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OFFICIAL OPINION 2001-11

The Honorable Christopher A. Toth
Prosecuting Attorney
60th Judicial Circuit
County-City Building, 10th Floor
227 West Jefferson Boulevard
South Bend, Indiana 46601

RE: Terms of employment for deputy prosecuting attorneys

Dear Mr. Toth:

This letter responds to your request for an advisory on the following questions:

- 1) Whether the prosecuting attorney can set vacation policy that differs from county policy.
- 2) Whether the county commissioners of a particular county, by authorizing payroll distributions for deputy prosecuting attorneys that include vacation days in excess of that allowed for county employees, can be in violation of the infraction covering improper approval of payroll claims.

It is my opinion that the prosecuting attorney may establish the terms of employment for the prosecutor's deputies because the deputies are employees of the prosecutor and not of the county. Also, it would not be an "improper approval of a payroll claim" if the county processed a payroll claim for a deputy prosecuting attorney whose terms of employment were inconsistent with the terms of employment of county employees.

ANALYSIS

1. Office of the prosecuting attorney

The office of prosecuting attorney in its present form was created by the judicial article of the Indiana Constitution in 1851.

There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall have been admitted to the practice of law in this State before his election, who shall hold his office for four years, and whose term of office shall begin on the first day of January next succeeding his election. . . .

IND. CONST. Art. 7, § 16. The office is a “constitutional office, carved out of the office of the attorney general as it existed at common law.” *State ex rel. Neeriemer v. Daviess Circuit Court*, 236 Ind. 624, 629, 142 N.E.2d 626, 628 (1957) (footnotes omitted), citing *State ex rel. Williams v. Ellis*, 184 Ind. 307, 312, 112 N.E. 98, 100 (1916). Prosecuting attorneys were originally appointed by the governor, later chosen by joint ballot of the state legislature, and finally elected by the people beginning in 1843. *State ex rel Bingham v. Home Brewing Co.*, 182 Ind. 75, 87, 105 N.E. 909, 913 (1914).

The prosecuting attorney is elected not for each county, but in “each judicial circuit” of the state. For this reason, the Indiana Supreme Court has remarked that judges of the circuit courts and prosecuting attorneys are not state, county, or township officers, but rather are officers of the circuit. *State ex rel. Pitman v. Tucker*, 46 Ind. 355, 359 (1874); *State v. Patterson*, 181 Ind. 660, 663, 105 N.E. 228, 229 (1914).

Officers of circuits are simply officers of the State of Indiana whose jurisdiction extends to territorial divisions of the state but nonetheless are not independent of the state. *See Woods v. City of Michigan City*, 940 F.2d 275, 279 (7th Cir. 1991) (Indiana circuit and superior court judges are judicial officers of the state, “they are not county officials”), quoting *Pruitt v. Kimbrough*, 536 F.Supp. 764, 766 (N.D. Ind. 1982), *aff’d*, 705 F.2d 462 (7th Cir. 1983).

Because the prosecuting attorney is a state officer, it follows that deputy prosecuting attorneys are also state officers. A prosecutor’s authority to appoint deputies and the number of deputies who may be appointed is a matter of statute. IND. CODE § 33-14-7-2. Under Indiana law, a deputy is fully authorized to act for the principal officeholder. IND. CODE § 1-1-4-1(5). Deputy prosecuting attorneys legally can perform any act pertaining to the office. *Hamer v. State*, 200 Ind. 403, 163 N.E. 91 (1928).

The prosecutor, in everything the prosecutor does, enforces state law. The prosecutor is not answerable to county authorities, nor does the prosecutor exercise county power. The prosecutor’s only connection with the counties in the prosecutor’s circuit is that the counties fund the operation of the office. IND. CODE § 33-14-7-2(g). But counties exercise no discretion or control beyond determining what level of funding is “necessary”. *See State ex rel. Schuerman v.*

Ripley County Council, 182 Ind. App. 616, 395 N.E.2d 867 (1979); *Brown v. State ex rel. Brune*, 172 Ind. App. 31, 359 N.E.2d 608 (1977). This level of independence is necessary for circumstances may arise where the prosecutor may be compelled to bring criminal charges against a member of the county commissioners. *Willner v. State*, 602 N.E.2d 507 (Ind. 1992).

“The prosecuting attorney is not only specifically provided for in the Constitution, but . . . is necessary to the administration of justice contemplated by the Constitution.” 1965 OAG No.36, pp. 177-78. A council cannot defeat the performance by an officer of a duty imposed upon the officer by the law. *Gruber v. State ex rel. Welliver*, 196 Ind. 436, 148 N.E. 481 (1925). If the county council fails to make appropriations for the salary of the prosecutor and the prosecutor’s deputies, it may be mandated to do so. *Howard County Council v. State, ex rel. Osborn*, 247 Ind. 279, 280, 215 N.E.2d 191, 192 (1966). But the mere fact that the county appropriates funds for the prosecutor does not make the prosecutor a county officer. *Bibbs v. Newman*, 997 F.Supp. 1174, 1180 (S.D. Ind. 1998). No statute or case holds that this duty of appropriation brings with it the right to control the terms of employment of deputy prosecuting attorneys.

2. Payroll claims

The manner of payment of salaries to *county* employees is authorized by the legislative body of a county. IND. CODE § 36-2-8-2. In addition, the county executive may allow a claim if it complies with Indiana Code section 5-11-10-1.6. The purpose of the statute is to insure that illegal claims are not paid out from government funds. *Eder v. Kreiter*, 40 Ind. App. 542, 547, 82 N.E. 552, 554 (1907). If the claim does not comply with that statute, “[a] county auditor or member of a county executive who violates this section commits a Class C infraction.” IND. CODE § 36-2-6-4(d). Indiana Code section 5-11-10-1.6 provides in pertinent part that a claim may only be paid where:

- (1) there is a fully itemized invoice or bill for the claim;
- (2) the invoice or bill is approved by the officer or person receiving the goods and services;
- (3) the invoice or bill is filed with the governmental entity's fiscal officer;
- (4) the fiscal officer audits and certifies before payment that the invoice or bill is true and correct; and
- (5) payment of the claim is allowed by the governmental entity's legislative body or the board or *official having jurisdiction over allowance of payment of the claim.* (emphasis added)

The prosecutor’s deputies are employees of the prosecutor and not the county, therefore, the prosecutor would have “jurisdiction over allowance of payment of the claim.” Payment of claims allowed by the prosecutor for salaries of deputy prosecuting attorneys whose terms of employment are different from those of county employees, therefore, would not violate Indiana Code section 5-11-10-1.6.

CONCLUSION

In summary, from the foregoing authorities it is clear that:

- The prosecuting attorney is an independent official of the circuit or the state, not the county.
- The prosecuting attorney is the employer of the prosecutor's deputies, and retains the right to control the terms of their employment.
- The county is obliged to provide the prosecutor with necessary funds to operate the office, but this obligation does not carry with it the right to dictate the terms and conditions of employment within that office.
- It would not be an "improper approval of a payroll claim" if the county processed a payroll claim for a deputy prosecuting attorney whose terms of employment were inconsistent with the terms of employment of county employees.

Sincerely,

Stephen Carter
Attorney General

Gordon White
Deputy Attorney General