

City Health Officer—Right of Alderman to Hold Position Under Appointment by Mayor.

A City Alderman cannot hold the office of City Health Officer under appointment from the Mayor for the reason that the two offices are incompatible.

J. E. Kelly, Esq.,
County Attorney,
Boulder, Montana.

My dear Mr. Kelly:

You have inquired whether an Alderman may hold the appointive position of Health Officer of the town, which appointment is made and the salary of such Health Officer fixed by the Mayor and Council.

The law is well established that incompatible offices may not be held by the same person and that an acceptance of an office usually effects a resignation from the office with which it is incompatible.

In the case of *State ex rel. Klick v. Wittmer*, 50 Mont. 22, 144 Pac. 648, the law of this State as to what constitutes incompatibility of offices and as to the effect of the acceptance of an office incompatible with one already held, has been declared. In that case the City Council established the office of purchasing agent and fixed the salary thereof, and then appointed one of the aldermen to the office. The Supreme Court held that such offices were incompatible and that a resignation as alderman impliedly occurred when the office of purchasing agent was accepted. The language of the court in that case, stating the conditions of incompatibility and also containing the citations substantiating the rule, is found at page 24 and is as follows:

“We think the office thus created and defined is clearly incompatible with the office of alderman. Offices are ‘incompatible’ when one has power of removal over the other (29 Cyc. 1382; *Attorney General v. Council*, 112 Mich. 145, 37 L. R. A. 211, 70 N. W. 450), when one is in any way subordinate to the other (*State v. Jones*, 130 Wis. 572, 118 Am. St. Rep. 1042, 10 Ann. Cas. 696, 8 L. R. A. (n. s.) 1107, 110 N. W. 431), when one has power of supervision over the other (*State v. Taylor*, 12 Ohio St. 130; *Cotton v. Phillips*, 56 N. H. 220; *State v. Hilton*, 80 N. J. L. 528, 76 Atl. 16), or when the nature and duties of the two offices are such as to render it improper, from consideration of public policy, for one person to retain both (*Mechem on Public Officers*, Sec. 422; *State v. Anderson*, 155 Iowa, 271, 136 N. W. 128; *State v. Thompson*, 122 N. C. 493, 29 S. E. 720; *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226; *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *People v. Commissioners*, 76 Hun, 146, 27 N. Y. Supp. 548; *State v. Buttz*, 9 S. C. 156).”

Section 3220 of the Revised Codes of 1907 reads as follows:

“The city or town council has the power to abolish any office, the appointment to which is made by the mayor, with the advice and consent of the council, and discharge any officer so appointed by a majority vote of the council, but no office created under this title must be abolished by the council.”

From your statement it appears that the Health Officer in question was appointed in the first instance by the Mayor and Council, and not by a Board of Health as provided by Section 1484 of the Revised Codes, and that his salary was fixed by the Council. On the authority of the above case the offices are incompatible.

You have also inquired whether such City Health Officer, who was appointed during a previous administration and was then elected Alderman, holds over, when no new appointment of the Health Officer was made after the re-election of the Mayor. This matter is apparently disposed of by the answer to your first question, inasmuch as both questions apply to the same person and situation.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.