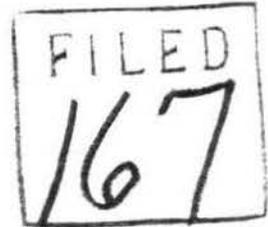


COMPATIBILITY OF OFFICES:
OFFICERS:
CITIES OF FOURTH CLASS
ALDERMAN:

In cities of the fourth class one individual cannot serve simultaneously as alderman and as collector.

April 19, 1963



Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
Clayton, Missouri

ATTENTION: Jerald M. Alton

Dear Mr. O'Brien:

This opinion is given in response to your request of April 4, 1963 for an official opinion of this office. You inquire whether:

"In a city of the fourth class, can an individual be elected to both the office of alderman and the office of Collector and serve in both offices simultaneously?"

Generally one person may hold several public offices simultaneously unless prohibited by statute or constitution, or prohibited by the common-law rule against simultaneous holding of two incompatible offices.

No known Missouri statute prohibits one person from simultaneously holding the office of alderman and city collector of a fourth class city. We therefore turn to consideration of the common-law rule.

"The rule at common law is well settled that where one, while occupying a public office, accepts another, which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first." State v. Bus, Mo., 36 SW 636, 637.

We therefore must determine whether the offices of alderman and collector of a fourth class city are incompatible. When are offices incompatible? What is the test?

The cases disclaim the existence of any universally applicable rule whereby a quick and accurate determination of compatibility vel non can be made. The determination must be made on a case-to-case basis. State v. Grayston, Mo., 163 SW2d 335, 339. Although there may be no universal rule of decision, there are however certain guides helpful in each determination. In an early Montana case, the court set out the following guides:

"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 the 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."
(Citations omitted) State v. Wittmer, Mont., 144 Pac. 648, 649.

Other cases have held offices to be incompatible when: a) one is subordinate to the other, b) one has supervisory power over the other, c) one has power of appointment or power of removal over the other, d) one audits the other's accounts. 67 C.J.S., Officers, §23, p.135. Mindful of these guides, what are the respective duties of alderman and collector in a fourth class city?

The collector in cities of the fourth class may be either an elective or appointive office. Section 79.050, RSMo Supp. 1961. Section 79.240, RSMo 1959, provides for the removal of officers in fourth class cities.

"The mayor may, with the consent of a majority of all the members elected to the board of aldermen, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the board of aldermen sitting as a board of impeachment. Any elective officer, including the mayor, may in like manner, for cause shown, be removed from office by a two-thirds vote of all members elected to the board of aldermen, independently of the mayor's approval or recommendation.

The mayor may, with the consent of a majority of all the members elected to the board of aldermen, remove from office any appointive officer of the city at will, and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the board of aldermen, independently of the mayor's approval or recommendation. The board of aldermen may pass ordinances regulating the manner of impeachments and removals." Section 79.240, RSMo 1959.

Thus, the board of aldermen has power of removal over the city collector.

Section 79.350, RSMo 1959, provides:

"The mayor or board of aldermen shall have power, as often as he or they may deem it necessary, to require any officer of the city to exhibit his accounts or other papers or records, and to make report to the board of aldermen, in writing, touching any matter relating to his office."

Section 79.310, RSMo 1959, requires the collector to make detailed reports to the board of aldermen. Section 94.320, RSMo 1959, provides the board of alderman "shall require the collector . . . to make out, under oath, lists of delinquent taxes remaining due * * * shall examine the lists carefully, and . . . shall approve the lists * * *." Thus, the board of aldermen have power to supervise the collector, to audit his accounts, and to subordinate his actions to their approval.

In cities of the fourth class: the aldermen have power of removal over the collector; they have the power to audit his accounts and to require detailed reports of his official acts; they have power to supervise his acts and subject them to their approval. When the respective powers and duties of alderman and collector are compared to the guides set out by the courts supra, we cannot but conclude that the offices of alderman and collector in cities of the fourth class are incompatible and that it would be contrary to the public interest for one person to hold both offices simultaneously.

Honorable Daniel V. O'Brien -4-

CONCLUSION

From the above considerations, it is the opinion of this office that in cities of the fourth class one individual cannot serve simultaneously as alderman and as collector.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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