

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 94

COUNTY COMMISSIONERS - Serving as county commissioner and county high school trustee simultaneously;
PUBLIC OFFICE - Serving as county commissioner and county high school trustee simultaneously;
SCHOOL BOARDS - Serving as county commissioner and county high school trustee simultaneously;
MONTANA CODE ANNOTATED - Sections 7-4-2110, 7-5-2103, 7-8-2216, 20-3-310, 20-6-213, 20-6-217, 20-6-309;
MONTANA CONSTITUTION - Article VII, section 10;
OPINIONS OF THE ATTORNEY GENERAL - 8 Op. Att'y Gen. at 402 (1920).

- HELD: 1. The offices of county commissioner and county high school trustee are incompatible, and one individual may not hold both offices simultaneously.
2. Although an individual may not simultaneously hold the offices of county commissioner and county high school trustee, state law does not prevent an individual from holding one of these offices while seeking the other.

8 July 1988

John T. Flynn
Broadwater County Attorney
Broadwater County Courthouse
Townsend MT 59644

Dear Mr. Flynn:

OPINIONS OF THE ATTORNEY GENERAL

You have asked my opinion on the following questions:

1. May an individual simultaneously hold the offices of county commissioner and county high school trustee?
2. What is the procedure to be followed when a person holding one position files and runs for an incompatible office?

The general rule is that public offices may not be held concurrently by the same person if those offices are incompatible in nature. State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648 (1914). The Klick opinion sets forth a number of factors that should be considered in determining whether offices are incompatible.

As you note in your opinion request, in 8 Op. Att'y Gen. at 402 (1920) it was held that the office of county commissioner was incompatible with the office of school trustee. Citing the Klick opinion, the 1920 Attorney General's opinion concluded that the nature and duties of the two offices were such that it would be improper for one person to retain both offices. Crucial to the opinion's conclusion was the fact that under state law a county commissioner had certain supervisory powers over a school trustee.

The reasoning followed in 8 Op. Att'y Gen. at 402 (1920) is still persuasive. Existing state statutes continue to give county commissioners some supervision over school trustees. County commissioners also have other responsibilities with respect to school districts. See, e.g., §§ 7-4-2110, MCA (county commissioners supervise the official conduct of all county officers and officers of districts and other subdivisions of the county charged with assessing, collecting, safekeeping, managing, or disbursing the public revenues); 7-5-2103, MCA (county commissioners divide counties into school districts); 7-8-2216 (county commissioners may sell county property to school district); 20-3-310, MCA (county commissioners may suspend a school trustee when charges are preferred against that trustee); 20-6-213, 20-6-217, 20-6-309, MCA (county commissioners hear appeals on decisions by school superintendents on transfers of territory from one elementary district to another, creation of new elementary districts, and organization of a joint high school district). There are also several statutes concerning the duties of a board of county commissioners to levy taxes to finance local education.

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For the above-stated reasons, I believe that the conclusion reached in 8 Op. Att'y Gen. at 402 (1920) remains valid, in spite of the fact that many of the duties of the two offices in 1920 have since been amended or repealed. The current nature and duties of the offices of county commissioner and county high school trustee could give rise to possible conflicts of governmental interest if one person were to retain both offices simultaneously.

Your second question concerns the effect of the filing by an officeholder for a second office that is incompatible. As a rule, Montana law does not prevent an officeholder from seeking an incompatible office, but rather from holding incompatible offices. See Committee for an Effective Judiciary v. State of Montana, 41 St. Rptr. 581, 679 P.2d 1223 (1984), in which the Court recognized the existence of a general constitutional scheme declaring indirectly the rights of all officeholders in all branches of government to seek other office while still holding office. 41 St. Rptr. at 587, 679 P.2d at 1228.

An exception to this general scheme is found in Article VII, section 10 of the Montana Constitution, which requires that one who holds a judicial position must forfeit the office by filing for an elective public office other than a judicial position. By contrast, there is no comparable prohibition for the offices of county commissioner or county high school trustee.

THEREFORE, IT IS MY OPINION:

1. The offices of county commissioner and county high school trustee are incompatible, and one individual may not hold both offices simultaneously.
2. Although an individual may not simultaneously hold the offices of county commissioner and county high school trustee, state law does not prevent an individual from holding one of these offices while seeking the other.

Very truly yours,

MIKE GREELY
Attorney General