

ATTORNEY GENERAL

May 11, 1977

PROSECUTOR JOSEPH P. LORDI  
*President, New Jersey County Prosecutors  
Association*  
Essex County Courts Building  
Newark, N.J. 07102

FORMAL OPINION 1977 – No. 10.

Dear Prosecutor Lordi:

In accordance with the requests of Prosecutor Judson Hamlin and Prosecutor Burrell Ives Humphreys, you have asked advice as to whether the residency requirements of *N.J.S.A.* 40A:9-1 and *N.J.S.A.* 11:22-7 apply to assistant prosecutors and county investigators. This inquiry was prompted by the decision in *Skolski v. Woodcock et al.*, 149 *N.J. Super.* 340 (App. Div. decided April 11, 1977), which requires county detectives to reside in the county of their employ.

In *Skolski* the Bergen County Prosecutor, Joseph Woodcock, appealed a law Division judgment declaring that a county detective was not required to reside within the county as a condition of continued employment and enjoining his termination. Skolski instituted the action by complaint in lieu of prerogative writ, contending that the residency requirements of *N.J.S.A.* 40A:9-1<sup>1</sup> were inapplicable to county detectives or, in the alternative, were unconstitutional. Prosecutor Woodcock filed a complaint in lieu of prerogative writ seeking a declaratory judgment that *N.J.S.A.* 40A:9-1 was constitutional and applicable to the office of county detective, mandating the immediate termination of Skolski. Subsequently, Prosecutor Woodcock amended his complaint to seek a declaration that *N.J.S.A.* 11:22-7<sup>2</sup>, which establishes residency requirements for employment in the classified civil service, was also applicable to the office of county detective, was constitutional and provided additional cause for Skolski's immediate termination.

The Appellate Division in *Skolski* rested its judgment solely on its interpretation of *N.J.S.A.* 11:22-7, which it held "requires residency within the county not only as a condition for eligibility for appointment to the office of county detective but also as a condition for continued employment in that office." 149 *N.J. Super.* at 346. In view of this conclusion, the Appellate Division found it unnecessary to consider the application and constitutionality of *N.J.S.A.* 40A:9-1. (*Id.*)

At the outset it should be noted that *N.J.S.A.* 11:22-7 applies only to classified civil service employees, and thus does not govern the two positions of assistant prosecutor and county investigator, which are in the unclassified service or at the pleasure of the prosecutor, respectively. *N.J.S.A.* 2A:157-10 and 2A:158-15; see *Rolleri v. Lordi*, 146 *N.J. Super.* 297 (App. Div. 1977). Consequently, these two positions fall outside the holding in *Skolski*.

The issue left unresolved in *Skolski* is whether *N.J.S.A.* 40A:9-1 applies to the prosecutor and his staff. It may be questioned whether the prosecutor and his staff fall into the category of county "office," as that term is employed in *N.J.S.A.* 40A:9-1. See *In re Application of Daggett for Appointment of a County Investigator and Incurring of other Expenses*, Docket No. L-11885-74 (Law Div. decided May 23, 1975), at pp. 3-5 (hereinafter *In re Daggett*). In this respect there is a distinct difference in wording between *N.J.S.A.* 11:22-7, where the statute applies to all positions and employments in the classified service, where the service is to be rendered in a par-

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ticular county...and payment therefore is made from the funds of such county," and *N.J.S.A.* 40A:9-1, which applies to the more limited class of "every person holding an office, the authority and duties of which relate to a county only." (emphasis added). The Chancery Division in *Skolski* held that *N.J.S.A.* 40A:9-1 did not apply to county detectives because the authority and duties of that office do not "relate to a county only." This holding was reiterated by the Appellate Division in *Skolski*, 149 *N.J. Super.* at 343, without comment but with authoritative reference to *Dunne v. Fireman's Fund Am. Ins. Co.*, 69 *N.J.* 244, 250-252 (1976); *Cashen v. Spann*, 66 *N.J.* 541, 552 (1975), cert. den. 423 *U.S.* 829 (1974); cf. *Cooper v. Imbriani*, 63 *N.J.* 535 n. 1 (1973).

The *Skolski* reference is clearly correct because the authority and duties of the prosecutor and the prosecutor's staff do not relate "to a county only." Rather, the prosecutors, assistant prosecutors and investigative staff occupy a hybrid status. *Dunne v. Fireman's Fund Am. Ins. Co.*, *supra* at 248. They may be characterized as county officers for some purposes such as the payment of salary, but as State officers for other purposes such as the enforcement of the criminal laws of the State. In this connection, *R.* 3:7-3(a) directs that an indictment allege a crime as "against the peace of this State, the government and dignity of the same." When a County Prosecutor and his staff pursue a criminal prosecution or investigation, they act as agents of the State rather than of the county only. *In re Dagget*, *supra*. Indeed, in many instances the prosecutor and his staff will be routinely engaged in multi-county investigations, with indictments being brought and trials held as a result of criminal acts in more than one county.<sup>3</sup> Cf. *State v. Seaman*, 114 *N.J. Super.* 19 (App. Div. 1971), certif. den. 58 *N.J.* 594 (1971), cert. den. 404 *U.S.* 1015 (1972). Thus, while the Prosecutor's Office exists primarily for the benefit of the local residents of the county, its function is not exclusive but is for the good of the entire State. Cf. *Godfrey v. McGann*, 37 *N.J.* 28, 35 (1962).

Moreover, public policy dictates that assistant prosecutors and investigators not be subject to residency limitations. The objective is to secure the services of the most highly qualified people to enforce the criminal laws of the State, a goal which is clearly inhibited if restricted by artificial geographical boundaries. The policy basis is especially evident in the more sparsely populated counties.

On this score, with specific reference to investigators, "undercover agents are commonly utilized to detect and eradicate crime, and in a small county it might be impractical or impossible to locate and hire qualified individuals for that purpose. Also, from a more practical standpoint, it might be extremely difficult to hire a local resident for this purpose who is not well known to the surrounding community. An undercover agent who is known by the general populace would find it impossible to properly perform his most difficult task." *In re Daggett*, *supra* at 5. While it is now required by *Skolski* that county detectives reside within the county of their employ, there is a rational basis for distinguishing between detectives and investigators. The clear legislative purpose and plan in providing for investigators was to "[afford] to the county prosecutor and confidential investigatory staff serving at his pleasure and removable at his will notwithstanding the terms of any earlier tenure enactments." *Brennan v. Byrne*, *supra* at 336. Despite the identity of duties and responsibilities among detectives and investigators, the two positions are not "fungible." Rather, it is clear that the Legislature intended to vest in the prosecutor a great deal of latitude and discretion in the selection of his investigative staff, with the tenured position of county detective balanced by investigators serving at his pleasure in whom, as was aptly put in the statement attached to the original bill creating the posi-

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tion (which became L. 1931, c. 164), "he has that degree of confidence resulting from personal intimate knowledge." *Rolleri v. Lordi, supra* at 306.

For the above reasons, then, assistant prosecutors<sup>4</sup> and county investigators are not subject to the mandatory residency requirements of *N.J.S.A.* 40A:9-1 because they are not exclusively "county" officers and since their duties clearly do not relate "to a county only...." Moreover, these officers are not in the classified service and thus not subject to the residency requirements for classified employees set forth in *N.J.S.A.* 11:22-7. Accordingly it is our conclusion that assistant prosecutors and county investigators need not be residents of the county in which they are employed.

Very truly yours,

WILLIAM F. HYLAND

*Attorney General of New Jersey*

By: Robert J. Del Tufo

*First Assistant Attorney General*

1. 40A:9-1. **Residence of Officers**

Except in the case of counsel, attorney, engineer, health officer, auditor, comptroller, appointed tax collector, elected assessors who have received tenure under P.L. 1967, c. 44 §7 (c. 51:1-35:31) appointed tax assessor, or members of boards of assessors or as otherwise provided by law, every person holding an office, the authority and duties of which relate to a county only, or to a municipality only, shall reside within said county or municipality as the case may be.

Any person holding or attempting to hold any such office in a county or municipality in violation hereof, may be ousted in a proceeding in lieu of prerogative writ.

2. 11:22-7. **Applicants limited to residents of county, municipality and school districts**

For all positions and employments in the classified service, where the service is to be rendered in a particular county, municipality or school district, or any judicial district of such county, and payment thereof is made from the funds of such county, municipality or school district, or judicial district of the county, the commission shall limit the eligibility of applicants to the qualified residents of the county, municipality or school district, or judicial district of such county, in which the service is to be rendered and from the funds of which the employee is to be paid.

3. It is to be noted in this respect that the New Jersey County Prosecutors Association and the Division of Criminal Justice in the Attorney General's Office have established an Organized Crime Policy Board. The Board constitutes an administrative mechanism to insure the pooling of existing law enforcement resources in a concerted action by the State's prosecutorial community to combat and attack syndicated criminal activity.

4. Parenthetically, it is also most certainly arguable that assistant prosecutors fall within the category excepted by *N.J.S.A.* 40A:9-1, since the intent of the statute was clearly to exclude the whole professional class of counsel and attorney. Assistant prosecutors are attorneys representing the State and the county.