

**OP. NO. 05-033**

**CRIMINAL PROCEDURE: DISABILITY OF JUDGE OR ATTORNEY FOR COMMONWEALTH; COURT-APPOINTED COUNSEL, INTERPRETERS; TRANSCRIPTS – INDIGENT DEFENSE.**

**COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS — POWERS OF CITIES AND TOWNS — GENERAL POWERS AND PROCEDURES OF COUNTIES.**

**No authority for locality to supplement salaries of public defender or his staff.**

The Honorable Mitchell Van Yahres  
Member, House of Delegates  
December 2, 2005

#### **Issue Presented**

You inquire whether a locality may provide funds to supplement the salaries of the employees of the public defender office practicing in its jurisdiction.<sup>1</sup> You also ask whether an employee of the public defender's office would violate any state conflict of interests laws by soliciting or accepting such supplements from a locality.<sup>2</sup>

#### **Response**

It is my opinion that a locality does not have the authority to supplement the salaries of the public defender or his staff. Because I reach such conclusion, it is unnecessary to address the conflict of interests question that you present.

#### **Background**

You state that a city and county served by the same public defender office are interested in supplementing the salaries of that office.<sup>3</sup> You further state that under the proposed arrangement, the Virginia Indigent Defense Commission, which employs and oversees personnel in public defender offices statewide,<sup>4</sup> would enter into an agreement with each locality. Under this agreement, you relate that the locality would provide an annual payment to the Commission, which would use the money to supplement individual salaries in the local office. Finally, you relate that the Commission's executive director would set the actual compensation of each employee in accordance with Commission policies and procedures.<sup>5</sup>

#### **Applicable Law and Discussion**

Virginia follows the Dillon Rule, which states that local governments "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable."<sup>6</sup> A review of the statutory grants of power made by the General

Assembly to local governments generally,<sup>7</sup> and to cities<sup>8</sup> and counties<sup>9</sup> specifically, reveals that the General Assembly has not expressly granted localities the authority to fund such supplements.

"[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."<sup>10</sup> Questions of implied legislative authority are resolved by analyzing legislative intent.<sup>11</sup> In determining legislative intent, the Supreme Court of Virginia has looked both to legislation adopted and bills rejected by the General Assembly.<sup>12</sup> The Virginia Supreme Court "has consistently refused to imply powers that the General Assembly clearly did not intend to convey."<sup>13</sup>

In this case, the General Assembly has acted in a related area, while declining to do so in situation you present.<sup>14</sup> The General Assembly has expressly granted authority for localities to supplement the salaries of the Commonwealth's attorneys "or any of their deputies or employees."<sup>15</sup> The General Assembly, however, has not granted such authority to public defenders' offices. Thus, the absence of a similar statute leads me to conclude that the General Assembly has not granted implied authority for localities to supplement the salaries of the public defender or his staff.

You also inquire whether an employee of the public defender's office would violate any conflict of interests laws by soliciting or accepting such supplements from a locality. Since localities lack the authority to provide such payments, the question regarding acceptance of such a payment is moot.

### **Conclusion**

Accordingly, it is my opinion that a locality does not have the authority to supplement the salaries of the public defender or his staff. Because I reach such conclusion, it is unnecessary to address the conflict of interests question that you present.

<sup>1</sup>For purposes of this opinion, the term "locality" collectively refers to cities and counties.

<sup>2</sup>Specifically, you ask whether § 2.2-3103, which prohibits certain conduct by state or local government employees, would affect the proposed appropriations.

<sup>3</sup>The General Assembly has established several public defender offices that serve multiple localities. See Va. Code Ann. § 19.2-163.04(t) (LexisNexis Supp. 2005) (combining city of Charlottesville and Albemarle County). The duties of public defenders and their assistants are delineated at § 19.2-163.3.

<sup>4</sup>Section 19.2-163.01 (LexisNexis Supp. 2005).

<sup>5</sup>See § 19.2-163.01(B) (providing that executive director, with approval of Commission, sets compensation for public defenders and their personnel).

<sup>6</sup>Norton v. City of Danville, 268 Va. 402, 408 n.3, 602 S.E.2d 126, 129 n.3 (2004); see also Arlington County v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (*quoting* City of Va. Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

<sup>7</sup>See Va. Code Ann. §§ 15.2-900 to 15.2-975 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

<sup>8</sup>See §§ 15.2-1100 to 15.2-1132 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

<sup>9</sup>See §§ 15.2-1200 through 15.2-1249 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

<sup>10</sup>Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

<sup>11</sup>Tabler v. Bd. of Supvrs., 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980).

<sup>12</sup>*Id.* Apparently, no bills specifically addressing the issue of local supplementation of public defender offices previously have been introduced in the General Assembly.

<sup>13</sup>*Id.*

<sup>14</sup>The *Virginia Code* is one body of law. When possible, statutes are construed "with a view toward harmonizing" them with other statutes. See Branch v. Commonwealth, 14 Va. App. 836, 839, 419 S.E.2d 422, 425 (1992). Moreover, much can be inferred from the absence of statutory provisions or language in the *Code*, particularly when comparing related statutes therein. See, e.g., Indus. Dev. Auth. v. Bd. of Supvrs., 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002) (holding that when General Assembly includes specific language in one section of act, but omits that language from another section, courts presume that exclusion of language was intentional); Williams v. Matthews, 248 Va. 277, 284, 448 S.E.2d 625, 629 (1994) (holding that when statute contains given provision with reference to one subject, omission of such provision from similar statute dealing with related subject is significant to show existence of different legislative intent); Forst v. Rockingham Poultry Mktg. Coop., 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981) (holding that when General Assembly uses two different terms in same act, it is presumed to mean two different things).

<sup>15</sup>Section 15.2-1605.1 (LexisNexis Repl. Vol. 2003). The Commonwealth's attorney is responsible for prosecutions at the local level. See § 15.2-1627(B) (LexisNexis Repl. Vol. 2003). Section 19.2-163.01(A)(13) allows the Virginia Indigent Defense Commission "[t]o receive and expend moneys appropriated by the General Assembly of Virginia and *to receive other moneys as they become available to it* and expend the same in order to carry out the duties imposed upon it." (Emphasis added.) This language, however, is neither an express nor an implied authorization for the localities to provide such funds.

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