

**CITIES AND TOWNS — Commission-manager plan of government; eligibility of public officers and employees to hold office of city commissioner; OFFICES AND OFFICERS — Compatibility of offices, commission-manager form of city government; city commissioners and public office; OFFICE AND OFFICERS — Compatibility of offices, commissioner-manager form of city government; city commissioner and public employees. Sections 11-3212 and 11-3214, R.C.M. 1947.**

- HELD:**
- 1. Legislators, city and county elected officials and school teachers may not concurrently hold the office of city commissioner in a commission-manager form of city government and their current offices or employment.**
  - 2. School trustees are exempted from the restrictions of section 11-3214, R.C.M. 1947, and, therefore, may hold the offices of city commissioner, in a commission-manager form of city government, and school trustee concurrently.**
  - 3. Present city councilmen and the mayor of a city which is changing over to a commission-manager form of government may hold the office of city commissioner, as the terms of office do not run concurrently and, thus, the offices are not incompatible.**

February 5, 1973

Senator William H. Bertsche  
Montana State Senate  
State Capitol  
Helena, Montana 59601

Dear Senator Bertsche:

You have requested my opinion as to whether certain public officials and employees are eligible to hold the position of city commissioner in a new commission-manager form of city government while maintaining their current offices or positions of employment. Specifically, you have asked whether public officials including legislators, school trustees, city and county elected officials, including present city council members, and school teachers are eligible for the position of city commissioner in a new commission-manager form of city government.

The qualifications of city commissioners are set out in section 11-3214, Revised Codes of Montana, 1947, which states in pertinent part:

... Commissioners and other officers and employees shall not hold any other public office or employment, except in the state militia, as school trustees, or notary publics, ...

That section limits the office of city commissioner to persons who are neither public officers nor public employees at the time of service as commissioners.

The term "public office" has been defined by the Montana Supreme Court to include elected officials and certain other persons in public employment. **State ex rel. Barney v. Hawkins**, 79 Mont. 506, 528, 257 Pac. 411 (1927). The term "public employee" has not been defined in Montana cases; however, the Supreme Court of Arizona, in **Local 266 v. Salt River Project**, 275 P.2d 393 (1954), stated at page 402:

Public Employment means employment by some branch of government or body politic specially serving the needs of the general public.

Based on section 11-3214, R.C.M. 1947, legislators, city and county elected officials and school teachers may not concurrently hold the position of city commissioner and their current offices or positions of employment. School trustees, however, are exempt from the narrow restrictions of section 11-3214, supra. It should be noted that commissioners qualify for their office at the time their terms commence. Section 11-3212, R.C.M. 1947.

A portion of your question relates to whether present city council members of a city which is changing over to a commission-manager form of government are eligible for the position of city commissioner. Section 11-3212, R.C.M. 1947, provides in part:

The commissioners elected at the first election shall qualify and their terms of office shall begin on the first Monday after their election, and the terms of office of the mayor and councilmen or aldermen in such city or town in office at the beginning of the term of office of the commissioners first elected under the provisions of this act shall cease and terminate. ...

Because the terms of the city councilmen and the mayor terminate at the same time the terms of city commissioners commence, there is no reason why the two offices could not be held by a single person without being incompatible. The Montana Supreme Court has held that offices are incompatible when:

... one has 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. **State ex rel. Klick v. Wittmer**, 50 Mont. 22, 24-25, 144 Pac. 648 (1914). (Cited cases omitted)

The test in **Klick**, applied in the situation presented, does not reflect incompatibility between the office of city councilman or mayor and the office of city commissioner in a commission-manager form of city government.

## OPINIONS OF THE ATTORNEY GENERAL

## THEREFORE, IT IS MY OPINION:

1. Legislators, city and county elected officials and school teachers may not concurrently hold the office of city commissioner, in a commission-manager form of city government, and their current offices or employment.
2. School trustees are exempted from the restrictions of section 11-3214, R.C.M. 1947, and therefore may hold the offices of city commissioner, in a commission-manager form of city government, and school trustee concurrently.
3. Present city councilmen and the mayor of a city which is changing over to a commission-manager form of city government may hold the office of city commissioner, as the terms of office do not run concurrently and, thus, the offices are not incompatible.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General