



## Legislative Fiscal Bureau

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February 7, 2018

TO: Members  
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: District Attorneys: Section 13.10 Request to Create a 1.0 Assistant District Attorney Project Position in Marinette County -- Agenda Item II

### REQUEST

The Department of Administration (DOA) requests that the Joint Committee on Finance authorize the creation of a 1.0 assistant district attorney (ADA) project position in the Marinette County District Attorney's Office from January 1, 2018, through December 31, 2019. This position would be supported by funds appropriated to the District Attorneys "salaries and fringe benefits" appropriation (s. 20.475(1)(d)) for special prosecutors under s. 978.045(1r)(bp). Consequently, no supplemental funding is requested. The request is only for approval of the additional GPR project position authority.

This request was submitted to the Joint Committee on Finance on December 11, 2017, under s. 13.10 of the statutes.

### BACKGROUND

*Request Background.* In 2017 Act 59, a new provision was added to the special prosecutor provision in Chapter 978. This provision allows a special prosecutor to be appointed to provide case assistance in counties with a population of less than 45,000 people with a "significant case backlog" as certified by the Department of Administration (DOA), if a petition for such an appointment is approved by the affected county board. The provision sunsets on December 31, 2019. The provision provided \$41,000 GPR in 2017-18 and \$82,100 GPR in 2018-19 in the District Attorneys "salaries and fringe benefits" appropriation.

On October 6, 2017, DOA received requests from Circuit Court Judge James A. Morrison and the Marinette County District Attorney (DA) asking DOA for the appointment of a special prosecutor under Act 59. On October 31, 2017, the Marinette County Board passed a resolution

supporting the request for a special prosecutor. Marinette County was the only county to submit an application. On November 9, 2017, DOA certified that the Marinette County's DA's office has a "significant case backlog" and has otherwise met the requirements under Act 59.

A special prosecutor is not a state position but rather is paid on an hourly basis. On December 5, 2017, the DA indicated to DOA her difficulty recruiting for a position that does not qualify for state benefits. The District Attorney requested that the State Prosecutors Office request, through the s. 13.10 process, the creation of a 1.0 GPR ADA project position assigned to Marinette County for the period January 1, 2018, through December 31, 2019, using the funds provided for the special prosecutor. This full-time project position would qualify for state benefits.

The administration estimates that a 1.0 GPR ADA project position base salary and fringe rate costs \$71,000 per year. The requested position is estimated to cost \$34,700 in 2017-18, \$75,100 in 2018-19, and \$37,600 in 2019-20. This estimate assumes that the person hired worked in another DA office and would, therefore, be eligible for pay progression after six months rather than after a year.

*Staffing the Marinette DA's Office.* The Marinette County DAs Office currently consist of 2.5 state funded positions. In June, 2016, a longtime ADA in the Marinette DA's Office left the office. In June, 2017, the DA left and there has been turnover of county funded support staff. Currently, Marinette county has one DA and one ADA. Also, Marinette County is authorized an additional 0.5 GPR ADA, a position which has been vacant since June, 2016, and 0.5 PR ADA, supported from county revenues. The PR position was vacant from its creation in March, 2017, until it ended in December, 2017.

In addition, a special prosecutor is working about four hours a week on Child in Need of Protection and Services (CHIPS) cases. According to the DA, the CHIPS special prosecutor position was created upon the initiative of the two Marinette County Circuit Court judges. The position began August 1, 2016. This position was filled, because the judges had arranged for an attorney who was working part-time for the Marinette County Corporation Counsel's Office handling child support matters to act as special prosecutor for CHIPS cases until the second ADA position in the Marinette County DA's Office could be filled.

According to the DA, the 0.5 GPR ADA position was last posted in June or July, 2016. The DA believes the posting did not receive any qualified applicants. Due to this issue with recruitment, the former DA, began discussions with the Marinette County Board of Supervisors in the fall of 2016 to determine if it would contribute salary and benefits for a 0.5 PR ADA position. The goal was to merge these two 0.5 ADA positions (one GPR and one PR) to make a 1.0 ADA position. The Marinette County Board of Supervisors agreed to fund a 0.5 PR ADA position. On March 28, 2017, the Joint Committee on Finance approved a 16.505 request for this 0.5 PR ADA position through December 31, 2017.

In June, 2017, after the current DA was appointed, she requested that DOA post two 1.0 ADA position vacancies. One of those vacancies was a 1.0 GPR ADA vacancy to replace the position the DA herself vacated when appointed DA. The other was the combination 0.5 GPR /0.5

PR ADA position that would remain a 1.0 ADA position through December 31, 2017 at which time it would revert to the 0.5 GPR ADA position unless the county agreed to continue to fund the 0.5 PR ADA position. The DA was able to hire one ADA to fill the permanent 1.0 GPR ADA position, but was unable to fill the other position.

In June, 2017, the Marinette County Board declined to extend funding for the 0.5 PR ADA position due to the expiration of the vacant position on December 31, 2017. The Marinette County Board requested that the DA's office hold on hiring for the GPR/PR ADA vacancy pending the potential receipt of funding under the special prosecutor's budget provision.

*Caseload.* At the end of September, 2015, when the office was fully staffed with experienced attorneys and support staff, the office filed 180 new felony cases; 126 new misdemeanor cases; and 200 new criminal traffic cases. At the end of September, 2016, the office had filed 169 new felony cases; 59 new misdemeanor cases; and 150 criminal traffic cases. As of the end of September, 2017, the Marinette County District Attorneys' Office has filed 172 new felony cases; 71 new misdemeanor cases; and 166 new criminal traffic cases. These numbers indicate a general decline in the number of misdemeanor cases filed between 2015 and 2017. This general trend in the decline of misdemeanor cases filed reflects a similar decline statewide.

According to the DA, when she first started in the Marinette County DA office in July, 2009, in the 0.5 GPR ADA position, there was practically no backlog in cases to review. She attributes this to a fully staffed office with experienced attorneys and support personnel. According to DA, in June 2017, there were 424 unreviewed cases. On December 13, 2017, the office had 472 unreviewed criminal cases of which 155 were felonies, 303 were misdemeanors and 14 were criminal traffic cases. Between mid-September and mid-December, 2017, the office received 208 referrals that were not reviewed as of mid-December, 2017.

## **ANALYSIS**

Of particular concern in the hiring of an ADA in Marinette County has been the eligibility for or ineligibility of part-time positions or special prosecutors to state benefits. The eligibility for state benefits depends on both the prior employment status of the person being hired and the position for which the person is hired. Under current law, to be eligible for state healthcare benefits, an employee must be eligible for Wisconsin Retirement System (WRS) benefits. An employee who began employment on or after July 1, 2011, must work at least two-thirds time, defined by administrative rule to be 1,200 hours, to qualify for participation in the WRS. Secondly, the employee must be expected to be employed for at least one year.

This eligibility provision applies differently to a person employed by a WRS employer prior to July 1, 2011. Employees in this group would have had to work at least 600 hours and elected to participate in the WRS system to be WRS eligible in a 0.5 position after July 1, 2011. Therefore, for example, if an ADA was first hired for the 0.5 ADA position in 2010, since the position would have to work more than 600 hours per year, and, thus, be eligible for state benefits. When the position was made ineligible for state benefits starting in July, 2011, the ADA continued to be

eligible for benefits because of prior WRS eligibility before 2011, and continued 1,040 hours per year service (the hour equivalent of a 0.5 position).

If the ADA left the 0.5 ADA position in 2015 for a 1.0 ADA position, the position the ADA left would have been ineligible for benefits since 2011 for any newly hired Individual. A person hired for this position could receive benefits if they, like the hypothetical ADA, were eligible as an individual for benefits because they had worked more than 600 hours per year and participated in the WRS system prior to July, 2011, or qualified for WRS benefits in their previous job. The Marinette DA indicates that a person hired for the 0.5 GPR ADA position at the Marinette County DA's office would likely not have WRS service prior to July 1, 2011.

The DA attributes the lack of qualified applicants to the position not qualifying for state benefits. Given the difficulty that Marinette County DA's office has had filling a position without state benefits since 2016, and DOA's prior finding of a significant backlog, the Committee could approve the DA's request for a 1.0 GPR ADA project position, which would qualify for state benefits, from January 1, 2018, through December 31, 2019. [Alternative 1]. This alternative would allow the Office to hire a fully benefited position for a two-year period.

Only certain types of prior employment with the state allow an employee's eligibility for state benefits to still qualify once there has been a change in the status of the position, either in number of hours worked and whether the position is project or permanent. A project position (a position established for less than four years to address temporary workload issues for a planned under-taking) must be expected to last more than a year in order to be eligible for state benefits. Therefore, the combined 0.5 GPR ADA/0.5 PR ADA position may not have qualified for state benefits, since it was only authorized as a 1.0 position for nine months.

An employee may move from a permanent position to a project position and maintain their benefits, but an employee may not move from a full-time project position to a 1,040 hour permanent position and remain eligible for state benefits. Therefore, once the 1.0 project position expires in 2019, it could be argued that the Marinette County DA's office would be left with the 0.5 GPR ADA position, which would not be eligible for state benefits. In addition, as identified above, even if the ADA in the project position wants to remain in the 0.5 GPR ADA position, they may choose not to, as their prior service in the project position would not be carried forward to the part-time permanent position. The fully staffed office, as indicated previously, has 2.5 attorneys. If the 0.5 GPR ADA position cannot be filled, it is likely that a backlog may again start to accumulate.

If the ADA GPR position were 0.5 permanent and 0.5 project position for two years, which would qualify it for state benefits, the person in the position, if they chose to stay in the permanent 0.5 GPR ADA position, would lose any accumulated sick leave or vacation benefits from the project portion of the position, but would remain eligible for healthcare benefits. However, if the person occupying the position left, the same difficulties in hiring new for a 0.5 GPR position would remain.

In order to address the issues of benefits eligibility, and caseload management, the existing 0.5 GPR position could be increased to 0.6 GPR, so that the position qualifies for state benefits,

and combined with a 0.4 GPR ADA project position from January 1, 2018, through December 31, 2019. [Alternative 2] This alternative would provide the additional support the office indicates it needs to address the backlog, while also leaving the office with a position that can be filled at the end of the two-year period, as the indicated main obstacle, the lack of state benefits, will be removed. In addition, the additional 0.1 GPR ADA permanent position and 0.4 GPR ADA project position estimated base salary and fringe rate would be \$17,400 in 2017-18, \$37,600 in 2018-19, and \$18,800 in 2019-20.

According to the DA: "Increasing the 0.5 FTE position to a full-time special prosecutor for a limited time will allow this office to hire a qualified full-time attorney. The addition of this position over a two-year period, will allow this office to keep pace with current incoming referrals and allow the office to address the backlog."

If the request is not approved, Marinette County DA's Office will still have funding available to hire a special prosecutor to address the DOA certified case backlog. The special prosecutor funding would allow a special prosecutor to work the equivalent hours of a 0.78 ADA position. [Alternative 3]

## **ALTERNATIVES**

1. Approve the Department of Administration's request to create a 1.0 GPR assistant district attorney project position in the Marinette County District Attorney's Office, from January 1, 2018 through December 31, 2019. *[This position would be funded with monies already provided under the District Attorneys' GPR appropriation.]*
2. Create a 0.4 GPR assistant district attorney project position in the Marinette County District Attorney's Office, from January 1, 2018 through December 31, 2019 and increase the permanent 0.5 GPR assistant district attorney position to a permanent 0.6 GPR position.
3. Deny the request.

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