

No. 56

**OFFICERS—INCOMPATIBILITY OF OFFICES—CITIES
CITIES AND TOWNS—COUNTIES****Held: Office of Under-sheriff is not incompatible with office of City Councilman and both offices may be held by one person.**

March 22, 1941.

Mr. Arthur C. Erickson
County Attorney
Sheridan County
Plentywood, Montana

Dear Mr. Erickson:

You have requested my opinion as to whether a person may hold the office of under-sheriff and be a member of the city council at the same time.

We find no constitutional or statutory inhibitions against a person holding two offices at the same time, except Section 7, Article V of the Montana Constitution, which is not applicable here.

In this State, the common law is the law and rule of decision where not declared by code or statute and where it is not repugnant to the State or Federal Constitutions. (Section 5672 and Section 10703 of the Revised Codes of Montana, 1935.) At the common law, there was no inhibition against the holding by the same person of more than one office provided they were not incompatible with each other.

22 R. C. L. 412;

Throop on Public Officers, Section 30.

The courts have not attempted to state a general definition as to what constitutes incompatibility and have dealt with each case in the light of the particular facts involved. (See note: L. R. A. 1917A 216). It has been held there is no incompatibility in the public functions of a deputy sheriff and a director of the public schools of a city (State v. Bus, 135 Mo. 325, 36 S. W. 636) or between the offices of sheriff and chief of police of a city (Peterson v. Culpepper, 72 Ark. 230, 79 S. W. 783).

This office has previously held the Clerk of Court may be mayor of a city at the same time (in absence of incompatible duties) (Volume One, Report and Official Opinions of the Attorney General, page 67); there is no incompatibility between the office of Sheriff and that of a school trustee (Volume Two, Report and Official Opinions of the Attorney General,

page 13); a Public Administrator may also be Deputy Sheriff (Volume Four, Report and Official Opinions of the Attorney General, page 32); the offices of Justice of the Peace and Public Administrator may be held by one person (Volume Five, Report and Official Opinions of the Attorney General, page 57).

But in Volume Fourteen, Report and Official Opinions of the Attorney General, page 69, it was ruled the offices of County Commissioners and town councilmen were incompatible as contrary to public policy. The reasons for such ruling seem quite obvious.

The principal tests of incompatibility which have been applied are where an office is subordinate to the other in some of its important and principal duties or where the holding of both offices is improper, from considerations of public policy.

State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 Pac. 648;

State v. Anderson, 155 Iowa 271, 136 N. W. 128.

With the foregoing principles in mind, we cannot discern where any contrariety or antagonism arises between the functions performed by an under-sheriff and those performed by a member of a city council. We agree with you, therefore, in your opinion, that such offices are not incompatible.

Sincerely yours,

JOHN W. BONNER
Attorney General