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S-759

OFFICERS:

**Power of County Board to
Abolish Office of Public
Defender**

Honorable George P. Wittman
State's Attorney, Jersey County
Court House, P. O. Box 309
Jerseyville, Illinois 62052

Dear Mr. Wittman:

I have your letter wherein you state in part:

"The County Board of Jersey County, Illinois is contemplating setting up the position of Public Defender in the County. However, the County Board wants to know that if once they create the position of Public Defender, can it at any time do away with the position."

Jersey County has a population of less than 35,000 so that section 1.1 of "AN ACT in relation to the office of Public Defender" (Ill. Rev. Stat. 1973, ch. 34, par. 5601.1)

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is applicable. This section of said Act provides in pertinent part:

"§ 1.1. In each county of this State containing less than 35,000 inhabitants, the county board may, by resolution, create the office of Public Defender and the person appointed to such office shall be known as the Public Defender. * * * "

While the above cited language confers upon the county board the power to create the office of public defender, it is silent as to the authority to abolish the office. Moreover, none of the other sections of "AN ACT in relation to the office of Public Defender" (Ill. Rev. Stat. 1973, ch. 34, par. 5601, et seq.) deal with the question raised in your letter.

The Act does grant certain supervisory powers to the circuit judges of the county. Section 2 of the Act (Ill. Rev. Stat. 1973, ch. 34, par. 5602) gives the circuit judges of the county the power to appoint, by a majority vote, a licensed attorney and to fill a vacancy in like manner. Section 2, supra, further provides that the appointee holds his office at the pleasure of the circuit judges. In addition,

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section 6 of the Act (Ill. Rev. Stat. 1973, ch. 34, par. 5606) provides that the judges shall determine the number of assistants. As to the expenses of the office in counties of less than 500,000 population, section 7 of the Act (Ill. Rev. Stat. 1973, ch. 34, par. 5607) provides for their payment after the presiding judge of the circuit court approves such expenses as being necessary.

The above cited powers of the circuit judges in regard to the office of public defender in no way authorize the judges, expressly or impliedly, to abolish the office. In fact, the power to appoint, remove, and fill vacancies is clearly distinguishable from the power to abolish the office. In City of Chicago v. People ex rel. Byrne, 114 Ill. App. 145, this distinction between the power to abolish an office and the power to discharge the incumbent was clearly articulated at page 152:

"The power to abolish an office is wholly different from the power to discharge the incumbent. When an office is abolished, there is strictly and accurately speaking no discharge of the person holding it. The office simply ceases to exist, and the abolishment is directed not to the person, but to the office."

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Consequently, the power of the judges is a power over the incumbent of the public defender's office and not a power to determine whether the office itself shall continue to exist. The supervisory powers of the judges over the person of the incumbent in no way preclude the power of the county board to abolish the office. It is therefore my opinion, for the reasons which follow, that the county board has the power to abolish the office of public defender.

First, the general rule is that where an office is created by statute, it is wholly within the control of the legislature creating it. Unless forbidden by the constitution, the legislature which created the office also has the power to abolish it. (People v. Lippincott, 67 Ill. 333; Groves v. Board of Education of Chicago, 367 Ill. 91.) While the county board is not the legislature, it performs legislative functions in regard to its constituency. Courts in other jurisdictions have held that any governmental body which possesses the power to create an office has, in the absence of some provision of law passed by a higher authority, the implied power to abolish

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such office. Durbin v. Schneider, 120 Ohio App. 366, 202 N.E. 2d 427; Shamberger v. Ferrari, 73 Nev. 201, 314 P. 2d 384.

Secondly, in opinion No. S-183, issued May 28, 1970, the question was whether the county board could dissolve the zoning commission without the adoption of an ordinance or resolution after the zoning commission has been appointed. The statute authorized the county to establish a zoning commission but was silent on its dissolution. In that opinion, I concluded that, since the county board had authority to initially determine whether to have a zoning commission, it could by implication dissolve the zoning commission. While a zoning commission is distinguishable in many respects from the office of public defender, the principle as to creation and dissolution of an office is equally applicable.

Finally, it is a well established rule of statutory construction that, in construing a statute to give effect to the intention of the General Assembly, it is proper to look to the object or purpose to be subserved by the statute.

(Cherin v. R. & C. Co., 11 Ill. 2d 447; Illinois National Bank

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v. Chegin, 35 Ill. 2d 375.) It is my opinion that in adding section 1.1 to "AN ACT in relation to the office of Public Defender" (Ill. Rev. Stat. 1973, ch. 34, par. 5601, et seq.) the object sought to be attained was to allow smaller counties flexibility in complying with recent decisions of the United States Supreme Court regarding the appointment of defense counsel for indigent defendants. Section 1.1, supra, provides for this flexibility by allowing for the creation of the office of public defender. It is reasonable to conclude, consistent with the notion of flexibility, that the General Assembly also intended that the county board could abolish the office, depending on what the board determined to be the most economical way in which to meet its constitutional obligation.

In view of the foregoing, it is unnecessary to determine whether the county board could abolish the office of public defender pursuant to section 4 of article VII of the Illinois Constitution of 1970.

Consequently, in answer to your question, it is my opinion that the power vested in the county board by section 1.1 of "AN ACT in relation to the office of Public Defender"

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(Ill. Rev. Stat. 1973, ch. 34, par. 5601.1) to create the office of public defender impliedly includes the power to abolish such office.

Very truly yours,

A T T O R N E Y G E N E R A L