

Opinion No. 81**Dual Employment—Deputy Superintendent of Schools—
Deputy Probation Officer**

Held: A deputy superintendent of schools may simultaneously serve as a deputy probation officer without violating the Montana constitution, statutes or doctrine of incompatible office holding.

November 24, 1958

Mr. John C. Harrison
Lewis & Clark County Attorney
Helena, Montana

Dear Mr. Harrison:

You ask whether the deputy superintendent of schools may simultaneously serve as deputy probation officer.

You advise me that the Juvenile Court judge of your district plans to employ the present deputy school superintendent to work on a part time basis with the juvenile court committee and among delinquent and straying girls as deputy probation officer, and that for the additional work she will receive a small additional salary.

For the purpose of this inquiry I do not believe it is material whether these positions be considered as public offices or mere employment. In either instance whether they can be held concurrently depends upon whether under the law incompatibility is present.

Neither Art. V, Sec. 7 nor Art. IV of the Montana constitution is applicable to this inquiry, and these are the only constitutional provisions dealing with dual office holding. Article V, Sec. 7 prohibits the appointment of a legislator to state civil office during his term. It plainly does not apply here. While Article IV, which declares the familiar separation of powers doctrine, has been deemed to forbid the concurrent holding of offices created by the constitution. (See Opinions of the Attorney General, Vol. 25, Page 144). Each of the positions under consideration was created by the legislature rather than the constitution.

In addition to not finding any constitutional prohibition I find no statutory prohibition so the common law rule of incompatibility becomes the test of whether these positions may be held by one person. (See Sec. 12-104, RCM, 1947.)

That rule was stated in *State v. Wittmer*, 50 Mont. 22, 144 Pac. 648 as follows:

"Offices are incompatible when the incumbent of one has power of removal over the other, or when one has power or supervision over the other, or when the nature and duties of the two render it improper, from considerations of public policy, for one person to retain both."

I have reviewed the duties and powers of the probation department as set out in Sec. 10-623, RCM, 1947, and I do not find that the performance of those duties and powers would be incompatible with the performance of these duties of a deputy superintendent of schools as appear in Sec. 75-1501 to 75-1535, RCM, 1947.

Plainly the deputy probation officer has no authority or power to supervise the deputy superintendent of schools or appoint or remove her from office or vice versa. And plainly nothing in the nature of either position shows it to be subordinate to the other.

Policy considerations in this instance, I believe, favor the dual incumbency. By virtue of her position in the superintendent's office the deputy is in constant contact with schools, teachers and girls. From this she gains a special knowledge that should make her particularly useful to a court as an assistant in the probation department. In addition these two positions do not bear such a check and balance relationship to each other that from a policy consideration the principle of separation of powers is violated.

The probation position is to be part time, therefore, these positions do not demand that the person fitting them to be in two different places at the same time, so the question of physical incompatibility is not present.

It is therefore my opinion that the deputy superintendent of schools may simultaneously serve as a deputy probation officer, and that the holding of both positions by one person does not violate the constitution or any statute of Montana and that the positions are not incompatible.

Very truly yours,
FORREST H. ANDERSON
Attorney General