

46 Op. Att'y Gen. No. 26

CONFLICT OF INTEREST - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
COUNTY COMMISSIONERS - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
COUNTY OFFICERS AND EMPLOYEES - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
DISASTER AND EMERGENCY SERVICES - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
MONTANA CODE ANNOTATED - Sections 7-5-2101, -2107, 10-3-201, -401 to -406;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 47 (1989), 42 Op. Att'y Gen. No. 94 (1988).

HELD:

The office of county commissioner and the position of county coordinator of disaster and emergency services are incompatible, and one individual may not hold both simultaneously.

December 12, 1996

Mr. Loren Tucker
Madison County Attorney
P.O. Box 36
Virginia City, MT 59755

Dear Mr. Tucker:

You have requested my opinion on the following question:

May an individual simultaneously hold the office of county commissioner and the position of county coordinator of disaster and emergency services?

The Board of County Commissioners of Madison County has appointed one of the county commissioners to the position of county coordinator of disaster and emergency services (DES). Because the Board has supervisory powers over the DES coordinator, you have asked whether one individual should serve both as county commissioner and as DES coordinator.

Your question requires consideration of the doctrine of incompatible public offices. This doctrine arises from the common law and addresses the public policy concerns inherent in the simultaneous holding of multiple public offices or positions. The doctrine was discussed in 43 Op. Att'y Gen. No. 47 (1989), and the analysis set forth in that opinion is useful in the resolution of your inquiry.

The common-law doctrine of incompatible public offices serves the purposes of (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. 43 Op. Att'y Gen. No. 47 at 165, citing Acevedo v. City of North Pole, 672 P.2d 130, 134 (Alaska 1983).

More than 80 years ago the Montana Supreme Court observed that offices are incompatible when one has 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). See also 63A Am. Jur. 2d Public Officers and Employees, §§ 65, 78 (1984); 67 C.J.S. Officers and Public Employees § 27(a) (1978).

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).

In 42 Op. Att'y Gen. No. 94 (1988), it was held that the offices of county commissioner and county high school trustee are incompatible and that one individual may not hold both offices simultaneously. That opinion, which also applied the doctrine of incompatible offices set forth in Klick, noted that crucial to its conclusion was the fact that under state law a county commissioner has certain supervisory powers over a school trustee.

The simultaneous holding of the office of county commissioner and the position of county DES coordinator presents a similar concern. The board of county commissioners has the general power to manage the business and concerns of the county and to employ such persons as it deems necessary to assist in the performance of its duties. Mont. Code Ann. §§ 7-5-2101, -2107. As required by Mont. Code Ann. § 10-3-201, the county commissioners must designate an agency responsible for emergency and disaster prevention and preparedness and coordination of response and recovery. The board, through its chairman, must notify the division of disaster and emergency services of the state department of military affairs concerning the manner by which the county is providing or securing emergency and disaster planning and services, and it must identify the person responsible for obtaining the planning and services.

To meet its statutory obligation to provide for such planning and services, the Board of County Commissioners in Madison County employs a county DES coordinator, who assists the board in the preparation of a county-wide or interjurisdictional disaster and emergency plan and program and in the fulfillment of its other duties under Mont. Code Ann. § 10-3-401. The DES coordinator would also assist the board and its chairman with their duties in the event of a local emergency proclamation or disaster declaration under Mont. Code Ann. §§ 10-3-402 to -406.

The county DES coordinator in Madison County is a county employee appointed by the Board of County Commissioners and paid by the county. While the county may be reimbursed, in whole or in part, from state and federal sources for the expenses associated with the DES coordinator's position, the fact remains that the county commissioners have the power of supervision, revision, and removal over the position of DES coordinator. A county commissioner who is also employed as a county DES coordinator would be laboring under a conflict of duties between the office and the position. Based upon the rationale in Klick and the authorities discussed above, I conclude that the office of county commissioner and the position of county DES coordinator are incompatible and that one individual may not hold both simultaneously.

Because of this conclusion, I have not addressed the other concerns raised in your letter of inquiry. In addition, this opinion does not address the simultaneous holding of the position of DES coordinator and any office or position other than that of county commissioner; to determine whether other offices and positions may be incompatible, the appropriate analysis would have to be applied on a case-by-case basis.

THEREFORE, IT IS MY OPINION:

The office of county commissioner and the position of county coordinator of disaster and emergency services are incompatible, and one individual may not hold both simultaneously.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/jp/dm