



STATE OF IDAHO

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ATTORNEY GENERAL OPINION NO. 87-10

TO: Lincoln County Commissioners
Lincoln County Courthouse
Shoshone, Idaho 83352

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Which governmental entity is responsible for filling a vacancy in the office of county prosecuting attorney?
2. Is there an alternative means to fill a vacancy in the office of county prosecuting attorney, if the board of county commissioners is unable to find a properly qualified replacement for that office?

CONCLUSIONS:

1. It is the duty of the board of county commissioners, pursuant to Idaho Code § 59-906, to fill a vacancy in the office of county prosecuting attorney by appointing a person with the same qualifications necessary for election to that office.
2. When the board of county commissioners is unable to find an election-qualified replacement to fill a vacancy in the office of county prosecuting attorney, the district court, pursuant to Idaho Code § 31-2603, may appoint some "suitable" person as special prosecutor to perform prosecutorial duties for the time being.

Question 1:

Your opinion request asks which governmental entity has primary authority to fill vacancies in the office of county prosecutor. Our informal survey of practice around the state indicates that such vacancies are routinely being filled by boards of county commissioners.

Two separate obstacles arise, however, in assigning this duty to the board of county commissioners. In the first place, under Idaho statutes, there are several other candidates potentially available to assume the appointing function once a vacancy occurs in the office of county prosecutor. The district court, to assure the smooth and uninterrupted administration of justice, is given authority to appoint a "special prosecutor" when the office is vacant, or when the prosecutor is absent from the county or has a conflict. Idaho Code § 31-2603(a). The attorney general, pursuant to his duty to oversee effective enforcement of penal laws throughout the state and his duty to supervise prosecuting attorneys in criminal actions, is authorized to appoint a "special assistant attorney general" to assist local prosecutors in criminal prosecutions. Idaho Code §§ 31-2603(b) and 67-1401(5). And the governor, pursuant to his duty under Idaho Code § 67-802 to see that all offices are filled and all statutory duties performed, is empowered to fill vacancies not otherwise provided by law. Idaho Code § 59-912.

Clearly, the authority of the district court, the attorney general and the governor is fallback in nature and is triggered only when other mechanisms break down. It thus appears that the board of county commissioners is the logical entity to fill a vacancy in the office of county prosecutor.

Here, however, a second and more fundamental obstacle arises. The board of county commissioners is authorized to fill "all vacancies in any county office . . ." Idaho Code § 59-906 (emphasis added). But in Idaho it would appear that "county office" is a term of art, designating only the six county officers (commissioners, coroner, sheriff, assessor, treasurer and clerk/auditor/recorder) enumerated in art. 18, § 6, of the Idaho Constitution. That section, after listing these six county offices, expressly states: "No other county offices shall be established, . . ." The county prosecutor is not included in the list and thus would not appear to be a "county officer" at all. If this be the case, then the board of county commissioners is not empowered to fill a vacancy in that office.

Several decisions of the Idaho Supreme Court can be read as supporting the proposition that the county prosecutor does not occupy a county office. In State v. Wharfield, 41 Idaho 14, 236 P. 862 (1925), the defendant was accused of bribing the county prosecutor and therefore of violating 1919 Compiled Statutes § 8118, which stated: "Every person who gives or offers any bribe to any executive officer of this state, . . . is guilty of a felony." 41 Idaho at 15, 236 P. at 862 (emphasis added). The district court dismissed the charge on the ground that the alleged bribe had not been given to an "executive officer of this state." The Idaho Supreme Court sustained this ruling:

While [the prosecuting attorney's] duties, as prescribed by law, may call upon him to perform executive functions in executing or administering the laws, it cannot reasonably be said that he was intended by the constitution to be an executive officer, or to be included in the executive department, or a classification as broad as that of an "executive officer of this state."

41 Idaho at 17-18, 236 P. at 863. The court rested its analysis on the fact that the office of prosecuting attorney is found in article 5 of the Idaho Constitution, dealing with the judicial department. The court concluded that the prosecutor was "if not a quasi-judicial officer, or an officer of the court, at least an officer of the judicial department, charged with the exercise of powers properly belonging thereto." 41 Idaho at 17, 236 P. at 863.

This holding of the Wharfield court has been cited twice in later opinions of the court, each time in dissent. State v. Griffiths, 101 Idaho 163, 183, 610 P.2d 522, 542 (1980); State v. Russell, 108 Idaho 58, 64, 696 P.2d 909, 915 (1985).

More recently, the matter was tangentially addressed in Derting v. Walker, ___ Idaho ___, 739 P.2d 354, 87 I.S.C.R. 875 (1987). The supreme court in that case affirmed a summary judgment in favor of the defendant, county prosecuting attorney Walker, in an action seeking reimbursement to the county of all monies earned by Walker from contracts with municipalities for prosecution of city misdemeanors. The court held that "any compensation received for prosecution of city misdemeanors is outside the scope of either Idaho Constitution art. 5, § 18 [dealing with prosecuting attorneys] or art. 18, § 7 [dealing with compensation of county officers]." Id. at 879-880. En route to this holding, the Court found it "significant that the creation of

[the office of prosecuting attorney] was accomplished by amending of art. 5 of the constitution comprehending the judicial department, and no amendment was made to art. 18, § 6, denominating 'county officers.'" Id. at 877.

Thus, the Idaho Supreme Court in Wharfield and again in Walker has stated that the county prosecutor is a member of the judicial department. However, the court has left open the question as to whether the county prosecutor might nonetheless be a "county officer." The two propositions are not mutually exclusive. For example, the district court clerk is a county officer as ex-officio auditor and recorder under art. 18, § 6, and Idaho Code § 31-2001, even though the office is created in art. 5, § 16, as part of the judicial department. Even more tellingly, the former office of probate judge, until court reform, was enumerated as a "county office" under art. 18, § 6, and Idaho Code § 31-2001, even though the position was created at statehood within the judicial department by art. 5, § 21 (repealed in 1962).

Thus, there is no fundamental incompatibility between the statement that a prosecutor functions within the judicial department of government and the statement that he occupies a county office. A review of the history of the office of county prosecutor convinces us that both statements are correct.

Historical Background.

At statehood, in 1890, Idaho adopted a district attorney system to prosecute violations of the criminal law. District attorneys were provided for in art. 5, § 18. It made sense to place the office of district attorney within article 5, "Judicial Department," as all attorneys function as officers of the court. See 27 C.J.S. District & Prosecuting Attorneys, § 1, p.623. It would not have made sense to place the district attorney among the enumerated "county officers" in article 8, "County Organization," because the original constitution expressly rejected a county prosecutor system. Indeed, at statehood, there were only five district attorneys for the entire state, one for each of the judicial districts set out in art. 5, § 11.

Six years after statehood, Idahoans abandoned the district attorney system in favor of a county prosecutor system. They did so by amending art. 5, § 18--which had called for a district attorney to be elected "for each judicial district"--to provide that a prosecuting attorney be elected "for each organized county in the state." The question put to the voters read: "Shall

section 18 of article V, of the Constitution of the State of Idaho, be so amended as to abolish the office of district attorney, and create the office of county attorney?" 1895 Sess. Laws, S.J.R. No. 5, p.236 (emphasis added). The meaning of the electorate's action was unmistakable: the office of district attorney was stricken from the constitution and the office of county attorney was substituted in its place.

It is understandable that the legislature in 1896 chose to attain its goal of substituting a county prosecutor system for a district attorney system by amending art. 5, § 18. That section was a clean vehicle spelling out the credentials, residency requirements, prosecutorial duties and salary schedule for the district attorney. As such, it was easily amended to substitute the county prosecutor and the parallel requirements of that office. It would have been considerably less tidy to strike § 18 altogether from article 5 ("Judicial Department"), thereby leaving a gap in that article of the constitution, and insert the parallel language into article 18 ("County Organization"). This sort of constitutional contortion may well have been advisable, but was unnecessary to effect the legislative purpose of creating the new office of county (prosecuting) attorney.

The Idaho Supreme Court so held in the case of Hays v. Hays, 5 Idaho 154, 47 P. 732 (1897). The case was brought by the newly appointed county prosecutor for Ada County, demanding that the incumbent district attorney turn over his case files and vacate his allegedly defunct office. The supreme court held that the amendment of 1896 was not intended to take effect on the day it was certified by the board of canvassers. Instead, the new county prosecutors were not intended to take office until the next general election of county officers:

The general election laws of the state provide the time and manner for the election of county officers, of whom the prosecuting attorney is made one; . . .

5 Idaho at 160, 47 P. at 733 (emphasis added). The court proceeded to analyze the salary provisions and the duties of office assigned to the prosecuting attorney and again concluded that the amendment was not intended to:

go into full operation until the time fixed by law for county officers to qualify and enter upon the discharge of their duties by virtue of their election in November, 1898.

Id. at 161, .47 P. at 734 (emphasis added).

Thus, the Idaho Supreme Court, in a case decided only two months after adoption of the constitutional amendment of 1896, expressly held that the effect of the amendment was to make the county prosecutor into a "county officer."

The action of the legislature shortly after approval of the 1896 amendment to art. 5, § 18, demonstrates the same understanding. The legislators proceeded to list the county prosecuting attorney in the statutory section entitled "county officers enumerated." See, Idaho Code § 31-2001 and predecessors beginning with 1901 Idaho Political Code § 1553.

Thus, it is our opinion that the effect of the 1896 amendment was to create a new county office. The list of county officers in art. 18, § 6, must henceforth be read as having been amended to include the office of county prosecutor. The prohibition in that article against establishing any new county offices applies only to legislative action, not constitutional amendment.

This understanding of the purpose of the 1896 amendment is illustrated by the fact that the duties of district attorney were carried over with little alteration into later codifications of the duties of the county prosecutor. Compare, 1887 Revised Statutes, § 2052, as amended by 1891 Sess. Laws, p.46, with 1897 Sess. Laws, p.74. Since that time, the prosecutor's duties have always been located in the county section of the Code. See, Idaho Code § 31-2604 and predecessors beginning with 1901 Idaho Political Code § 1669. By locating these duties in this part of the code, the legislature has affirmed that the county prosecutor is a county officer.

In addition, statutory provisions governing the election of the county prosecuting attorney have always been located among statutes relating to election of county officers. The first codification providing for the election of a prosecutor listed him among county officers. 1901 Idaho Political Code § 747. This inclusion of the prosecutor among elected county officers continued until recently when election provisions for the various county officers were listed in consecutive statutes. Compare, 1932 Idaho Code Annotated § 33-202 and Idaho Code § 34-615, repealed by 1970 Sess. Laws, ch. 140, with Idaho Code §§ 34-617 to 34-623. Again, the legislature determined that the prosecuting attorney is a county officer.

Finally, our opinion that the county prosecutor holds a county office is bolstered by the treatment given to the prosecutor's salary in both the constitution and the code. The 1896 amendment to art. 5, § 18, specifically provided for payment of the county prosecutor's salary out of the county treasury. The current version provides for compensation "as may be fixed by law." The law presently applicable is Idaho Code § 31-3106, which, like its predecessors, deals with compensation of county officers. See 1901 Idaho Political Code § 1690. See also, 1907 Revised Code § 2118; 1919 Compiled Statutes 3699. (From 1929 until 1982, the statutes listed prosecutor salaries separately, as the compensation varied depending on the population of the county. See e.g., 1932 Idaho Code Annotated §§ 30-2609, 30-2610; former Idaho Code §§ 31-3109 (repealed 1949), 31-3110 (repealed 1949), 31-3111 (repealed 1957), 31-3112 (repealed 1959) 31-3113; and 1982 Sess. Laws, ch. 191, p.333.) Thus, every codification of Idaho law following the amendment of 1896 has treated the county prosecutor as one of the "county officers" who must be compensated out of the county treasury, pursuant to art. 18, § 7, of the Idaho Constitution. The Idaho Supreme Court expressly recognized the applicability of this constitutional provision to county prosecutors in Givens v. Carlson, 29 Idaho 133, 157 P. 1120 (1916).

Our conclusion here is not arrived at lightly. We recognize there may arguably be authority for the proposition that a prosecuting attorney is not a county officer. Though mindful of this authority, we remain convinced that what is commonly assumed is also grounded in sound legal analysis. If the prosecuting attorney is not a county officer, then we would have to conclude that the understanding of the people of this state has been contrary to law for close to a century. This is not our conclusion.

Having determined that the county prosecuting attorney is a county officer, the statutory means for filling vacancies in the office is clear. Idaho Constitution art. 5, § 19, indicates that prosecutor vacancies are filled "...as provided by law." Idaho Code § 59-906 provides the law:

All vacancies in any county office of any of the several counties of the state, except that of the county commissioners (who shall be appointed by the governor), shall be filled by appointment by the county commissioners of the county in which the vacancy occurs in accordance with the

procedure prescribed below until the next general election, when such vacancy shall be filled by election.

It follows that the board of county commissioners, except under circumstances outlined below in Question 2, is statutorily empowered to fill vacancies in the office of county prosecutor.

Question 2:

A problem may arise in the smaller counties of Idaho when the board of county commissioners attempts to fill a vacancy in the office of county prosecutor. The power of the board to fill such vacancies is limited by the requirement that:

The person selected shall be a person who possesses the same qualifications at the time of his appointment as those provided by law for election to the office.

Idaho Code § 59-906. In the case of the prosecutor, this means that the person selected must be "a resident and elector of the county for which he is elected." Idaho Const. art. 5, § 18. Similarly, Idaho Code § 34-623 requires that the prosecuting attorney be "a qualified elector within the county." Clearly, then, under Idaho Code § 59-506, the board of county commissioners may not fill a vacancy in the prosecutor's office with an appointee who resides outside the county.

The inability of the board of county commissioners to find an election-qualified replacement does not prevent a county from hiring an able attorney to perform prosecutorial functions. Without such a capable legal servant, the administration of justice in the county would certainly fail. Idaho Code § 31-2603 provides a solution in the limited instance where commissioners are unable to fill a prosecutor vacancy pursuant to Idaho Code § 59-906.

Special prosecutor-Appointment.- (a) When there is no prosecuting attorney for the county, or when he is absent from the court, . . . the district court may, upon petition of the prosecuting attorney, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the

trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such. . . . (Emphasis added.)

This provision for the appointment of a "special prosecutor" has existed as long as the office of county prosecuting attorney. 1897 Sess. Laws, p.74. See also, 1891 Sess. Laws, p.46. The rationale behind equipping the district court with this emergency power is clear. Without someone to perform the duties of prosecutor, the court could not effectively render justice and the system of criminal justice in that county would grind to a halt. The appointment of a "special prosecutor" temporarily resolves this problem until such time as the board of county commissioners is able to appoint an election-qualified candidate or until the position is filled at an election.

We note, however, that the phrase "upon petition of the prosecuting attorney, . . ." cannot apply when the office is vacant. Obviously, when there is no prosecuting attorney, a prosecuting attorney cannot petition the district court for the appointment of a special prosecutor. The statutory purpose would be frustrated if a petition from the prosecuting attorney were a condition precedent to a court appointment "when there is no prosecuting attorney for the county."

In sum, county commissioners may only appoint election-qualified candidates to the position of county prosecutor. The district court is not so constrained when appointing a "special prosecutor." Such appointees need only be "suitable"; they need not be county residents. State v. Corcoran, 7 Idaho 220, 61 P. 1034 (1900).

We stress the necessity for cooperation between the district court and the board of county commissioners. The power of the district court to appoint a "special prosecutor" derives from the court's need to assure the smooth administration of justice, most especially the enforcement of the criminal law. But this is only half the prosecutor's job. The prosecutor must also provide legal advice to the county commissioners and to all other public officers of the county. Idaho Code § 31-2604(3). The right of the county commissioners to employ compatible civil counsel, though narrowly circumscribed, is ensured by the constitution. Idaho Const. art. 18, § 6. Thus, while the district court may be expected to appoint a special prosecutor who is competent in the courtroom, it is critical that the person chosen enjoy the

confidence of the county commissioners and the other county officials that he or she must advise.

CONCLUSION:

County prosecuting attorneys are "county officers" as envisioned by the Idaho Constitution, art. 5, § 18, and the Idaho Code. As such, when there is a prosecutor vacancy, it is the duty of the board of county commissioners to appoint an election-qualified replacement pursuant to Idaho Code § 59-906. This replacement must be twenty-one years old, a citizen of the United States, a practicing attorney admitted to the state bar, and a resident and elector of the county. In the unusual instance where a resident replacement cannot be found, the board must turn to the district court to appoint a temporary "special prosecutor" pursuant to Idaho Code § 31-2603. The "special prosecutor" possesses the same powers as a prosecuting attorney.

AUTHORITIES CONSIDERED:

Idaho Constitution

Idaho Const., art. 5, § 11
Idaho Const., art. 5, § 16
Idaho Const., art. 5, § 18
Idaho Const., art. 5, § 19
Idaho Const., art. 5, § 21 (repealed 1962)
Idaho Const., art. 18, § 6
Idaho Const., art. 18, § 7

Idaho Statutes

Idaho Code § 31-2001
Idaho Code § 31-2603
Idaho Code § 31-2604
Idaho Code § 31-3106
Idaho Code § 31-3109 (repealed 1949)
Idaho Code § 31-3110 (repealed 1949)
Idaho Code § 31-3111 (repealed 1957)
Idaho Code § 31-3112 (repealed 1959)
Idaho Code § 31-3113
Idaho Code § 34-615 (repealed 1970)
Idaho Code § 34-617
Idaho Code § 34-618

Idaho Code § 34-619
Idaho Code § 34-620
Idaho Code § 34-621
Idaho Code § 34-622
Idaho Code § 34-623
Idaho Code § 59-906
Idaho Code § 59-912
Idaho Code § 67-802
Idaho Code § 67-1401(5)
1932 Idaho Code Annotated § 30-2609
1932 Idaho Code Annotated § 30-2610
1932 Idaho Code Annotated § 33-202
1919 Compiled Statutes § 3699
1919 Compiled Statutes § 8118
1907 Revised Code § 2118
1901 Idaho Political Code § 747
1901 Idaho Political Code § 1553
1901 Idaho Political Code § 1669
1901 Idaho Political Code § 1690
1887 Revised Statutes § 2052

Session Laws

1982 Sess. Laws, ch. 191, p.333
1897 Sess. Laws, H.J.R. No. 10, p.185
1897 Sess. Laws, p.74
1895 Sess. Laws, S.J.R., No. 5, p.236
1891 Sess. Laws, p.46

Idaho Cases

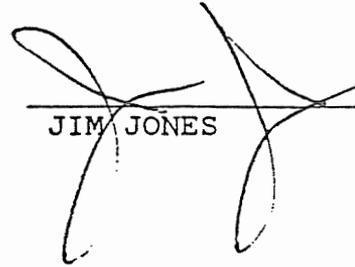
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Hays v. Hays, 5 Idaho 154, 47 P. 732 (1897)
Givens v. Carlson, 29 Idaho 133, 157 P. 1120 (1916)
State v. Corcoran, 7 Idaho 220, 61 P. 1034 (1900)

Other Authorities

27 C.J.S. District & Prosecuting Attorneys, § 1 (1959)

DATED this 27th day of August, 1987.

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