



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720-1000

LARRY ECHOHAWK
ATTORNEY GENERAL

April 30, 1991

TELEPHONE
(208) 334-2400

TELECOPIER
(208) 334-2530

NATURAL RESOURCES
TELECOPIER
(208) 334-2590

Rick Laam
City Administrator
City of Orofino
217 1st St.
P.O. Box 312
Orofino, Idaho 83544

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. Laam:

You have requested an opinion from this office regarding legal consequences of a person concurrently serving in the Idaho Legislature and as the mayor of a municipality. For the reasons set forth below, this office can see no legal basis to prohibit an individual from holding these offices at the same time.

Unlike several other states, Idaho has no constitutional or statutory provisions prohibiting a state legislator from concurrently holding another public office. Arizona's Constitution, for example, provides:

No member of the Legislature, during the term for which he shall have been elected or appointed shall be eligible to hold any other office or be otherwise employed by the State of Arizona or, any county or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to employment as a teacher or instructor in the public school system.

Art. 4, Pt. 2, § 5, Arizona Constitution. See also, art. VI, § 6, Utah Constitution; art IV, § 13, California Constitution. The only statutory prohibitions against Idaho legislators holding

separate public office is found at I.C. § 59-102. This section provides in part:

It shall be unlawful for any member of the legislature, during the term for which he was elected, to accept or receive, or for the governor, or other officials or board, to appoint such member of the legislature to, any office of trust, profit, honor or emolument, created by any law passed by the legislature of which he is a member.

This section clearly does not apply to the present matter.

Since there is no statutory prohibition in Idaho against an Idaho legislator holding a separate local public office, the focus then turns to whether these public positions are incompatible under the common law. The common law doctrine of incompatibility as it relates to one person holding two public offices is based upon the public policy that public service requires the discharge of official duties with undivided loyalty. Whether two separate public positions held by one individual are incompatible was addressed in Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960). In Reilly, the New Jersey Supreme Court was called upon to determine whether a state legislator could also serve as a municipal attorney. In concluding that the dual office holding was permissible the court stated:

We come accordingly to the question whether the office of municipal attorney is incompatible with the office of senator. Incompatibility is usually understood to mean a conflict or inconsistency in the functions of an office. It is found where in the established governmental scheme one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another. . . . There is no conflict between senator and township attorney in any of the conventional applications of the doctrine. The Legislature has no power in any judicial, executive or administrative sense to interfere with, supervise or review the performance of an incumbent in local office. Nor does it have the power to appoint to or to remove from local office.

166 A.2d at 367. See also Haskins v. State ex rel. Harrington, 516 P.2d 1171 (Wyo. 1973); 3 McQuillin, Municipal Corporations, § 12.67 (3rd Ed.).

In the present matter the two positions are not incompatible. The office of city mayor is wholly independent from the state legislature and cannot in any sense be viewed as subordinate. Conversely, the duties of mayor, as described in ch. 6, title 50, of the Idaho Code, do not conflict or clash with the duties of a state legislator.

Finally, it has been suggested that holding dual office violates the distribution of powers clause of the Idaho Constitution, art. 2, § 1. This section provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The scope of this provision in relation to the separation of powers among the three branches of state government was previously analyzed in Attorney General Opinion No. 85-5. In relation to the separation of powers between state and local governments (prohibiting a person from serving in an executive capacity on the local level and as a legislator in the state government), this office has been unable to find any authority indicating that the doctrine has any application.

The purpose for the separation of powers in government is to avoid the consolidation of sovereign power in one branch of government or person. As stated in 16 Am. Jur. 2d, Constitutional Law, § 296:

The true meaning of the general doctrine of the separation of powers seems to be that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments, and that no one department ought to possess directly or indirectly an overruling influence over the others.

This threat is not present when one person functions in two distinct levels of government.

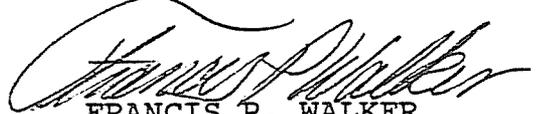
The fact that a state legislator is also a municipal executive officer does not in any sense impinge or intrude upon the authority of the state judicial or executive branches.

Rick Laam
April 30, 1991
Page 4

Similarly, the fact that a city mayor is also a state legislator does not intrude upon the authority of the respective city counsel. Thus, holding dual public offices, one municipal and one state, does not violate art. 2, § 1, of the Idaho Constitution.

In conclusion, this office can find no statutory or common law prohibitions preventing a city mayor from serving in the Idaho Legislature. Should you have any further questions on this matter please contact me.

Yours very truly,



FRANCIS P. WALKER
Deputy Attorney General

FPW/pb

L042691A