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April 13, 1988

The Honorable Harold E. Bailey, Jr.
Prosecuting Attorney of Lewis County
P. O. Box 686
Weston, West Virginia 26452

Dear Mr. Bailey:

You have requested an Attorney General's opinion interpreting West Virginia Code § 7-7-8, which provides:

"If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case. The court shall certify to the county court [county commission] the performance of that service when completed and recommend to the county court [county commission] a reasonable compensation for the attorney for his service, and the compensation, when allowed by the county court [county commission] shall be paid out of the county treasury. * * *"

At issue is whether the funds "paid out of the county treasury" are to be charged against the funds appropriated in the budget of the Prosecuting Attorney.

This opinion assumes that the prosecuting attorney's budget has not anticipated and provided for funds for the purpose of paying special prosecutors. Whether such expenditures may be budgeted for the prosecuting attorney and thereafter paid out of his budget is not addressed by this opinion. However, where no specific appropriation is made within the prosecutor's budget, funds for the compensation of a special prosecutor should be taken from other general funds of the treasury of the county.

As quoted above, Code 7-7-8 does not specify whether the special prosecutor's compensation is to be drawn from the prosecuting attorney's budget. To answer this question, one must examine the role of the special prosecutor, as contrasted with the roles of others compensated by funds appropriated in the prosecutor's budget.

Several West Virginia Supreme Court decisions focus on the requirement that a special prosecutor be compensated reasonably by the county commission "out of the county treasury." State ex rel. Johnson v. Robinson, 162 W. Va. 579, 251 S.E.2d 505 (1979); Moore v. Starcher, ___ W. Va. ___, 280 S.E.2d 693 (1981); Goodwin v. Cook, 162 W. Va. 161, 248 S.E.2d 602 (1978). This language, of course, is no more enlightening than the language of Code 7-7-8.

Additionally, there is a notation in Johnson, supra, that the county commission is vested with discretion to pay a special prosecutor only what the commission determines to be reasonable compensation. 251 S.E.2d at 505. In specifically rejecting the notion that the circuit judge sets the rate of compensation, Johnson, by implication, shows that the prosecuting attorney does not set the compensation either. A special prosecutor and a county commission should, where possible, agree to a specific amount of compensation in advance of the legal services. 251 S.E.2d at 510. The prosecuting attorney thus has no role in setting or approving the compensation of a special prosecutor.

In contrast, the prosecuting attorney does have the authority to set the salaries of his assistants, deputies and employees, and he states these salaries in the request for appropriations or budget he prepares for the county commission under Code 7-7-7. Code 7-7-7 provides:

"The county clerk, circuit clerk * * * and prosecuting attorney shall, prior to March second of each year, file with the county commission a detailed request for appropriations for anticipated or expected expenditures for their respective offices, including the compensation for their assistants, deputies and employees, for the ensuing fiscal year.

* * *

"After the county commission has fixed the total amount of money to be expended by the county for the ensuing fiscal year and after each county

official has fixed the compensation of each of his assistants, deputies and employees, as provided in this section, each county official shall file prior to June thirtieth, with the clerk of the county commission, a budget statement for the ensuing fiscal year setting forth the name, or the position designation if then vacant of each of his assistants, deputies and employees, the period of time for which each is employed, or to be employed if the position is then vacant, and his monthly or semimonthly compensation."

In two prior opinions, this office has interpreted Code 7-7-7 and stated that the county officials (including prosecutors) "are the actual employers of their own deputies, assistants and employees," 56 Ops. Att'y Gen. 362 (June 25, 1976); and that "the county commission does not have the authority to set the actual compensation for the deputies, assistants or employees," 56 Ops. Att'y Gen. 332 (February 17, 1976). Thus, the county commission does not set the salary for employees who are paid under the prosecutor's budget, but does set the compensation for special prosecutors. A special prosecutor is to be appointed to serve where the prosecuting attorney is unable to act, or where it would be improper for him or his assistants to act. Code 7-7-8. Being so disqualified from acting, the prosecutor is accordingly disqualified from supervising a special prosecutor. It seems logical to conclude that the prosecutor's budget should not be invaded for payment of or compensation which he has no authority to set, for services which he may not supervise.

Additionally, the difference between regular employees of the prosecuting attorneys and special prosecutors may be ascertained by a facial analysis of Code 7-7-8. That code section, when referring to a prosecutor's hiring of assistants, makes clear reference to Code 7-7-7, which requires the prosecutor to prepare his budget, detailing his assistants' compensation. Code 7-7-8 then provides for the county commissions' compensation of special prosecutors without reference to Code 7-7-7 or the prosecutor's budget. The purposeful reference to Code 7-7-7 when discussing regularly employed assistants, and the notable absence of such reference when discussing the appointment of special prosecutors, leads to the conclusion that special prosecutors are paid from the general county funds other than those appropriated for the prosecutor's budget.

Accordingly, it is our opinion that the compensation of a special prosecutor is to be taken from the general funds of the

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treasury of the county, and not to be charged against the budget of the prosecuting attorney.

Very truly yours,

CHARLES G. BROWN
Attorney General

By


MARY RICH MALOY

Assistant

MRM/lfb