

December 12, 2005

Mr. Philip F. Walsh  
West Yellowstone Town Attorney  
P.O. Box 6400  
Bozeman, MT 59771-6400

Re: Firefighter/EMT Service on Town Council

Dear Mr. Walsh:

You have requested an opinion regarding the application of the doctrine of incompatibility of offices, as analyzed in 47 Op. Att’y Gen. No. 19 (1998), to a situation in which an employee of the Town’s firefighter/EMT department has been elected to the Town Council. Since the cited opinion directly addresses the issue, it has been determined that a letter of advice rather than a formal opinion is appropriate in response to your request.

In the opinion, Attorney General Mazurek held, in pertinent part, that a city public works director and employees of a city public works department may not serve on the city governing body. The opinion relied on the common law doctrine of incompatibility of offices, which holds that public employment and public officeholding are incompatible when the powers of the office include control and supervision over the position of employment. In this case, the town government has the power to “establish and promulgate rules governing the employment of member or employees of [the town’s] fire department[.]” Mont. Code Ann. § 7-33-4121. Moreover, the town government has, among other things, certain powers with respect to suspension of firefighters, Mont. Code Ann. § 7-33-4124(1), (3), the power to determine the number of firefighters employed, Mont. Code Ann. § 7-33-4125, and to set the compensation of firefighters within limits set by law, Mont. Code Ann. §§ 7-33-4127, -4128. Under these circumstances, the concerns regarding a council member being both supervisor and supervised, as explained in the opinion, would seem to be quite compelling.

47 Op. Att’y Gen. No. 19 (1998) has not been overturned by a court, and the legislature has left the holding undisturbed despite the passage of four legislative sessions since the

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opinion was issued. It remains authoritative, and in my view controls the question you pose. It would therefore be my opinion that the office of Town Council member is incompatible with employment as a member of the Town's firefighter/EMT department.

This letter of advice may not be considered a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN  
Chief Civil Counsel

cdt/jym