

PEACE OFFICERS:  
FIREARMS:  
WEAPONS:  
ALDERMAN:  
PUBLIC OFFICERS:

In cities of the Fourth Class an alderman may not be appointed a special police officer; and an alderman, by virtue of his office as alderman, is not empowered to carry firearms.

OPINION NO. 404

October 19, 1967

Honorable E. J. Cantrell  
State Representative - 33rd District  
St. Louis County  
3406 Airway  
Overland, Missouri 63114



Dear Representative Cantrell:

This is in response to your request for an opinion from this office, which request asks:

- "1. In cities of the 4th class, may an Alderman be appointed a Special Police Officer?"
- "2. May an Alderman, by virtue of his office as Alderman, be empowered to carry fire-arms?"

In answer to question number one, 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, including the new conflict of interest statutes, prohibits one person from simultaneously holding the office of alderman and special police officer of a Fourth Class City. Therefore, the rule at common law is determinative in this instance.

"1. 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 vs. Bus, Mo., 36 S.W. 636, 637.

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The question, therefore, becomes whether the offices of an alderman and special police officer of a Fourth Class City are incompatible.

There seems to be no universally applicable rule whereby a quick and accurate determination of incompatibility can be made. The determination must be made on a case to case basis. State vs. Grayston, Mo., 163 S.W. 2d 335,339. Although there may be no universal rule of decision, there are 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 (29 Cyc. 1382; Attorney General v. Council, 112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211), when one is in any way subordinate to the other (State v. Jones, 130 Wis. 572, 110 N.W. 431, 8 L.R.A. [N.S.] 1107, 118 Am. St. Rep. 1042, 10 Ann. Cas. 696), when one has power of supervision over the other (State v. Taylor, 12 Ohio St. 130; Cotton v. Phillips, 56 N.H. 220; State v. Hilton, 80 N.J. Law, 528, 78 Atl. 16), 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. \* \* \* \* " State vs. Wittmer, Mont., 144 P. 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 others accounts. 67 C.J.S. Officers, Section 23, page 135. With these guidelines in mind, the next consideration becomes, what are the respective duties of an alderman and a special police officer in a Fourth Class City?

A special police officer in cities of the Fourth Class is an appointive office. Section 85.620, RSMo 1959. Section 79.240, RSMo 1959 in pertinent part provides for the removal of any appointive officer of the city at will by the mayor with the consent of a majority of all the members elected to the Board of Alderman; or for the removal of any appointive officer by a two-thirds vote of all members elected to the Board of Alderman. Thus, the Board of Alderman has power of removal over a special police officer.

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Since the Board of Alderman does have the power of removal over a special police officer, it is readily seen that the offices of an Alderman and special police officer may be considered incompatible. Also, due to the fact that a police officer exercises a great deal of authority inherent in his position, it is thought apparent that said officer in the event of misconduct should be removed from office immediately. It is further apparent that if one were a police officer and a member of the Board of Alderman, said person would have some control over whether he would or would not be relieved of his position. This in itself supports a finding of incompatibility. Therefore, it is believed incumbent on this office to find that an alderman, appointed a special police officer, violates the common law rule of incompatibility and thus cannot serve simultaneously as an alderman and a special police officer.

In regard to your second question, it is thought that Section 564.610, V.A.M.S., Laws of 1967, is controlling. For clarity said statute is set out below:

"If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any courtroom during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of firearms, bowie knife, springback knife, razor, metal knucks, billy, sword cane, dirk, dagger, slung shot or other similar deadly weapons or shall, in the presence of one or more persons, exhibit any such weapons in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or, directly or indirectly, sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment by the department of corrections for not more than five years, or by imprisonment in the county jail not less than fifty days nor more than one year, but nothing contained in this section shall

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apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state. As amended Laws 1965, p. 673, § 1, as amended Laws 1967, p. \_\_\_\_, H.B.No.331, § 1."

It is noted that the above section applies to any person and excludes only legally qualified sheriffs, police officers, and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace. Looking then to the duties of an alderman of a Fourth Class City as set out in Chapter 79, RSMo 1959, it is readily seen that the duties of an alderman do not include making arrests, executing process, civil or criminal, or aiding in conserving the public peace, that is, as a "bona fide duty" of his office as alderman.

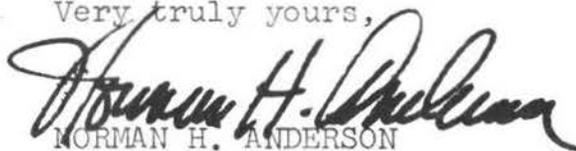
Therefore, it is the opinion of this office that an alderman, by virtue of his office as alderman, is not excluded from the operation of Section 564.610, RSMo 1959, and therefore, is not empowered to carry firearms any more than any other ordinary citizen, and would in fact violate said section if he were to carry a firearm in any manner set out therein.

#### CONCLUSION

From the above considerations, it is the opinion of this office that in cities of the Fourth Class an alderman may not be appointed a special police officer; and an alderman, by virtue of his office as alderman, is not empowered to carry firearms.

The foregoing opinion which I hereby approve was prepared by my Assistant, L. Michael Lorch.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General