

**Opinion No. 1****Offices and Officers—Vacancy—Acceptance of Office—  
Incompatibility**

**Held: A member of a regular fire department is not an officer of a municipality. Notwithstanding this, he may not simultaneously be a member of a regular fire department and hold the office of either Mayor or Alderman since the latter exercise appointive, supervisory and removal powers over regular firemen. The simultaneous retention of this position and the exercise of these powers are incompatible.**

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February 5, 1957

Senator David F. James  
Liberty County  
Joplin, Montana

Dear Senator James:

You have requested my opinion whether a member of a regular fire department in cities such as Great Falls, Montana, may legally qualify for the office of Mayor or Alderman. Also, whether an individual accepting one salary would alter the situation.

If a regular fireman is elected Mayor or Alderman and continues in that position while exercising the powers of either office, there is no constitutional or general statutory provision disqualifying him from either office or which renders him unfit for his fireman's position. In the absence of a statute prohibiting the same person from holding two offices, the courts will look to the common law to determine whether such will be permitted.

Montana has recognized this doctrine, and the leading case on the subject is *State v. Wittmer*, 50 Mont. 22, 144 Pac. 648. In that case the court determined that the office of Alderman of the City of Great Falls and the office of City Purchasing Agent were incompatible. In so holding the court laid down the test of incompatibility, stating:

"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 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."

The Opinions of the Attorney General regarding incompatibility has reference to **two offices** being held by the same party. However,

a fireman is not an officer of a municipality as stated in Section 11-1902, Revised Codes of Montana, 1947:

"The chief of the fire department, and the assistant chief of or chiefs of the fire department, and the firemen shall NOT be deemed officers of the municipal corporation in which such fire department is established." (Emphasis added).

Section 11-1902, R.C.M., 1947, gives the Mayor power, with the consent of the council, to **appoint** all firemen.

Section 11-1903, R.C.M., 1947, gives the Mayor power to **suspend** any fireman. Approval of the suspension resides in the council.

Section 11-1906, R.C.M., 1947, enables the fire chief to establish **disciplinary rules** subject to the approval of the council.

Section 11-1931, R.C.M., 1947, allows the city council to divide all members of the fire department into platoons of three shifts.

Section 11-1939, R.C.M., 1947, enables the city council to promulgate **rules and regulations** governing employment of firemen.

The powers of appointment, supervision and removal of firemen by the Mayor and Aldermen infringe on the rights and duties of firemen so that the exercise of both by the same person, although one is an office and the other is not, creates an incompatibility that disqualifies the regular fireman from acting as such whenever he is elected to the office of Mayor or Alderman.

The acceptance of only one salary would not render this opinion invalid since it is the exercise of the power and not the acceptance of the salary that renders the simultaneous retention of these positions incompatible.

It is my opinion that a member of a regular fire department although qualified to be elected to the office of Mayor or Alderman, surrenders his position as a fireman upon election and qualification to either office. The exercise of powers under the office of Mayor or Alderman, which grant powers of appointment, supervision, and removal, are incompatible with the position of fireman.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General