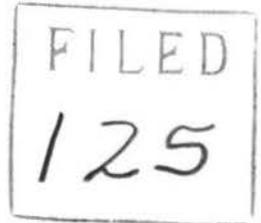


PROSECUTING ATTORNEYS: Only one assistant prosecuting attorney may be appointed in third and fourth class counties.

February 2, 1967



OPINION NO. 125

Honorable Fielding Potashnick  
Prosecuting Attorney  
Scott County  
County Courthouse  
Sikeston, Missouri

Dear Mr. Potashnick:

In your letter of January 3, 1967, you requested an opinion from this office as follows:

"Section 56.240 provides in substance that the Prosecuting Attorney, counties of the third class, may appoint one Assistant Prosecuting Attorney, etc.

"May a Prosecuting Attorney of a county of the third class, which contains more than 30,000 inhabitants, appoint a second Assistant Prosecuting Attorney to serve without compensation from the County or State?"

Scott County is a third class county with a population of 32,748.

Section 56.240, RSMo Cum. Supp. 1965, provides that the prosecuting attorney in counties of the third and fourth class may appoint one assistant prosecuting attorney who shall take the oath or affirmation of office as required of the prosecuting attorney. You inquire whether the second assistant may be appointed by you to serve without compensation. We assume that your question concerns the appointment of an assistant prosecuting attorney who is to be vested with the full duties and responsibilities of an assistant prosecuting attorney.

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In 67 C.J.S., Officers, § 148 (a) the rule of law concerning the appointment by a public officer of deputies and assistants is stated in part as follows:

"Public power may not be delegated to private persons or corporations, over whom no supervision is maintained, nor may the discharge of the duties of public officers ordinarily be so delegated, and it has been held that a public officer may not delegate his official duty to another than a deputy. Moreover, an officer may not delegate to an agent power to do an act required by statute involving judgment and discretion. As a rule, however, public officers may appoint deputies for the discharge of ministerial duties, except where the law requires the duty to be performed by the principal in person."

The Supreme Court of this State has pronounced a similar doctrine in *Small v. Field*, 102 Mo. 104, 14 S.W. 815, in discussing the authority for the appointment of a deputy court clerk, the court stated, l.c. 118:

"And it is also said by the appealing defendants that no provision is anywhere to be found in those statutes for the appointment of a deputy for a territorial district court. But at common law a ministerial officer had authority to appoint a deputy. Com. Dig.--Tit. Officer (D.I.); Am. & Eng. Cyclop. of Law--Tit. Deputy, 624. Thus, a sheriff, though his patent of office does not say he may execute his office per se vel sufficientem deputatum suum, yet he may make a deputy. 7 Bac. Ab.--Tit. Offices & Officers, 316 (L).

"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316, 317,--Tit. Offices and Officers. And the rule is general that a deputy may do every act which his principal might do. Com. Dig. Officers, D. 3; Confiscation Cases, 20 Wall. 92."

It, thus, appears that the authority of a public officer to appoint a deputy or an assistant depends upon the duties that are to be delegated. The source or lack of compensation is immaterial in determining whether the appointment can be made.

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Certainly the duties of the prosecuting attorney are not ministerial but are considered as quasi judicial with discretionary powers. In *State v. Smith*, 258 S.W.2d 590, the Supreme Court in discussing the office of prosecuting attorney and his duties and authority stated, l.c. 593:

"[2-5] When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i. e., not merely ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. This court has written much upon the broad discretion vested in a public prosecutor. *State on Inf. of McKittrick v. Wymore*, supra; *State on Inf. of McKittrick v. Wallach*, 353 Mo. 312, 182 S.W.2d 313, 318, 319. In this jurisdiction it is recognized that this public office is one of consequence and responsibility. The status of the prosecuting attorney as a public officer is given dignity and importance by our statutes. Sections 56.010 to 56.620 RSMo 1949, V.A.M.S. With every other attorney at law a prosecuting attorney is, of course, an officer of the court in a larger sense; but **he** is not a mere lackey of the court nor are his conclusions in the discharge of his official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's cases. A public prosecutor is a responsible officer chosen for his office by the suffrage of the people. He is accountable to the law, and to the people. He is 'vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. He is disqualified from becoming in any way entangled with private interests or grievances in any way connected with charges of crime. He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned.' *Engle v. Chipman*, 51 Mich.

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524, 16 N.W. 886, 887. 'The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers.' State ex rel. Thrash v. Lamb, 237 Mo. 437, 141 S.W. 665, 669."

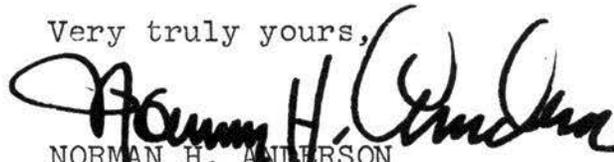
In Elliott v. Jackson County, 194 Mo. 532, the Supreme Court held that when the statute provides for a chief deputy prosecuting attorney to be appointed, the appointment of a second chief deputy would be without authority of law.

CONCLUSION

It is the opinion of this office that the prosecuting attorney in a third or fourth class county is authorized to appoint only one assistant.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General