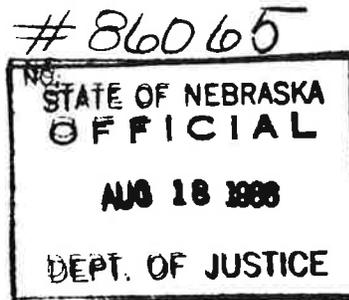


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



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Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: August 18, 1986

SUBJECT: Creation of Office and Duties of Public Defender

REQUESTED BY: Stephen L. Von Riesen
Hall County Attorney

WRITTEN BY: Robert M. Spire, Attorney General
William L. Howland, Assistant Attorney General

This is in response to your question concerning the creation and elimination of the office of public defender and whether the public defender may represent indigent juveniles in juvenile court proceedings. You also asked if the public defender could be appointed for a time shorter than an elected term.

The office of the public defender may be created in any one of three ways. First, it may be created pursuant to Neb.Rev.Stat. §29-1804 (Reissue 1985); that is, by election. A public defender is mandatory under that provision in counties with a population in excess of 100,000. In smaller counties the office may be created by the appointment of a public defender. Thereafter, the office is filled by election.

The office of public defender in counties with a population under 100,000 was not created by the Legislature in Neb.Rev.Stat. §29-1804 (Reissue 1985), it was merely authorized. An analogous situation arose in Goodwin v. State, 142 Ind. 117, 41 N.E. 359 (1895). The Legislature there passed an act authorizing the creation of the office of city attorney "if the common council deem it expedient." Id. at 119, 41 N.E. at 360. The court stated: "The Legislature . . . did not create the office of city attorney, within the full sense of the term, but authorized the common council to determine whether the city should have such an officer. The power that creates an office may abolish it before the expiration of the term of the officer." Id. at 120, 41 N.E. at 360. Similarly, the Legislature here did not create the office of public defender; therefore, the county board may disenfranchise it.

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Additionally, the office of public defender is not a constitutional office, and so may be abolished by an entity with the power to create it. Stetter v. Town Board of Town of Amherst, 362 N.Y.S.2d 97, 99 (App.Div. 1977); 56 Am.Jur.2d. Municipal Corporations §239 (1971).

Further judicial authority supports this position. "Except where an office or position is required by statute, the governing body of a municipality may, by appropriate action, dispense with and abolish positions of public employment the need for which no longer exists." McCartney v. Franco, 87 N.J.Super. 292, 297, 209 A.2d 329, 331 (1965) (emphasis added). The Legislature did not require that counties with populations under 100,000 employ a public defender.

The above cited authority leads us to conclude that the position of public defender created under Neb.Rev.Stat. §29-1804 (Reissue 1985) may be abolished by the county board.

Secondly, the office of public defender may be created pursuant to Neb.Rev.Stat. §29-1805.01 et seq. (Reissue 1985). These sections authorize a judicial district public defender. This office may be created by the Governor on the recommendation of the judge or judges from a particular district. Judicial district public defenders are appointed initially and elected thereafter.

The county board may not abolish the office of judicial district public defender, because the office is created by the Governor and not by the county board.

Finally, the office of the public defender may be created and filled pursuant to LB 885 (signed into law April 17, 1986). This provision allows counties with a population of less than 35,000 to appoint and contract with an individual to serve in the capacity of public defender. A public defender appointed under this provision is not elected; he is in office only by virtue of the contract with the county board. The contract may be for any period of time greater than two years.

If the county board chooses to contract with an individual to fill the office of public defender, the county board may abolish the office by simply allowing the contract to expire and not renewing it.

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We are of the opinion, based on the foregoing that the office of Public Defender if authorized by the County Board under §29-1804, may be eliminated at some future time if the Board would find, after hearing and notice, that the need for such an office no longer existed or, that it was no longer in the county's best interest to continue with that mechanism for the defense of indigent individuals. We would point out, however, that the disenfranchisement could probably only be effective at the end of the term of any elected public defender. In other words, once established, and thereafter filled by the elective process, the office could not be terminated except, after hearing and notice to all interested parties and then only at the conclusion of any existing unserved term. It does not appear that a vote of the electorate would be necessary in view of the fact that it is within the power of the County Board to establish the office. The issue would however, certainly be appropriate to submit to the voters if the Board chose to do so.

In reviewing the questions which you have raised we have reviewed an earlier opinion issued by our office dated December 2, 1981 which touched on some of the same issues. Insofar as this opinion is in conflict with portions of the earlier opinion, we would emphasize that we have considered the most recent effort of the Legislature in this area which seems to support the conclusions reached herein.

The duties of the public defender are discussed in Neb.Rev.Stat. §29-1804.03 (Reissue 1985). Public defenders are given the authority to represent indigent juveniles who are charged with a felony or a misdemeanor punishable by imprisonment. The statute does not explicitly address the question of whether the public defender can represent juveniles in juvenile court proceedings.

Neb.Rev.Stat. §43-272(1) (Reissue 1984) requires the court to appoint counsel to represent indigent juveniles in juvenile court proceedings. Nothing in the statute precludes the court from appointing the public defender in such proceedings.

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In addition, Neb.Rev.Stat. §29-1805.07 (Reissue 1985) requires the judicial district public defender to represent indigent minors in juvenile court proceedings. Analogously, and because the county public defender statute does not address the issue, it must be assumed that county public defenders may also be appointed to represent indigent minors in juvenile court proceedings.

Sincerely,

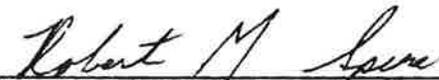
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APPROVED:



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