

PROSECUTING ATTORNEY:

ASSISTANT PROSECUTING
ATTORNEY:

Appointment; liabilities.

January 12, 1944



Honorable A. L. Gates
Prosecuting Attorney
California, Missouri

Dear Mr. Gates:

Under date of January 11, 1944, you wrote this office requesting an opinion, as follows:

"As prosecuting attorney of Moniteau County I desire a written official opinion from your office concerning the following questions.

"1. As my induction into the United States Army appears imminent do I under the law have the authority while in United States service to retain my office during the present term? I understand that I do have that authority under a recent court decision and if I do have this right do I have the authority under Sec. 12962 R.S. 1939 to appoint an assistant prosecuting attorney in a county of this size? Our population is 11,775.

"2. Would an assistant prosecuting attorney appointed under the above conditions be liable for his official acts or would the prosecuting attorney be liable?

"3. An assistant prosecuting attorney appointed under the above conditions would he sign complaints and informations A. L. Gates, Prosecuting Attorney, by John Doe, Assistant Prosecuting Attorney or would he merely sign informations and complaints in his official capacity John Doe, Assistant Prosecuting Attorney?

"4. In appointing assistant prosecuting attorney under the above conditions is it necessary to have the approval of the circuit judge or the acting circuit judge of such an appointment?"

You are correct in your view of the law that your induction into the United States Army under the Selective Service Law will not vacate your office, and in this connection your attention is directed to the following brief quotation from the case of State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499, l. c. 501:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

Section 12962, R. S. Mo. 1939, referred to in your letter, is as follows:

"Each prosecuting attorney in this state may appoint one assistant prosecuting attorney, who shall possess all the qualifications of a prosecuting attorney, and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are now or may hereafter be made liable."

To be read with this section are also Sections 12963 and 12964, R. S. Mo. 1939, prescribing the method of the appointment of an assistant prosecuting attorney, fixing his duties, and the manner in which he shall be paid. The last mentioned section is as follows:

"The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when the prosecuting attorney is sick or absent from the county, or when the prose-

cuting attorney is engaged in the discharge of the duties of his office, so that he cannot attend. The assistant prosecuting attorney shall be paid only by the prosecuting attorney, and may assist the prosecuting attorney at his request in any case: Provided, that he shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney."

These three sections apply in all counties of the state except where there are other statutes relating to particular classes of counties. There is no other statute relating to counties the size of Moniteau County, and therefore these sections authorize the appointment of an assistant prosecuting attorney in Moniteau County.

Section 12962, supra, specifically makes the assistant prosecuting attorney liable for all penalties for failure or neglect to discharge his duties.

In connection with these three sections of the statutes, we wish to call to your attention the case of State v. Carey, 318 Mo. 813, l. c. 817, in which the question was raised as to the legality of the filing of an information by an assistant prosecuting attorney, and in discussing the question the court spoke as follows:

"The legality of the act of the assistant prosecuting attorney in filing the information is challenged; and as a consequence the validity of the information. It is conceded by the appellant that the assistant was appointed under the authority of Sections 751, 752 and 753, Revised Statutes 1919.

"Section 751 confers the power of appointment of an assistant upon the prosecuting attorney, defines the qualifications of the appointee and declares his official liability to be those of the prosecuting attorney.

"Section 752 prescribes how the appointment

shall be made and the manner in which the appointee shall qualify for the discharge of his duties.

"Section 753, so far as the same relates to the matter at issue, provides that the assistant shall perform the duties of the prosecuting attorney, (1) when the latter is sick, (2) absent from the county, or (3) engaged in the discharge of the duties of his office and cannot attend.

"Under the facts we are only concerned with the third subdivision of the section. It is conceded by the appellant that at the time the information was filed the prosecuting attorney was 'at the court house engaged in the performance of his duties.' This being true, the presumption will obtain that the discharge of those duties was such that he could not attend to the filing of the information and that the assistant was, under the statute, within the purview of his authority in filing it. Other than the concession of the appellant there is no showing as to the character of the duties which were being performed by the prosecuting attorney at the time the assistant filed the information. No such showing could properly have been made because the time and manner in which a prosecuting attorney discharged his official duties are details which the law intended should be left to his exclusive regulation. 'Such matters,' as was held in *State v. Hynes*, 39 Mo. App. 569, 'cannot be investigated collaterally with a view to determining whether an assistant prosecuting attorney had authority to file an information. Delay and expense would be incurred in the investigation of such collateral matters and would open up an inquiry the sole effect of which would be to obstruct the administration of the law.' Under the facts in this case it would require the determination of the extent to which a prosecuting attorney should be engaged in other official duties to give jurisdiction to his assistant to act.

"In affirming the ruling in the Hynes case, supra, the Kansas City Court of Appeals in Browne's Appeal, 69 Mo. App. 159, said: 'The existence of the conditions under which the assistant prosecuting attorney may act must be left to the decision of the prosecuting officer and cannot be raised in a collateral action.' When, therefore, either condition defined in the statutes arises, an assistant prosecuting attorney may perform any act within the range of the duties of that office. This conclusion is in harmony with a well established rule in construing statutes defining the powers of public officers that 'where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed. Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also.' (Mechem's Offices and Officers, sec. 570.)

"Furthermore, in discussing the question here under review, in State v. Weeks, 88 Mo. App. 263, the Kansas City Court of Appeals hold that 'where an information is filed in a criminal court by an assistant prosecuting attorney (as was the case at bar), it will be presumed to have been filed by a proper official and that he had been duly appointed by the prosecuting attorney under the authority of Section 4975, Revised Statutes 1899 (now Sec. 751, R. S. 1919), in the absence of any record to the contrary.'"

As the Carey case announces that an assistant prosecuting attorney may perform any act within the range of the duties of that office, and the signing of informations would come under the duties of the prosecuting attorney, the assistant prosecuting attorney should sign his own name, in his own capacity, to informations and complaints.

Honorable A. L. Gates

-6-

January 12, 1944

None of the sections above referred to require the appointment of an assistant prosecuting attorney to be approved by the circuit judge of the county where the appointment is made.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR