

VOLUME NO. 43

OPINION NO. 47

CONFLICT OF INTEREST - Dual trusteeship of volunteer fire department and fire service area;

FIRE DEPARTMENTS - Dual trusteeship of volunteer fire department and fire service area;

PUBLIC OFFICERS - Dual trusteeship of volunteer fire department and fire service area;

MONTANA CODE ANNOTATED - Sections 2-2-102(1), 2-2-125, 7-33-2311, 7-33-2401, 7-33-2402, 7-33-4101, 7-33-4109;

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 94 (1988).

- HELD: 1. Concurrent trusteeship of both a volunteer fire department and a fire service area does not constitute a conflict of interest.
2. Trusteeship in a volunteer fire department is not incompatible with simultaneous trusteeship in a fire service area.

December 7, 1989

Patrick C. Paul
Cascade County Attorney
Cascade County Courthouse
Great Falls MT 59401

Dear Mr. Paul:

You have requested my opinion concerning the following questions:

1. Is there a conflict of interest if any board members or other members of a volunteer fire department serve on the board of a fire service area?
2. If board members of a volunteer fire department can serve on the board of a fire service area, is there a conflict of interest if the same board members constitute a quorum and a majority of both boards?

Your questions concern the Fort Shaw Fire Service Area and the Fort Shaw Volunteer Fire Department, each of which is governed by a board of trustees composed of five persons. The two boards share three common members.

Therefore, the same three individuals may constitute both a quorum and a majority of each board. Your questions are prompted by section 7-33-2402, MCA, which provides as follows:

A fire service area created pursuant to 7-33-2401 may provide residents of an area with:

- (1) fire equipment, housing for the equipment, and related maintenance, for use by a fire service agency providing service to the area; or
- (2) fire protection by contracting for the services of a fire service agency.

The Fort Shaw Volunteer Fire Department is a "fire service agency providing service to the area" within the meaning of the foregoing statutory provision. Thus section 7-33-2402, MCA, provides authorization for the volunteer fire department and the fire service area to engage in cooperative interaction.

Your specific concern is whether such interaction constitutes a conflict of interest for the persons occupying dual trusteeship of these respective entities. I conclude that dual trusteeship does not implicate the provisions of Montana's conflict of interest statutes in this instance.

The standards for the regulation of the conduct of public officers and employees are set forth in Title 2, chapter 2, part 1, MCA. The provisions therein "set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana." § 2-2-101, MCA. The code of ethics provides advisory principles as well as specific rules of conduct the violation of which constitutes a breach of fiduciary duty. Section 2-2-125, MCA, provides in pertinent part as follows:

2-2-125. Rules of conduct for local government officers and employees. (1) Proof of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.

(2) An officer or employee of local government may not:

(a) engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties; or

(b) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.

There is no indication that any of the trustees in question have private business interests which would be implicated by the activities of the volunteer fire department and the fire service area. Therefore, section 2-2-125(2)(a), MCA, has no application in this instance.

It is clear that the trustees are representatives or agents of the foregoing entities within the meaning of section 2-2-125(2)(b), MCA. However, neither of those entities constitutes a "business or other undertaking" within the meaning of the foregoing statutory provision. Section 2-2-102(1), MCA, defines the term "business" for the purpose of the statutory code of ethics as follows:

- (1) "Business" includes a corporation, partnership, sole proprietorship, trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit.

Volunteer fire departments and fire service areas are governmental entities provided by law. *See, e.g.*, §§ 7-33-2311, 7-33-2401, 7-33-4101, 7-33-4109, MCA. The execution of their statutory function must not be confused with private business-oriented activity. The trustees' status as representatives or agents of the foregoing entities is not within the purview of section 2-2-125(2), MCA. Therefore, cooperative interaction pursuant to section 7-33-2402, MCA, does not constitute a breach of fiduciary duty under section 2-2-125(2)(b), MCA, for those occupying dual trusteeship of the respective governmental entities involved.

The analysis of your questions does not end with the conclusion that dual trusteeship does not constitute a conflict of interest in this instance. Simultaneous tenure in multiple public offices has been a traditional area of public concern. The holding of incompatible public offices was prohibited at common law. 63A Am. Jur. 2d Public Officers and Employees § 65. Although similar, the doctrine of incompatible public offices is perhaps better suited than strict conflict-of-interest law for analysis of issues concerning dual office holding.

Although the reasoning behind each is similar, incompatibility of office or position is not the same as conflict of interest. Incompatibility of office or position involves a conflict of duties between two offices or positions. Of course, this conflict of duties is also a conflict of interest. But a conflict of interest can exist when only one office or position is involved, that conflict being between that office or position and a non-governmental interest. Incompatibility of office or position requires the involvement of two governmental offices or positions. Incompatibility of office or position may be sufficient for vacation of an office when conflict of interest is not.

Coyne v. State ex rel. Thomas, 595 P.2d 970, 973 (Wyo. 1979). The doctrine of incompatible offices serves the following interests.

The purposes attributed to such provisions include: (1) preventing multiple position-holding, so that offices and positions of public trust would not accumulate in a single person; (2) preventing individuals from deriving, directly or indirectly, any pecuniary benefit by virtue of their dual position-holding; (3) avoiding the inherent conflict which occurs when an employee's elected position has revisory power over the employee's superior in another position; and (4) generally, to insure that public officeholders and public employees discharge their duties with undivided loyalty. 3 E. McQuillan [sic], Municipal Corporations § 12.67 (3d rev. ed. 32).

Acevedo v. City of North Pole, 672 P.2d 130, 134 (Alaska 1983). The operation of the doctrine of incompatible offices is quite simple. Acceptance of a second public office incompatible with a current public position operates as an implied resignation from the latter position. Mulholland v. Ayers, 109 Mont. 58, 99 P.2d 234, 239 (1940); State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648, 650 (1914). See also 42 Op. Att'y Gen. No. 94 (1988). Public offices are incompatible under the following conditions:

Offices are "incompatible" when one has power of removal over the other [citations omitted], when one is in any way subordinate to the other [citations omitted], when one has power of supervision over the other [citations omitted], 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 [citations omitted].

State ex rel. Klick v. Wittmer, *supra*, 144 P. at 649-50.

I conclude that the offices of trusteeship of a volunteer fire department and a fire service area are not incompatible under the foregoing test. Volunteer fire departments and fire service areas are separate governmental entities. Neither owes its creation or continued existence to the other. Each lacks any form of supervisory authority with respect to the personnel of the other. Finally, there is no indication that dual trusteeship imposes an insurmountable obstacle to the proper discharge of the attendant duties thereof.

In view of the foregoing conclusion that dual trusteeship does not constitute a conflict of interest in this instance, there is no reason to answer your second question.

THEREFORE, IT IS MY OPINION:

1. Concurrent trusteeship of both a volunteer fire department and a fire service area does not constitute a conflict of interest.
2. Trusteeship in a volunteer fire department is not incompatible with simultaneous trusteeship in a fire service area.

Sincerely,

MARC RACICOT
Attorney General