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**OFFICIAL OPINION 2002-4**

The Honorable Bernard A. Carter  
Prosecuting Attorney  
31<sup>st</sup> Judicial Circuit, Lake County, Indiana  
2293 North Main Street  
Crown Point, Indiana 46307

RE: Validity of County Ordinance Conferring Merit Status on Deputy  
Prosecutors

Dear Mr. Carter:

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

- 1) May a county council confer merit status on a deputy prosecuting attorney by adopting an ordinance to that effect under the authority of the Home Rule Statute?
- 2) What is the legal effect of such an ordinance?
- 3) May a county ever have the legal power to exercise control over the independent judgment of a prosecuting attorney in any of the prosecutor's employment decisions?

It is our opinion that a county council may not confer merit status on a deputy prosecuting attorney, and a county ordinance attempting to do so is invalid. The county government's legal powers as they relate to the prosecuting attorney's hiring decisions are set out in statute. The councils have direct involvement in the hiring of an investigator but in other matters have only indirect involvement stemming from the county's duty to appropriate necessary funds for the office.

## **BACKGROUND**

Along with your letter you included a copy of an ordinance that the Lake County Council adopted in 1983. Lake County, Indiana, Code of Ordinances, Volume I, Chapter 35: County Policy, §§35.30-35.38, Merit Status. The ordinance provides that “[a]ll full-time deputy prosecuting attorneys, including any deputy prosecuting attorney in a supervisory position, who accrue three years continuous service in the Prosecuting Attorney’s Office, shall be designated as having attained *merit status* for the purposes herein set forth.” (emphasis in original) As stated in your letter, “merit status created by the ordinance provides for a vesting of inalienable rights which, once attached, cannot be divested by the Prosecuting Attorney . . .” The ordinance also provides that if a deputy prosecuting attorney is disciplined, he or she may appeal to a grievance board made up of the circuit judge, the presiding judge of the superior court, and a third person selected by the prosecuting attorney, whose decision is binding on the prosecuting attorney. § 35.35(N). The “Statement of Intent” for the ordinance sets out that the county council adopted the ordinance under the authority of IND. CODE § 36-1-3-2, the Home Rule Act.

## **DISCUSSION**

### **1. The Home Rule Act**

In 1980 the General Assembly adopted Indiana’s current Home Rule Act (“Act”). Under the Act, a local unit of government is granted broad authority, with few exceptions, to adopt any local law needed “for the effective operation of government as to local affairs.” IND. CODE § 36-1-3-2. But certain powers are withheld from local control and, additionally, a local unit may not exercise power that is expressly denied by the Indiana Constitution or by statute. IND. CODE § 36-1-3-8; 36-1-3-5(a)(1).

Local laws may be invalid because they are preempted by state law. A local unit of government may not exercise power that is expressly denied by statute or expressly granted to another governmental entity. IND. CODE § 36-1-3-5. In addition, local units of government are prohibited from regulating conduct that is already regulated by a state agency, except as expressly granted by statute. IND. CODE § 36-1-3-8(7). If state law preemptively governs an area, a local unit of government may legislate the area only when given specific authority to do so in the enacting statute. *City of Hammond v. N.I.D. Corp.*, 435 N.E.2d 42, 48 (Ind. Ct. App. 1982).

Thus, “where the legislature properly enacts a general law which occupies the area, then a municipality may not by local ordinance impose restrictions which conflict with rights granted or reserved by the General Assembly.” *Suburban Homes Corp. v. City of Hobart*, 411 N.E.2d 169, 171 (Ind. Ct. App. 1980). *See also Koppin v. Strode*, 761 N.E.2d 455, 461 (Ind. Ct. App. 2002) (citing *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987)).

## 2. 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).

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.

### **3. Employment status of deputy prosecuting attorneys**

As noted above, if the prosecuting attorney is acting as a state officer, it follows that deputy prosecuting attorneys are also acting as 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); *State ex rel. Williams v. Ellis*, 184 Ind. 307, 313, 112 N.E. 98 (1916); *Stout v. State*, 93 Ind. 150 (1884).

For this reason, the Seventh Circuit has held that a deputy prosecutor has a confidential relationship with the prosecuting attorney, with the ability to directly implement policy by acting for the prosecutor. *Livas v. Petka*, 711 F.2d 798, 800 (7th Cir. 1983); *see also Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S.Ct. 1853 (1996) (deputy attorneys general). When a prosecuting attorney selects deputies, therefore, he or she is acting as a state officer. The decision to appoint or discharge a deputy is not some administrative detail of running the office, but rather is the selection of the lawyers through whom the prosecuting attorney will execute the function of the office. "Since the officer who appoints a deputy is responsible for all official acts of the deputy and the deputy may perform all the official duties of the officer who appointed him and is subject to the same regulations and penalties as the officer who appointed him, it is obvious that the Indiana general assembly intended deputies appointed under the chapter to be officers-at-will of the appointing constitutional officer." 1988 OAG No.11, p. 193. "Under Indiana law the relationship is presumed to be an appointment at the will of the appointing authority, and there is no evidence here tending to show that the prosecutor's power to terminate the appointment at any time and for any reason has been limited by law." *Bibbs*, 997 F.Supp. at 1180.

### **4. Prosecuting attorney's other employment decisions**

Deputy prosecuting attorneys have a special relationship with the appointing authority and, like the prosecutor, act as state officers. In addition, the prosecutor may find it necessary to employ other individuals to assist with his duties. The appointment of an investigator must be done "with the approval of the county council or councils" and that person's salary "shall be set by the county council or councils." IND. CODE § 33-14-

6-1. That same statute, however, prevents the council from terminating the investigator position or reducing the compensation of the position by the council “without approval of the prosecuting attorney.” *State ex rel. Schuerman*, at 395 N.E.2d 869, 182 Ind. App. 618 (1979). In terms of other employment decisions that the prosecutor may make, “[t]here shall also be appropriated annually by the various county councils for other deputy prosecuting attorneys, investigators, clerical assistance . . . an amount as may be necessary for the proper discharge of the duties imposed by law upon the office of the prosecuting attorney of each judicial circuit.” IND. CODE § 33-14-7-2(g). Although the county council is obliged to support the prosecutor’s office,

It is self evident that two very different sums could be arrived at as the necessary salaries for a prosecutor’s staff. While these figures may be varied they may both be reasonable and thus not an abuse of discretion by the county council.

*Brown* at 359 N.E.2d 610, 172 Ind. App. 35. Aside from setting the level of funding, however, there is no direct involvement by the county councils in filling positions other than that of investigator.

## CONCLUSION

### **1. Conferring merit status**

“[D]eputies of elected Indiana constitutional officers [e.g. prosecuting attorneys] . . . are not, *by constitution or specific statute*, merit . . . Such deputies are officers-at-will” 1988 OAG No.11, p. 200 (emphasis in original). Under Indiana law the prosecutor is a state officer elected by the citizens of the circuit. “The prosecuting attorney is the employer of the prosecutor’s deputies, and retains the right to control the terms of their employment.” 2001 OAG No. 11. Conferring merit status on a deputy prosecutor is simply outside the realm of county regulation.

### **2. Validity of ordinance conferring merit status**

Ordinances are presumed valid and the burden of proving invalidity is upon any party challenging an ordinance. *Hobble v. Basham*, 575 N.E.2d 693, 697 (Ind. Ct. App. 1991). But an ordinance is invalid if it conflicts with “rights granted or reserved by the General Assembly.” *Suburban Homes Corp.*, 411 N.E.2d at 171. The prosecutor is a state officer and the General Assembly has enacted legislation concerning the appointment of deputies and their salaries. IND. CODE § 33-14-7-2. Because the General Assembly has enacted a general law that “occupies the area” an ordinance that interferes with the prosecutor’s statutory authority to select deputies is invalid.

### **3. Other employment decisions**

The nature of a county council's involvement in a prosecutor's employment decisions is set out in statute. The council may be directly involved in the decision to hire an investigator. The councils are indirectly involved in other decisions to expend funds by setting the level of appropriations deemed necessary, "but this obligation does not carry with it the right to dictate the terms and conditions of employment in that office." 2001 OAG No. 11.

Sincerely,

Stephen Carter  
Attorney General