



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 86-6

TO: The Honorable Larry EchoHawk
Idaho State Representative
1777 Lancaster
Pocatello, Idaho 83201

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Must an elected representative of the Idaho Legislature resign from his legislative position prior to assuming the office of prosecuting attorney within the State of Idaho?

Would that same individual be required to resign from his position on the 1986 general election ballot as a candidate for a legislative position?

CONCLUSION:

A prosecuting attorney may not serve as a member of the Idaho Legislature. Therefore, prior to assuming office as prosecutor, a legislator must resign from his legislative office. However, a prosecutor is not barred from seeking a legislative office.

ANALYSIS:

Idaho Code § 31-2601 sets forth the qualifications for prosecuting attorney:

No person shall be eligible to qualify for the office of prosecuting attorney who is not an attorney and counselor at law duly licensed to practice as such in the district courts of the state at the time he assumes office as prosecuting attorney. No prosecuting attorney shall hold any other county or state office during his term of office as prosecuting attorney provided,

however, that a prosecuting attorney or a deputy prosecuting attorney may be appointed by the attorney general as a special assistant attorney general for the performance of duties pursuant to such appointment in any other county than the county in which such prosecutor or deputy prosecutor serves. . . .(emphasis added)

It is axiomatic that where a statute is clear and unambiguous, the expressed intent of the legislature must be given effect. Intermountain Health Care v. Board of County Commissioners of Madison County, 109 Idaho 685, 710 P.2d 595 (1985). It is clear that the office of prosecuting attorney, in this context, is a county office. See Idaho Code § 31-2001. It is equally clear that a legislator is a state office holder within the meaning of Idaho Code § 31-2601. See Idaho Code §§ 67-301, 67-401 et seq. Therefore, a prosecutor is statutorily barred from serving as a legislator.

Further, even if Idaho Code § 31-2601 did not bar a prosecutor from holding a legislative office, it is our opinion that a prosecutor required to devote full time to the position of prosecuting attorney pursuant to Idaho Code § 31-3113 could not serve as a legislator. That statute mandates that the Bannock County Prosecutor devote full time to the performance of his official duties. We do not believe that a "full time" prosecutor could also serve as a "part-time" legislator given the time requirements imposed upon an Idaho legislator. Because of these two independent statutory bases, we do not believe it is necessary to address the potential incompatibility of these two offices, which could provide yet a third ground for prohibiting an individual from holding these two offices.

Concerning your second question, we do not find any statutory or constitutional prohibition that prevents a prosecutor from seeking a legislative seat. However, for the reasons set forth above, once elected the prosecutor would be required to make a choice between the two offices.

AUTHORITIES CONSIDERED:

1. Statutes:

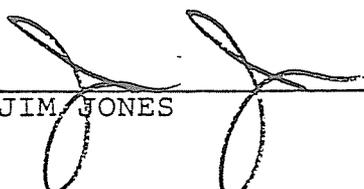
Idaho Code § 31-2001
Idaho Code § 31-2601
Idaho Code § 31-3113
Idaho Code §§ 67-301, 67-401 et seq.

2. Idaho Cases:

Intermountain Health Care v. Board of County Commissioners of
Madison County, 109 Idaho 685, 710 P.2d 595 (1985).

DATED this 3rd day of July, 1986.

ATTORNEY GENERAL
State of Idaho



JIM JONES

ANALYSIS BY:

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division