospital district trustee;
HEALTH CARE FACILITIES - Hospital district employee as hospital district trustee;
HOSPITAL DISTRICTS - Hospital district employee as hospital district trustee;
LOCAL GOVERNMENT - Hospital district employee as hospital district trustee;
LOCAL GOVERNMENT - Public works employee or director as city council member;
PUBLIC OFFICERS - Hospital district employee as hospital district trustee;
PUBLIC OFFICERS - Public works employee or director as city council member;
MONTANA CODE ANNOTATED - Section 7-34-2120; OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 26 (1996), 43 Op. Att'y Gen. No. 47 (1989), 41 Op. Att'y Gen. No. 81 (1986), 37 Op. Att'y Gen. No. 102 (1977).

HELD:

1. A hospital district employee cannot be a hospital district trustee.
2. A public works employee or director cannot be a member of the city council. The positions are incompatible.

October 13, 1998

Mr. Allin H. Cheetham
Chouteau County Attorney
P.O. Box 112
Fort Benton, MT 59442-0112

Mr. Richard L. Burns
Glendive City Attorney
P.O. Box 6
Glendive, MT 59330

Dear Mr. Cheetham and Mr. Burns:

You have recently asked my opinion on questions which are closely related and require similar analysis. I am therefore responding to both requests with one opinion. The related questions are:

1. May a hospital district employee be a trustee of the hospital district?
2. May a public works employee be a city council member?
3. May a public works director, or any other appointed city officer, hold the position of city council member?

Two employees of the Missouri River Medical Center, a hospital district health care facility, have filed for election to that hospital district's board of trustees. Mr. Cheetham questions whether serving in both positions creates a conflict of interest or is prohibited for any reason. A public works employee for the City of Glendive is also an elected alderman and sits on the Glendive city council. Mr. Burns asks first whether this presents a conflict of interest, and second, whether the two positions are incompatible.

As noted in Mr. Burns' letter, the question of whether a city employee sitting on the city council presents a conflict of interest was previously addressed in 41 Op. Att'y Gen. No. 81 (1986). In that opinion, former Attorney General Mike Greely held that there is no inherent conflict of interest when an employee of the City of Glendive is also an elected member of the city council. That opinion provides the controlling answer to Mr. Burns' initial question regarding a possible conflict of interest.

However, adoption of a conflict-of-interest statute in no way abrogates the common law rule against the holding of incompatible positions. *Tarpo v. Bowman Pub. Sch. Dist. No. 1*, 232 N.W.2d 67, 71 (N.D. 1975). 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, 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 said 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.

Unlike the office of county commissioner, the office of hospital district trustee is not compensated. Mont. Code Ann. § 7-34-2120. Nevertheless, the office of trustee is incompatible with employment by the hospital district. The trustee position has substantial powers over employees of the hospital district. Hospital district trustees employ (and discharge) hospital district employees. The trustees determine, within state guidelines, the salaries and benefits received by hospital district employees. Mont. Code Ann. § 7-34-2122(1); 37 Op. Att'y Gen. No. 102 (1977). Mr. Cheetham has indicated that the trustees also have direct supervision over the individuals who supervise district employees. Thus, an individual serving in the dual roles of employee and trustee would be in the position of controlling actions and decisions of his or her supervisor which could directly affect his or her job duties and compensation. Likewise, an individual serving as a public works employee and a member of the city council is in the position of controlling the actions and decisions of the employee's supervisor, the public works director.

In each situation, the individual must choose between the clashing duties of two positions, a choice the doctrine of incompatibility of offices was designed to avoid. *Township of Belleville v. Fornarotto*, 549 A.2d 1267 (N.J. 1988). Such scenarios are clearly "inimical" to the public interest and thus prohibited by the doctrine of incompatible offices.

Mr. Burns' third question concerns whether a public works director, or any other city officer, can be elected to the city council. According to Mr. Burns, the Glendive City Council has supervisory power and the power of removal over the public works director. Thus, the simultaneous holding of the office of city council member and the office of public works director presents a concern similar to that addressed in 46 Op. Att'y Gen. No. 26. There, the positions of county commissioner and county coordinator of disaster and emergency services were found to be incompatible as the county commission has the powers of supervision, revision, and removal over the position of DES coordinator. Similarly, the office of city council member is incompatible with either the office or the position of public works director.

The determination whether other appointed city offices and positions are incompatible with the office of city council member is fact-dependent and must be made on a case-by-case basis.

THEREFORE, IT IS MY OPINION:

1. A hospital district employee cannot be a hospital district trustee.
2. A public works employee or director cannot be a city council member. The positions are incompatible. Sincerely,

JOSEPH P. MAZUREK Attorney General

jpm/mas/dm