

4TH EDITION

# Constitutional Officers: Budgeting, Contracting, and Other Critical Issues

A GUIDE FOR COUNTY COMMISSIONERS



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Advancing Georgia's Counties.

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# Introduction

In Georgia, local government at the county level is structured so that power is distributed to several independent officials. One of the most challenging aspects of being a county commissioner is harmoniously and efficiently working with other elected county officials. Sometimes these relationships falter because of the personalities of one or more individuals involved. More often, problems arise from the basic tension established in the Georgia Constitution and statutes between the fiscal duties of the board of commissioners and the independent authority of other elected county officials. This tension is compounded by a lack of understanding among the board of commissioners and elected county officials of each other's duties and responsibilities under the law. As constitutional officers and county commissioners are elected officers, there is a great deal of coordination and cooperation required to balance the board of commissioners' fiduciary and fiscal duties to the county taxpayers with constitutional officers' functions established by law.

While certain state statutes and cases help guide county officials, it is not often clear where the board of commissioners' fiscal authority ends and the constitutional officers' statutory duties begin (and vice versa). In the past, there were a number of gray areas in the law that separated the powers of the board of commissioners and constitutional officers. However, the appellate courts have clarified several of these areas—mostly by taking fiscal authority away from the board of commissioners and giving it to constitutional officers. Generally, county commissioners and other elected officials are able to maintain a more positive relationship when all parties understand and respect the boundaries of their authority.

This guide is designed to help county commissioners understand the law and better identify the limits of their authority. It begins with a basic explanation of the structure of county government and then focuses on budgets, contracts, purchasing, salaries, employees, lawsuits, fees, and drug and forfeiture money. While the umbrella of county government includes many county elected and appointed officials, this guide focuses on the relationship between the board of commissioners and county constitutional officers, which include sheriffs, superior court clerks, probate judges and tax commissioners.

## TERMINOLOGY

For purposes of this guide the term “constitutional officer” will be used throughout to represent the four county-level constitutional officers—sheriff, probate judge, superior court clerk, and tax commissioner.

# Basic County Government Structure

The Georgia Constitution addresses the issue of county governance by allocating power between a county governing authority<sup>1</sup> (i.e., a board of commissioners) and county-level constitutional officers. The Georgia Constitution creates the positions of the constitutional officers, but leaves their duties to be determined by general law.<sup>2</sup> The board of commissioners, on the other hand, is given its authority both through the Constitution and through statute.

## COUNTY COMMISSIONERS

The board of commissioners serves as the governing body of the county. As such, they perform multiple roles including legislator, regulator, service provider, and fiscal authority. To ensure transparency in their operations, the board of commissioners must conduct the county's business in the open and maintain records (i.e., minutes, resolutions, ordinances, etc.) so that citizens may examine for themselves how their tax dollars are used.

The board of commissioners is required to abide by laws establishing how to

- approve and record contracts;
- adopt and amend budgets;
- audit funds;
- lawfully obligate the county;
- publicly bid projects;
- invest county funds;
- protect taxpayer dollars from lawsuits and claims;
- provide benefits for employees;
- provide payroll services; and
- responsibly bind the county.

## TERMINOLOGY

For convenience, the term “board of commissioners” is used throughout this guide to reflect the county governing authority, regardless of whether the county governing authority for a specific county is a board of commissioners, a sole commissioner, or the governing body of a consolidated government.

## COUNTY COMMISSIONERS AS LEGISLATORS AND REGULATORS

County commissioners serve as legislators at the county level. The board of commissioners is constitutionally vested with the legislative power to “adopt clearly reasonable ordinances, resolutions, or regulations” regarding county property, affairs, and government in general. However, the power to adopt ordinances, resolutions, and regulations is only valid if there is not a general state law on the same subject and these local laws are not inconsistent with the Georgia Constitution.<sup>3</sup>

<sup>1</sup> Official Code of Georgia Annotated (O.C.G.A.) § 1-3-3(7).

<sup>2</sup> The clerk of the superior court, judge of the probate court, sheriff, and tax commissioner are elected by qualified voters of their respective counties for terms of four years and shall have qualifications, powers, and duties as provided by general law. GA. CONST. art. IX, § 1, para. 3 (a).

<sup>3</sup> GA. CONST. art. IX, § 2, para. 1(a).

The following are specific types of ordinances authorized by the Constitution or statute for enactment by the board of commissioners:

- Adult bookstores and movie houses
- Precious metal and gem dealers
- Alcoholic beverages
- Public drunkenness
- Animal licensing
- Public indecency
- Auctioneering
- Rabies control
- Billiard rooms
- Removal of junk vehicles
- Building codes
- Repairing, closing and demolishing unfit buildings
- Cable television
- Sale of model glue to minors<sup>4</sup>
- Dangerous dogs
- Disorderly conduct
- Drainage basins
- Signs
- Fortune-telling
- Smoking in public places
- Historic preservation
- Soil erosion and sedimentation control
- Inspection of meats, poultry, and dairy products
- Solid waste handling and disposal
- Litter
- Street gangs
- Loitering
- Traffic regulation
- Off-road vehicles
- Used vehicle and used vehicle parts sales
- Zoning

#### **COUNTY COMMISSIONERS AS PROVIDERS OF SERVICES THAT PROTECT THE HEALTH, SAFETY, AND WELFARE OF THE CITIZENS**

In addition to granting legislative power, the Georgia Constitution also gives supplementary powers to the board of commissioners. These powers allow the board to provide services that include police and fire protection, solid waste collection and disposal, public health facilities and services, and road construction and maintenance.<sup>5</sup>

#### **COUNTY COMMISSIONERS AS FISCAL AUTHORITY AND SERVICE PROVIDER**

The board of commissioners has the fiscal authority to determine the budget and establish a millage rate to raise the revenues necessary to provide services required or permitted by law and desired by citizens. With the fiscal and fiduciary authority given to the board of commissioners comes great fiscal responsibility.<sup>6</sup> The board of commissioners is also vested with the ability to create special tax districts to provide for local government services within their counties.<sup>7</sup>

4 O.C.G.A. § 42-4-4.

5 For the complete list see GA. CONST. art. IX, § 2, para. 3.

6 O.C.G.A. §§ 36-81-3; 48-5-32.1(a)(3), GA. CONST. art I, §II, para. 1.

7 GA. CONST. art. IX, § 2, para. 6.

In addition to the constitutionally granted powers, the General Assembly has given the board of commissioner's original and exclusive jurisdiction to

- direct and control county property;
- levy a general tax for county purposes;
- levy special taxes for particular county purposes;
- establish, alter, or abolish roads and bridges;
- fill all vacancies in county offices (unless another body is empowered to do so);
- examine and settle claims against the county;
- examine and audit the accounts of all officers having the care, management, keeping, collection, or disbursement of money belonging to the county (or appropriated for its use and benefit);
- adopt rules and regulations for the support of the poor;
- provide county police and patrol;
- promote health;
- quarantine; and
- regulate peddling.<sup>8</sup>

## COUNTY CONSTITUTIONAL OFFICERS

There are four county positions that draw their authority from the state constitution and do not fall under the control of the board of commissioners. The terms "constitutional officers" or "county officers" typically refer to the sheriff, superior court clerk, tax commissioner, and probate judge.

Although magistrate courts are created in the Constitution and coroners, state court judges, solicitors, and surveyors are also independently elected county officials, they are not generally referred to as constitutional officers or county officers.<sup>9</sup> The powers and duties of the sheriff, superior court clerk, probate judge, and tax commissioner are determined by general law and not on a county-by-county basis.<sup>10</sup> The duties and minimum salaries of the constitutional officers are set by the General Assembly and are not within the authority of the board of commissioners to control, with the exception that discretionary supplements may be approved by the board of commissioners.<sup>11</sup>

8 O.C.G.A. § 36-5-22.1.

9 Although this guide is written specifically about constitutional officers, many of the same principles about the separation of authority would likely apply to the other elected county officials.

10 See GA. CONST. art. IX, § 1, para. 3.

11 GA CONST. art. IX, §1, para. 3(b); O.C.G.A. § 15-16-20 (sheriff); O.C.G.A. § 48-5-180 (tax commissioner); O.C.G.A. § 15-6-88 (superior court clerk); O.C.G.A. § 15-9-63 (probate judge).

## SHERIFF

The sheriff has the right and duty to enforce the laws enacted for the protection of the lives, property, health, and morals of the people.<sup>12</sup> While the office of the sheriff must be kept at the county seat and at the courthouse, the sheriff may also operate administrative facilities in areas of the county located outside the county seat.<sup>13</sup>

The sheriff is required to

- serve court papers;
- attend all sessions of the superior court and the probate court when required;
- be present and preserve order at all election locations while the polls are open;
- publish sales and other proceedings as required by law;
- keep records of publications;
- keep an execution docket;
- keep a book listing all sales by process of the courts;
- keep inmate records;
- receive and process all unexecuted writs from the previous sheriff;
- perform other duties as imposed by law or which necessarily pertain to his or her office;
- exercise the same duties, powers, and arrest authority within municipalities as within unincorporated areas;
- prepare and implement a courthouse security plan;<sup>14</sup>
- appoint one or more deputies;<sup>15</sup>
- set deputies' salaries;
- serve as the jailer and appoint other jailers;<sup>16</sup>
- take custody of the jail and inmates from the previous sheriff;
- furnish inmates with food, shelter and health care;<sup>17</sup>
- take arrestees to a jail in another county if his or her jail is in an unsafe condition;<sup>18</sup> and
- transport of mental patients.<sup>19</sup>

12 See *Elder v. Camp*, 193 Ga 320 (1942); *Veit v. State*, 182 Ga. App. 753 (1987).

13 O.C.G.A. §§ 15-16-9, 15-6-61(a)(1), 15-6-86; *Brewster v. Houston County*, 235 Ga. 68 (1975).

14 O.C.G.A. § 15-16-10.

15 O.C.G.A. § 15-16-23.

16 O.C.G.A. § 42-4-1.

17 O.C.G.A. § 42-4-32.

18 O.C.G.A. § 42-4-4.

19 O.C.G.A. § 37-3-101.

## TAX COMMISSIONER

The offices of tax receiver and tax collector have been consolidated into the office of tax commissioner in every county. Tax commissioners are authorized to collect certain taxes and fees. Funds collected by the tax commissioner must be transferred to the county general fund at least once per week or once every two weeks, depending upon the size of the county.<sup>20</sup> The tax commissioner is required to keep a cashbook to record all cash collected for taxes, as well as disbursements of such funds to the proper state and local authorities. Generally, this book must be balanced and filed by April 20th of each year with the board of commissioners, who have the power to audit it.<sup>21</sup>

Each year, the tax commissioner is required to render an account of official actions and to exhibit books, vouchers, and accounts to the board of commissioners. If the tax commissioner fails or refuses to do so after being notified by the board of commissioners, then the commissioners must suspend the tax commissioner from office pending a decision from the courts about whether the tax commissioner should be removed from office.<sup>22</sup>

The tax commissioner is required to

- collect county taxes;
- pay tax funds promptly to the county general fund;
- maintain an insolvent list;
- post and maintain a notice of days the office is open for collecting taxes (as well as regular office hours);
- issue executions for all unpaid taxes due the state or county;
- keep a permanent qualification or voters' book;
- make up registration lists as provided by the elections code;
- perform all duties pertaining to the office of tax collector,<sup>23</sup> and
- receive lists of uncollected taxes and uncompleted duties from previous tax commissioner.<sup>24</sup>

## SUPERIOR COURT CLERK

The powers and duties of the superior court clerk are mostly ministerial and include the maintenance of court records, registration of property transactions, oversight of the board of equalization, and recording of subdivision plats. To help perform duties of the office, the clerk may appoint deputy clerks.<sup>25</sup>

20 O.C.G.A. § 48-5-141. Tax commissioners must transfer collected tax money each week in counties with a population of 30,000 or more, and every two weeks in counties with a population of under 30,000.

21 O.C.G.A. §§ 48-5-138, 48-5-139, 48-5-154.

22 O.C.G.A. § 48-5-140.

23 O.C.G.A. § 48-5-127.

24 O.C.G.A. §§ 48-5-164; 48-5-128.

25 O.C.G.A. § 15-6-59(b).

The superior court clerk is required to

- record all proceedings in civil and criminal court cases;
- record the final record of every part of the pleading in every case, including garnishments, affidavits, bonds, and attachments in any judicial proceeding;
- reference the location of any subsequent paper in the original record of the case;
- keep the clerk's office at the county site and at the courthouse or other locations authorized by law;
- attend to the needs of the court;
- issue and sign every summons, writ, execution, order, or other paper under authority of the court;
- keep automated civil and criminal case management systems;
- keep a docket for recording all deeds, liens, and other documents regarding title to real or personal property;
- keep all law books furnished to the clerk for the public's convenience<sup>26</sup> (clerk may consent that these publications be maintained at the public law library);
- administer oaths required by the court or as required by law;
- participate in state-wide uniform automated system for real and personal property records;
- participate in carbon sequestration registry network;
- transmit and remit information and fees to the Georgia Superior Court Clerks Cooperative Authority;
- keep an automated, computer-based jury management system; and
- participate in agreements, contracts, and networks necessary for job performance.

### PROBATE JUDGE

The duties of the probate judge are judicial, ministerial, and clerical. Probate judges are required to

- probate wills;
- grant and repeal letters of testamentary and administration of an estate;
- settle controversies on the right of executorship or administration of an estate;
- sell and distribute property of deceased persons' estates;
- appoint and remove guardians for minors and the mentally incompetent;
- resolve controversies on the right of guardianship;
- audit and pass returns of all executors, administrators, and guardians;
- discharge former sureties and require new sureties from administrators and guardians;
- handle all other matters relating to the estates of deceased persons and the mentally incompetent;<sup>27</sup>

26 O.C.G.A. §§ 15-6-61, 15-6-62.

27 O.C.G.A. § 15-9-30(a)(10).

- perform county governmental administration duties under specific circumstances;
- serve as election superintendent (when there is no local legislation creating an elections board);
- fill vacancies in public offices;
- administer oaths to public officers;
- accept, file, approve, and record bonds of public officers;
- register and permit certain enterprises;
- issue marriage licenses;
- hear traffic cases (when there is no state court);
- receive pleas of guilty and impose sentences for fish and game violations;
- hold criminal commitment hearings;<sup>28</sup>
- hear cases involving the removal of road obstructions;
- conduct trials for certain misdemeanors;<sup>29</sup> and
- issue weapons carry and renewal licenses.<sup>30</sup>

28 O.C.G.A. § 15-9-30(b)(10).

29 O.C.G.A. §§ 15-9-30.1 through 15-9-30.9. These misdemeanors include violations of state rules and regulations regarding parks, historic sites, and recreational areas, violations of the “Georgia Boat Safety Act,” possession of less than an ounce of marijuana, the purchase or possession of alcohol by a minor, and cases involving litter on public and private property.

30 O.C.G.A. § 16-11-129.

# The Budget

The board of commissioners is responsible for approving the annual budget for all operations of the county, including the constitutional officers.<sup>31</sup> The budget must be balanced and account for each unit of the county.<sup>32</sup> While that sounds simple enough, the fact that independent elected county officials are also funded through the budget makes it very complicated.

A constitutional officer may insist that he or she needs additional funds to buy equipment, hire additional staff, or pay overtime to employees. On one level, this is no different than the same claims made by a department head; they are simply looking for additional funds to do their jobs. On another level, however, there is a significant difference. The constitutional officers are independent elected officials. As such, they are not employees of the commissioners and are not subject to supervision by the board of commissioners. Constitutional officers are charged by law to perform their duties and depend upon the board of commissioners to adequately fund them. While not obligated to give constitutional officers whatever they claim to need, the board of commissioners is charged by law to properly fund the constitutional officers.

## SETTING THE BUDGET

The preparation and administration of the budget is the responsibility of the county budget officer.<sup>33</sup> The duties of the budget officer are performed either by the board of commissioners or by someone appointed by the board of commissioners (e.g., the county manager, county administrator, or finance director).<sup>34</sup> The process of passing a budget begins with the submission of proposed budgets by the various departments and by the constitutional officers. Constitutional officers must include the amount of anticipated revenues by source and the amount budgeted for expenditures (i.e., at the department level, unless a more detailed legal level of control is adopted) in the proposed budgets they submit.<sup>35</sup> At this point, the board of commissioners is free to make reasonable adjustments to the proposed budget, including funding cuts. The board of commissioners is vested with the final decision as to where to allocate county property and funds.

Whether the board of commissioners has fulfilled their duty to make reasonable and adequate provisions to enable a constitutional officer to perform his or her duty is judged by an abuse of discretion standard.<sup>36</sup> The board of commissioners must be able to provide a reasonable explanation as to why county property funds were allocated a certain way.<sup>37</sup> The Georgia Supreme Court has stated that it will only reverse the board of commissioners' budget decision if "it is clear and manifest" that the board of commissioners abused their discretion in establishing a budget.<sup>38</sup> Once balanced, the budget is implemented by passage of a local ordinance or resolution.<sup>39</sup>

31 O.C.G.A. §§ 36-81-3(a), 36-81-3(b)(1).

32 A budget is balanced when the sum of estimated revenues and appropriated fund balances is equal to appropriations. O.C.G.A. § 36-81-3(b)(3).

33 O.C.G.A. § 36-81-2(2).

34 O.C.G.A. § 36-81-4.

35 O.C.G.A. § 36-81-5(b).

36 E.g., Chaffin v. Calhoun, 262 Ga. 202 (1992); Griffies v. Coweta County, 272 Ga. 506 (2000); Board of Commissioners of Randolph County v. Wilson, 260 Ga. 482 (1990); Lovett v. Bussell, 242 Ga. 405 (1978) quoting Dunn v. Beck, 144 Ga. 148 (1915).

## HOW MUCH IS ENOUGH?

Any budget approved by the board of commissioners must be reasonable and must provide reasonably sufficient funds to allow the constitutional officer to discharge his or her legal duties.<sup>40</sup>

There is a fine line between providing what the board of commissioners believes is a reasonable budget and dictating to a constitutional officer how to perform his or her statutory duties. On one hand, in order for the board of commissioners to make an educated decision about what is a reasonable budget, the board should know about the types of services that the constitutional officer provides, the impact of state or federal mandates, the workload of the constitutional officer, and budgets of other county officials in similarly situated counties. On the other hand, that knowledge naturally may result in the board of commissioners having opinions about how the constitutional officer could perform his or her duties more efficiently and more effectively with less staff or different equipment. However, trying to make the constitutional officer accept those opinions could run afoul of the prohibition against dictating to an officer how to perform his or her duties.

In *Chafin v. Calhoun*, the board of commissioners removed 47 percent of the sheriff's proposed budget to avoid duplication of effort and expense when the responsibility for patrols and drug enforcement shifted from the sheriff's office to the new county police department. Avoiding duplication of effort and expense was seen by the Georgia Supreme Court as a reasonable decision by the board of commissioners and the transfer of such duties did not divest the sheriff's office of all law enforcement responsibilities.<sup>41</sup> However, in *St. Lawrence, Beam, and Prouse v. The Board of Commissioners of Chatham*, a percentage across-the-board reduction in all county department budgets (including constitutional officer budgets) was deemed not acceptable by the trial court. The Chatham County Superior Court held that the board of commissioners failed to properly exercise their discretion by neglecting to consider the varying needs of constitutional officers relative to other county needs.<sup>42</sup>

37 Paul Vignos, Georgia Local Government Law: Court Resolution of County Government Disagreement, 46 Mercer L. Rev. 599, 623 (1994).

38 Lovett v. Bussell, 242 Ga. 405 (1978).

39 O.C.G.A. § 36-81-3(b)(1).

40 Chaffin, 262 Ga. at 203-04.

41 *Id.*

42 St. Lawrence, Beam and Prouse v. The Board of Commissioners of Chatham County, Georgia, CV01-1479 Superior Court of Chatham County (December 7, 2001).

## HOW FUNDS APPROPRIATED THROUGH THE BUDGET ARE SPENT

While the board of commissioners is clearly responsible for preparing and maintaining the budget for all county functions, the courts have made it clear that the board of commissioners must defer to the judgment of constitutional officers when it comes to spending within the budgets approved for them.<sup>43</sup> Despite the board of commissioners' fiscal control, they have no say in how the constitutional officers manage their department or carry out their duties established by law.<sup>44</sup> Once the funds are appropriated in the budget, it is within the discretion of each constitutional officer to spend those funds as he or she sees fit, keeping in mind that money may not be moved—except within the established legal level of control—without board approval.

## SETTING THE LEGAL LEVEL OF CONTROL

The law states that, at a minimum, the legal level of control must be at the department level.<sup>45</sup> This means that the budget officer, a department head, or a constitutional officer may be able to transfer money to different budget categories within their own department without having the board of commissioners adopt a budget amendment in a commission meeting. However, it also means that funds cannot be transferred from one department to another department unless the board adopts a budget amendment in a commission meeting.

The board of commissioners is free to establish a more detailed budgetary document and level of control.<sup>46</sup> This may require the board to establish more sophisticated budget procedures. Like an adjustment to the budget, changing the legal level of control must be adopted through a resolution or ordinance passed by the board of commissioners.<sup>47</sup>

## EFFECT OF SETTING A MORE DETAILED LEVEL OF CONTROL

If the legal level of control is at the department level (which is the default set in state law), then the constitutional officers may move money around within their department's budget without going before the board. However, if the board of commissioners sets the legal level of control at a more detailed level, the constitutional officers cannot move money from one budget category to another without the approval of the board of commissioners (as specified in the resolution establishing the more detailed level of control).

## TERMINOLOGY

**The legal level of control is the lowest level of budgetary detail where the county's budget officer or manager cannot reassign appropriated funds without approval of the board of commissioners.<sup>48</sup>**

43 Griffies, 272 Ga. at 508-09.

44 Griffies, 272 Ga. at 508.

45 O.C.G.A. § 36-81-2(14).

46 O.C.G.A. § 36-81-5(b).

47 *Id.*

48 O.C.G.A. § 36-81-3(d)(1).

The more detailed the level of control established by the board of commissioners, the more the board becomes involved with the spending decisions of the various departments in county government, including the constitutional officers. While a more detailed level of control may generally be appropriate, there is a risk that too detailed a level of control would encroach on the authority given to constitutional officers to carry out their duties without the approval of the board of commissioners.

In several cases, the courts have held that the board of commissioners cannot strip constitutional officers of their duties either directly through legislation or indirectly through the micromanagement of funds.<sup>49</sup> The Georgia Supreme Court has cautioned that the board cannot “attempt to do indirectly, by exercise of their fiscal authority and their control of county property, that which they could not do directly.”<sup>50</sup> Thus, the board of commissioners cannot establish a system where any spending decision by the constitutional officer requires board approval because that will essentially be dictating to the constitutional officer how to do his or her job. For instance, a legal level of control that required board approval for a change in allocation between the sheriff’s narcotics and traffic divisions could be problematic and possibly seen as the use of fiscal authority to exercise a form of direct control over the constitutional officer.

On the other hand, it may be appropriate for the level of control to be established lower than the department level. For example, it may be possible to establish a legal level of control that requires the constitutional officer to seek board approval should the officer wish to transfer funds allocated for maintenance of his or her facilities to capital expenditures. Requiring approval of the board of commissioners could be justified by the fact that the officer’s facilities are county property and that the board, in its discretion, believes that the maintenance amount was necessary for the upkeep of the officer’s facility. In another example, a legal level of control that would require board approval for transfers from capital expenditures to salaries may be appropriate, in that capital expenditures are often a one-time expense. However, increases in salaries or positions create an ongoing expense into future budget years.

## OVERSPENDING THE BUDGET

While the board of commissioners has the authority to determine the budget, they cannot determine how the budget will be spent in the exercise of the constitutional officer’s duties, as long as the amounts are within the allotted budget.<sup>51</sup> Problems arise when constitutional officers fail to remain within their budget. Unfortunately, the board of commissioners has limited options in such a case. The board can do the following:

- Talk with the constitutional officer to try to find a way to help him or her come into compliance.
- Be open to legitimate needs of a constitutional officer that may justify an amendment to increase funding for the constitutional officer.

49 Chaffin, 262 Ga. at 203; see generally, Wolfe v. Huff, 232 Ga. 44 (1974); Wolfe v. Huff, 233 Ga. 162 (1974) (hereinafter “Wolfe II”); Bd. Of Comm’rs of Dougherty County v. Saba, 278 Ga. 176, 180 (2004); see Boswell v. Bramlett, 274 Ga. 50, 50 (2001).

50 Wolfe II, 233 Ga. at 164.

51 *Id.*

- Do nothing until the constitutional officer's budget is exhausted prior to the end of the fiscal year. However, even if the constitutional officer unlawfully overspends his or her budget, the county is still obligated by the Fair Labor Standards Act (FLSA) to pay the wages and overtime of the employees of the department.
- Engage in a battle in the press about which elected official is a better steward of county property tax dollars.
- Educate the public through reports and audits regarding the use and misuse of their tax dollars.
- File a petition for mandamus in superior court, asking the judge to order the constitutional officer to stay within budget.<sup>52</sup>

Obviously, some options are preferable to others. Although personalities often get in the way, county commissioners need to remember that they are trustees with a fiduciary responsibility to the citizens in selecting which course of action to take in resolving budget disputes.<sup>53</sup>

## BUDGET AMENDMENTS

Even though the budget is set at the beginning of the fiscal year, the board of commissioners has the ability to amend the budget to adapt to changing governmental needs.<sup>54</sup> The board also has the authority to amend or change estimates or required expenditures of a constitutional officer anytime during the fiscal year.<sup>55</sup> If the amendment involves the reallocation of funds at the legal level of control, the amendment is subject to approval by the board of commissioners through adoption of a local ordinance or resolution.<sup>56</sup>

## CLOSING THE COURTHOUSE AS A COST-SAVING MEASURE

During tough economic times, many boards of commissioners have considered unpaid holidays or furlough days for their employees. While boards can clearly require their employees to take furlough days, they cannot impose furlough days on employees of the constitutional officers unless the employees are under the county's civil service system. While the board of commissioners may not be able to require furlough days, they do have the ability to close the courthouse by formally declaring a public holiday, which can reduce the cost of maintenance, utilities, and salaries of board employees.<sup>57</sup> In closing the courthouse, the board of commissioners must be mindful that some constitutional officers located in the courthouse have office hours dictated by law.<sup>58</sup> However, with the board closing the courthouse by declaring a public holiday, constitutional officers may vary the office hours dictated by law. It is within the discretion of constitutional officers to rearrange their employees' schedules around the closing or not. Boards of commissioners are strongly encouraged to discuss the option of furlough days or closing the courthouse and the impact on the public with constitutional officers prior to taking such actions.

52 Id.; see, e.g., Haralson County v. Kimball, 243 Ga. App. 559 (2000).

53 GA. CONST., art. 1, § 2, para. 1; Malcolm v. Webb, 211 Ga. 449, 459 (1955).

54 O.C.G.A. § 36-81-3(d).

55 O.C.G.A. § 36-5-22.1(7); Board of Commissioners of Randolph County v. Wilson, 260 Ga. 482 (1990).

56 O.C.G.A. § 36-81-3(d).

57 O.C.G.A. § 36-1-12; Mobley v. Polk County, 242 Ga. 798 (1979).

58 See O.C.G.A. §§ 15-6-93 and 15-9-83.

In the case of a clerk of superior court with at least one employee, the office must be open Monday through Friday from 9:00 a.m. until 5:00 p.m., unless the office is open on Saturdays. The clerk may close the office for inclement weather if other constitutional offices are closed. In counties with a population of less than 10,000, the clerk may close the office for lunch if all other county offices are closed for lunch. The clerk is not required to open the office on any public and legal holiday or day of rest recognized and designated as such by the county commissioners. Finally, the clerk may close the office for training every six months under certain conditions.<sup>59</sup> The probate judge is authorized by statute to establish his or her office hours, with the requirement that the office be closed on Sundays and may be closed one other additional day.<sup>60</sup>

59 O.C.G.A. § 15-6-93.

60 O.C.G.A. § 15-9-83.

# Compensation of County Officials

When constitutional officer positions were initially created, officers were allowed to keep the fees they collected as salary. However, the General Assembly later established minimum salaries for all of the constitutional officers in lieu of fees. With few exceptions, constitutional officers have moved from the fee system of compensation to a salary. Also, while most fees now are required to be paid into the county treasury, there are still a few fees that can be kept as personal compensation by constitutional officers (see Fees Kept as Personal Compensation by the Constitutional Officer, p. 38).

## CONSTITUTIONAL OFFICER SALARIES

Constitutional officers are either paid according to the state minimum salary,<sup>61</sup> based upon the county's population, or by an act of the General Assembly (i.e., local legislation), whichever is greater. The population-based salaries are devised from the U.S. census. The population totals from the official 2010 census became effective on July 1, 2011. In any year that the Department of Community Affairs publishes a census estimate before July 1, the population in the census estimate is used unless it results in a reduction of a constitutional official's salary, in which case the 2010 census population totals should be used.<sup>62</sup> A base salary is established by statute, which is increased by state-mandated supplements for additional duties that may be performed by the constitutional officer, by longevity, and by cost of living adjustments determined by the state. Any constitutional officer paid according to a state minimum salary statute must be paid in equal monthly installments.<sup>63</sup>

The board of commissioners is authorized, but not required, to supplement a constitutional officer's salary.<sup>64</sup> However, once a supplement is given by the board, it may not be reduced or eliminated during the officer's term. If the board of commissioners wants to reduce or eliminate a supplement, action must be taken prior to January 1 of the constitutional officer's new term. The board of commissioners is also authorized, but not required, to provide a monthly expense allowance to constitutional officers based upon population.<sup>65</sup>

For more information on computing constitutional officer and other state minimum salaries, see the *ACCG Guide for Computing County Official Salaries*, available through the ACCG website at [www.accg.org](http://www.accg.org).<sup>66</sup> This guide is published annually after the cost of living adjustments are announced by the Governor's Office of Planning and Budget.

61 O.C.G.A. §§ 15-6-88, 15-9-63, 15-16-20, 48-5-183.

62 O.C.G.A. § 1-3-1(d)(2)(A).

63 O.C.G.A. §§ 15-6-88(a), 15-9-63(a)(1), 15-16-20(a)(1), 48-5-137(g), 48-5-183(b)(1).

64 O.C.G.A. §§ 15-6-88(d), 15-9-63(a)(3), 15-16-20(a)(3), 48-5-183(b)(3).

65 O.C.G.A. §§ 15-6-88.2, 15-9-64.1, 15-10-105.2, 15-16-20.2, 48-5-183.1.

66 The salary guide is endorsed and reviewed annually by the Constitutional Officers Association of Georgia.

## THE EFFECT OF FURLoughS OR REDUCTION IN CONSTITUTIONAL OFFICER SALARIES

In tight budget times, some constitutional officers may request that they be subject to furloughs or reductions in salary along with county employees. However, the Georgia Constitution restricts boards of commissioners from taking any action that impacts constitutional officer salaries.<sup>67</sup> Because of this prohibition, the board may not vary from the salaries established by law, even at the constitutional officer's request. When reduced salaries are requested, the recommended action is to pay the constitutional officer his or her state mandated compensation. The constitutional officer can then make a donation to the county for the amount of the requested reduction.

# Personnel Policies and Civil Service Systems

The Constitution not only limits the board of commissioners' authority over the constitutional officers, but also limits their authority over employees of the constitutional officer.<sup>68</sup> Personnel supervised by constitutional officers are seen as employees of the officer and not of the board of commissioners.<sup>69</sup> The board of commissioners cannot take any action affecting the personnel of constitutional officers.<sup>70</sup> The Georgia Supreme Court has interpreted this to mean that unless the constitutional officer places his or her employees in a county civil service system, the board cannot affect the conditions of their employment.<sup>71</sup>

## EMPLOYMENT DECISIONS

The constitutional officers are responsible for making employment decisions about their employees, including hiring and firing decisions and setting salaries. This is, however, all subject to the budget.<sup>72</sup>

The board of commissioners may not terminate or direct a constitutional officer to terminate an employee, because it would be a direct encroachment on the officer's constitutional power to make his or her own staff determinations.<sup>73</sup>

In years when budget cuts are necessary, the board of commissioners can, however, reasonably reduce the amount budgeted for the constitutional officer and allow the officer to decide how the reduction will occur in his or her budget. Such action is not seen as an abuse of discretion, even if it may require the constitutional officer to adjust the total number of his or her employees or their pay.<sup>74</sup>

## CIVIL SERVICE OR MERIT SYSTEMS

Personnel policies enacted by a board of commissioners only cover employees who are under the control of the board. Such policies do not apply to employees of constitutional officers, unless they are covered under a county civil service system. Employees of a constitutional officer can only be placed in a county civil service system if the officer petitions the board of commissioners to include his or her employees in the system.<sup>75</sup>

68 Id.

69 Boswell, 274 Ga. at 51; see *Marting v. Peach County, Georgia et al*, 2011 U.S. Dist. LEXIS 117655 (2011) and *Robbins v. Chatham County et al.*, 863 F. Supp. 2d 1367 (2012).

70 GA. CONST. art. IX, § 2, para. 1 (c)(1).

71 *Gwinnett County v. Yates*, 265 Ga. 504 (Ga. 1995).

72 Boswell, 274 Ga. at 50.

73 Bd. Comm'rs of Randolph County, 260 Ga. at 483-84.

74 Id.

75 GA. CONST. art. IX, § 1, para. 4; O.C.G.A. § 36-1-21.

### WHAT IS INCLUDED IN A CIVIL SERVICE SYSTEM?

State law is silent on the definition of a civil service system or what must be included in the system. Generally, a civil service system is put in place to promote public service and offer employees the inducement of promotion for merit and not political allegiance.<sup>76</sup> Essentially, it is meant to insulate the government workforce from shifting political winds to allow for effective and efficient government service.<sup>77</sup>

Several county civil service systems have been enacted across the state and, while they vary in the specifics, the broad outline of what is established is relatively consistent. Typically, the purpose of a county civil service system is to establish a personnel administration system that uses merit principles to govern the appointment, promotion, transfer, layoff, removal, discipline, and well-being of employees governed by the system.<sup>78</sup>

Many civil service systems create a classification system that identifies the type of employees covered by the system (e.g., full-time, permanent employees) and not covered by the system (e.g., part-time employees, temporary employees, department heads, contract employees, etc.). In addition, the classification system sets the duties, powers, and responsibilities of each position covered by the service. Appointments are based on merit. The fitness of an employee is generally tested through competitive examination.

The system may have position control, which provides that there are a specified number of positions. New employees may not be hired unless one of the positions is vacant. New positions may not be created without going through the board of commissioners.

A civil service board may be established to create the system's regulations and to ensure regulations are enforced. Many systems provide that an employee cannot be dismissed or disciplined except for good cause and in accordance with the regulations established in the system. Some systems provide for progressive discipline.

The courts do not seem concerned with the exact label given to the system, whether it is called a "civil service system" or a "personnel system."<sup>79</sup> It appears that what is important is the legislative action taken by the board of commissioners to officially adopt the system, not the name they choose to give it.

### HOW TO INCLUDE CONSTITUTIONAL OFFICERS' EMPLOYEES IN A CIVIL SERVICE SYSTEM

There are several steps to bringing employees of a constitutional officer under a county's personnel system:

1. The board of commissioners must create a civil service system. A civil service system must be adopted by ordinance or resolution and needs to provide for the rules and administration of the system.

76 15A Am. Jur. 2d Civil Service § 1.

77 Id.

78 For an example of a county civil service system, see the Fulton County Merit System at 1982 Ga. Laws 4896.

79 See generally, Wayne County v. Herrin, 210 Ga. App. 747 (1993).

2. The constitutional officer has to request in writing that his or her employees be covered under the county civil service system. Inclusion in the civil service system is not automatic and cannot be done unilaterally by the board of commissioners. Without the written request by the constitutional officer, the board of commissioners cannot include employees of constitutional officers in the county civil service system.<sup>80</sup>
3. After receiving the request, the board of commissioners is allowed to include the employees of the requesting constitutional officer in the civil service system by ordinance or resolution.

Once the employees are covered under the system, subsequent constitutional officers cannot remove them from coverage.<sup>81</sup> This potentially can create a problem because constitutional officers will no longer have the free reign over their hiring and firing practices that they had before entry into the system. The appellate courts have held that constitutional officers whose employees are under the county personnel system are limited in their ability to hire and fire “to vacancies created by the removal of employees in the manner provided under the applicable personnel or civil service system or vacancies created when employees resign or retire.”<sup>82</sup> Constitutional officers must abide by the hiring and firing regulations set out by the system’s board.<sup>83</sup> Inclusion under the system does not, however, make employees of constitutional officers employees of the county.

## SALARIES OF EMPLOYEES OF CONSTITUTIONAL OFFICERS

The board of commissioners is not authorized to set the salaries of employees of a constitutional officer. Those decisions are within the discretion of the constitutional officers. The boards’ authority is generally restricted to approving the budget of the constitutional officers. The constitutional officers must then make their personnel and salary decisions based on the budget approved for them by the board of commissioners.<sup>84</sup>

## EMPLOYMENT BENEFITS FOR CONSTITUTIONAL OFFICERS AND THEIR EMPLOYEES

The board of commissioners may create and maintain retirement or pension systems for any elected constitutional officers or employees paid (in whole or in part) from county funds.<sup>85</sup> Additionally, the board of commissioners is authorized, but not required, to provide group health, life, disability, liability, social security, and employment security coverage for constitutional officers, their employees, and their families.<sup>86</sup>

## FAIR LABOR STANDARDS ACT

Although employees of constitutional officers are not employees of the board of commissioners, the county may still be held liable if an employee is not treated in accordance with the Fair Labor Standards Act (FLSA).

80 Yates, 265 Ga. at 508.

81 O.C.G.A. § 36-1-21(b).

82 Herrin, 210 Ga. App. at 753 (1993).

83 *Id.*

84 Boswell, 274 Ga. 50.

85 GA. CONST. art. IX, § 2, para. 3(a)(14); O.C.G.A. § 36-1-11.1(a).

86 O.C.G.A. § 36-1-11.1(a).

## BASIC FLSA REQUIREMENTS

In general, the FLSA establishes the minimum wage and requires employees (other than those exempt as executives or administrators) to be paid overtime at 1.5 times their regular rate for each hour worked over 40 hours within a work week or receive compensatory time off at 1.5 times the number of hours worked over 40 within a workweek.<sup>87</sup>

The maximum amount of compensatory time that may be accrued by a covered employee is 240 hours. After that maximum is reached, a covered employee must be paid overtime if he or she worked more than 40 hours in a workweek. However, an employer may require employees to use compensatory time.<sup>88</sup> Employees must be permitted to use their compensatory time within a reasonable period of a request unless it would be unduly disruptive.<sup>89</sup> Employees must be paid any unused compensatory time upon separation from employment with the county.

## SPECIAL RULES FOR SHERIFF OFFICES

Because law enforcement agencies, including sheriffs, operate 24 hours per day, 7 days per week, the FLSA provides a partial exemption for law enforcement employees.<sup>90</sup> Rather than using a 40-hour workweek, a sheriff's department may have work periods of 7 to 28 days. For example, if the work period is 7 days, then these employees are entitled to overtime or compensatory time for every hour worked over 43. If the work period is 28 days, then law enforcement employees are entitled to overtime or compensatory time for every hour worked over 171.<sup>91</sup> Employees performing law enforcement activities may accumulate up to 480 hours of compensatory time.

Additionally, FLSA provides a complete exemption from overtime for law enforcement employees in departments that regularly employ fewer than five employees during the workweek.<sup>92</sup>

## FLSA ISSUES FOR COMMISSIONERS AND CONSTITUTIONAL OFFICERS

FLSA problems can occur between the board of commissioners and the constitutional officers—most often with the sheriff's office. Because sheriff offices are around-the-clock operations, a sheriff may ask for additional funding to meet what he or she believes are staffing requirements. If the board of commissioners does not provide additional funds to meet those requirements, the sheriff may schedule existing employees for overtime. Under the FLSA, the board is responsible for paying minimum wage and overtime to the sheriff's employees when they work overtime, even if there is no money set aside in the sheriff's budget for overtime. While similar problems may occur with the other constitutional officers, the problem is less likely to arise.

87 29 U.S.C. § 207(a),(o).

88 See generally, *Christensen v. Harris County*, 529 U.S. 576 (2000).

89 29 U.S.C. § 207(o)(5).

90 29 U.S.C. § 207(k).

91 29 C.F.R. § 553.230.

92 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200.

## EMPLOYMENT DISCRIMINATION

Even though a board of commissioners does not manage employees of constitutional officers, the county may still be held liable for violations of the Americans with Disabilities Act, Age Discrimination in Employment Act, and Title VII of the Civil Rights Act (i.e., discrimination based upon sex, race, religion, or national origin). County personnel systems often provide procedures that are designed to prevent discrimination or, if it does occur, handle it appropriately. As such, it is advantageous to have employees of constitutional officers covered by the county's personnel system. However, where constitutional officers' employees are not covered, they should be encouraged to develop and adhere to policies on hiring, interviewing, investigating complaints, and disciplining employees that are designed to avoid liability.

It can also be helpful if the constitutional officers' personnel policies are similar to the policies adopted for the board of commissioners' employees. The county attorney should play a key role in working with all constitutional officials to ensure that proper policies and procedures are put in place and to ensure consistency between the policies of the county offices to the extent feasible.

# The Power to Contract

Generally, boards of commissioners have “the exclusive power to incur indebtedness and to authorize contracts and purchases.”<sup>93</sup>

State law requires all contracts entered into by the board of commissioners on behalf of the county to be approved in a commission meeting and included on the minutes.<sup>94</sup> This creates a single place where any member of the public can research or access any contracts to which the board is a party.

## CONTRACTS THAT REQUIRE MUTUAL CONSENT

State law authorizes constitutional officers to approve certain contracts with the consent of the board of commissioners. Similarly, in some instances, the board is authorized to approve a contract with the consent of the constitutional officer.

## HOUSING FEDERAL PRISONERS

The board of commissioners has exclusive jurisdiction over the “directing and controlling of all property of the county.”<sup>95</sup> While the jail is “placed in the keeping of the sheriff” for purposes of protection, this power is “subject to the order of the board of commissioners.”<sup>96</sup> State law allows the sheriff to receive federal prisoners with the written consent of the board of commissioners.<sup>97</sup> This law is silent regarding how the funds generated from the housing of federal prisoners are to be handled. Because the board of commissioners is included in the approval of the contract and because housing such prisoners would increase the amount of funds and resources necessary for the jail, it is assumed that the money generated by the housing of federal prisoners is included in the county’s budget process.

## PROVIDING ADDITIONAL LAW ENFORCEMENT SERVICES FOR CITIES

The sheriff has the ability to contract with cities within the county to provide law enforcement services.<sup>98</sup> As with the ability to house federal prisoners, the ability to contract with a city requires prior written approval of the board of commissioners.<sup>99</sup> Without the board’s approval, the sheriff has no authority to enter into such a contract with a city. Unlike the statute allowing federal government contracts, the state law regarding city contracts is not silent with respect to the sheriff’s control of the funds.<sup>100</sup> Any funds collected as payment for services provided to the municipality must be turned over to the board of commissioners and deposited in the general fund.<sup>101</sup> Without an express grant changing the entity responsible for funds generated by any city contract, the fiscal power and control still lies with the board. Therefore, any funds generated by a contract with a municipality must be turned over to the board of commissioners.

93 Stephenson v. Bd. Comm’rs of Cobb County, 261 Ga. 399, 401 (1991); see also O.C.G.A. § 36-5-22.1.

94 O.C.G.A. §§ 36-10-1, 50-14-1(b).

95 O.C.G.A. § 36-5-22.1(a)(1).

96 O.C.G.A. § 36-9-8.

97 O.C.G.A. § 42-4-9.

98 O.C.G.A. § 15-16-13.

99 *Id.*

100 O.C.G.A. § 15-16-13(c).

101 O.C.G.A. § 15-16-13(d).

### **PREPARE TAX DIGEST AND COLLECT TAXES FOR CITIES**

The board of commissioners may contract with any city located within the county to prepare the tax digest and assess and collect taxes for the city.<sup>102</sup> However, the tax commissioner must also approve the contract if the county has fewer than 50,000 tax parcels.

### **COLLECTION OF CITY TAXES**

Tax commissioners can contract with cities within the county to collect city taxes.<sup>103</sup> In counties where the tax commissioner receives tax payments for both the county and city or receives mailed tax payments for the county, the tax commissioner may enter into a contract for a lock box system with a bank to receive, process, and deposit mailed tax returns and payments.<sup>104</sup>

### **PRIVATE PROBATION COMPANIES**

The board of commissioners is authorized to enter into a contract with a private probation company to provide probation services upon the request and written consent of the chief judge of any county court that hears misdemeanor and ordinance violations. The termination of the contract must be initiated by the chief judge of the court and is subject to the approval of the board of commissioners.<sup>105</sup>

### **MUNICIPAL COURT SERVICES**

The board of commissioners and city council of a city located within the county may enter into an agreement for the magistrate court to provide municipal court services to the city.<sup>106</sup> However, the contract is not effective unless also approved by the chief magistrate judge.

## **CONTRACTS THAT CONSTITUTIONAL OFFICERS MAY ENTER INTO WITHOUT BOARD APPROVAL**

It is within the power of the General Assembly to vest the constitutional officers with specific abilities to contract and it has chosen to do so in specific instances.<sup>107</sup>

### **SUPERIOR COURT DATA AND FILINGS**

Superior court clerks can enter into contracts and agreements necessary for the performance of their duties as required by law.<sup>108</sup> Superior court clerks may enter into a contract to distribute, sell, or market records or computer-generated data from the office.<sup>109</sup> A monthly report of these contracts, as well as the revenues received, must be submitted to the board of commissioners. Superior court clerks may contract with the Georgia Superior Court Clerks' Cooperative Authority to develop and implement a statewide, uniform, automated information system for real and personal property.<sup>110</sup> No contract that requires county funds can be entered into unless the funds obligated are included in the clerk's operations budget at the time that the contract is executed.<sup>111</sup>

102 O.C.G.A. § 48-5-359.1(a).

103 O.C.G.A. § 48-5-359.1.

104 O.C.G.A. § 48-5-147.

105 O.C.G.A. § 42-8-101. All contracts must meet the uniform professional and contract standards as provided in O.C.G.A. § 42-8-107.

106 O.C.G.A. §§ 15-10-150, 15-10-151.

107 GA. CONST. art. IX, § 1, para. 3.

108 O.C.G.A. § 15-6-61(a)(19).

109 O.C.G.A. § 15-6-96.

110 O.C.G.A. § 15-6-97(a).

111 O.C.G.A. § 15-6-100.

## MAINTENANCE OF COPIES OF LEGAL ORGAN

Since the probate court clerk is required to maintain all newspapers in which the probate court's advertisements appear, the probate judge may enter into a contract with the sheriff and/or superior court clerk to bind, retain, microfilm, or photocopy newspapers, so that only one set is retained in the courthouse.<sup>112</sup> The agreement must specify which officer is responsible for maintaining and preserving the newspapers, microfilm, or photographs.

## INHERENT POWER TO CONTRACT

In addition to the specific contractual authority listed in the previous section, the Georgia Supreme Court has now given constitutional officers the inherent authority to enter into contracts that relate to their official duties even when there is not a specific law that authorizes the contract.<sup>113</sup> For example, while there is no state law authorizing the sheriff to enter into a contract for inmate health services, the sheriff has a duty to provide medical care to prisoners placed in his or her custody.<sup>114</sup> Consequently, the sheriff has the inherent authority to enter into contracts with medical care providers.<sup>115</sup> In the case of the superior court clerk, contracts may not be entered into to purchase services, supplies, or equipment authorized by O.C.G.A. §§ 15-6-50 through 15-6-99 that require expenditure of county funds, unless the funds are included in the clerk's operations budget when the contract is executed. Presumably, contracts of other constitutional officers must also be within the budgetary limitations of the constitutional officer contracting to expend county dollars.

Contracts entered into by constitutional officers are not required to be included in the minutes of the board of commissioners.<sup>116</sup> Therefore, there is no central repository for all county contracts. Members of the public researching the county's contractual obligations must contact each of the constitutional officers to find this information.

Irrespective of the inherent power of constitutional officers to contract, consent will still be required from the board of commissioners on contracts when specifically provided in the statute. Also, all of the requirements for boards of commissioners to enter into contracts (i.e., that contracts must be approved in a meeting and included on the minutes) still apply to contracts approved by the board.

112 O.C.G.A. §§ 15-9-37(a)(9); 15-9-43(b).

113 Bd. Comm'r's of Spalding County v. Stewart, 284 Ga. 573 (2008).

114 O.C.G.A. § 42-4-4(a)(2); Kendrick v. Adamson, 51 Ga. App. 402 (1935).

115 Hill v. Clayton Bd. of Comm'r's, 283 Ga. App. 15, 19 (2006); Bd. Comm'r's of Spalding County v. Stewart, 284 Ga. 573 (2008).

116 Bd. Comm'r's of Spalding County v. Stewart, 284 Ga. 573 (2008); see Wilson v. Strange, 235 Ga. 156, 161 (1975).

## CONTRACTS FOR FISCAL SERVICES

While there is no specific statutory authorization to do so, the board of commissioners may consider formally recognizing constitutional officers as separate legal entities. Constitutional officers have the ability to maintain their own bank accounts, employer identification numbers, and accounts with the Department of Labor. An agreement may be crafted between the board of commissioners and constitutional officers regarding (1) procedures for budget amendments and (2) processing of purchase orders and accounts payable, establishing that constitutional officers' employees are not employees of the county (and not subject to benefits provided by the commissioners unless provided in the contract) and establishing payroll procedures (if payroll services are still provided by the county). While the board of commissioners is required to provide lump sum funding to constitutional officers, the officers are in complete control as to how to spend it, as long as they meet all of the auditing, transparency, and record-keeping standards set by state and federal law.

# Lawsuits and Attorneys' Fees

Protecting the taxpayers from lawsuits against the county is the responsibility of the board of commissioners. The constitutional officers' role is limited to properly performing their duties and managing their offices.

## LIABILITY INSURANCE

The board of commissioners is authorized, but not required, to purchase liability insurance for the elected officers of the county.<sup>117</sup> The amount of coverage is also within the discretion of the board of commissioners.

## BONDS

State law requires that constitutional officers be bonded.<sup>118</sup> These bonds protect the county in case the officer fails to faithfully perform his or her duties or embezzles county funds. In general, the bond amount is set by state statute. The premium of the bonds must be paid by the board of commissioners from county funds. Rather than purchase several individual bonds, the county may purchase one blanket bond to cover all officials that must be bonded.<sup>119</sup>

## ATTORNEYS' FEES

There are three circumstances under which a constitutional officer is entitled to the payment of his or her attorneys' fees by the county under Georgia law: (1) at the option of the board of commissioners, (2) because of a Georgia Supreme Court ruling, or (3) because the county attorney has a conflict of interest. Each circumstance is discussed below.

### FEES PAID AT THE OPTION OF THE BOARD OF COMMISSIONERS

Georgia law allows the board of commissioners to adopt a policy to indemnify any local government employees, including constitutional officers, who are facing criminal, civil, or quasi-criminal charges in their official capacity, in lieu of obtaining insurance or indemnity.<sup>120</sup> If the local government official is charged with a crime of theft or embezzlement of property or assets in which the county has an interest, then the county can refuse to pay for the official's lawyer. The specifics of the policy, and the criteria for when a local government official will not qualify for representation under the policy, are determined by the board of commissioners.<sup>121</sup> The board of commissioners is not obligated to adopt a policy and can instead choose to buy insurance to indemnify the local government officials.<sup>122</sup> This law only addresses providing a defense for local government officials; an official who sues the county would not be able to recoup attorneys' fees under these sections if he or she was a plaintiff in the action.<sup>123</sup>

<sup>117</sup> O.C.G.A. § 45-9-20.

<sup>118</sup> O.C.G.A. §§ 15-6-59(a), 15-10-20(h), 15-9-7, 15-16-5, 48-5-122(b).

<sup>119</sup> O.C.G.A. § 45-4-11.

<sup>120</sup> O.C.G.A. § 45-9-21.

<sup>121</sup> Baker v. Gwinnett County, 267 Ga. App. 839 (2004).

<sup>122</sup> O.C.G.A. § 45-9-20.

<sup>123</sup> Bd. Comm'rs of Dougherty County v. Saba, 278 Ga 176, 180 (2004).

The board of commissioners has complete discretion to determine what actions will disqualify a local government official from coverage under the policy. When making an actual decision about whether to exclude a constitutional officer from the policy, *Gwinnett County v. Blaney* (see below) suggests that the disqualification must be related to litigation at hand and not be based on general or past behavior of the official.<sup>124</sup>

### ***Gwinnett County v. Blaney***

A county official was involved in a relationship with a woman in his office. When the board of commissioners found out, they warned him that the relationship was against county personnel policy and his willful violation of the policy disqualified him from coverage under the county plan for any claim of retaliation, discrimination, or allegation of unfair employment practices by any other employee in his office. The county refused to cover the official on a subsequent lawsuit brought by an employee, based on their determination that he no longer qualified for the plan due to his continuing interoffice relationship. The Georgia Supreme Court held that the official must be covered under the plan because he was disqualified for actions not relating to the case at hand.<sup>125</sup> The implication of this ruling is that any disqualification of a local government official must be specifically related to the action being brought against him or her and that the board of commissioners cannot issue a blanket removal from the plan.

### **FEES PAID BECAUSE OF A GEORGIA SUPREME COURT RULING**

A constitutional officer can require the county to pay his or her attorneys' fees through a remedy created by the Georgia Supreme Court in *Gwinnett County v. Yates*.<sup>126</sup> There are only two requirements to being granted attorneys' fees under the judicial rule: (1) that there is a conflict of interest for the government attorney; and (2) that the official is successful in his or her action. According to this case, payment of the fees is simply an expense of government operation.

### ***Gwinnett County v. Yates***

The superior court clerk discharged a deputy clerk, who filed an appeal with the merit board. The county attorney assigned to represent the superior court clerk refused to assert the defense that the merit board lacked the authority to infringe upon the rights and responsibilities of the superior court clerk. The clerk then obtained private counsel and filed a declaratory judgement action. The superior court sided with the clerk and held that under Georgia law, the power of the superior court clerk to hire and discharge is not superseded by the county's merit system, however, attorneys' fees were denied. The superior court clerk appealed the trial court's decision to deny payment of his attorneys' fees. On appeal, the Georgia Supreme Court found in favor of the superior court clerk and held that the board of commissioners must pay reasonable attorneys' fees when a county official, acting in his or her official capacity, hires outside counsel to assert a legal position that the county attorney cannot (because of a conflict of interest in representing the county) or will not assert, and the county official is successful in his or her claim.

124 *Gwinnett County v. Blaney*, 275 Ga. 696, 702 (2002).

125 *Id.*

126 *Gwinnett County v. Yates*, 265 Ga. 504, 508 (1995).

### FEES PAID BECAUSE THE COUNTY ATTORNEY HAS A CONFLICT OF INTEREST

The county is required to pay for an outside attorney when a constitutional officer is either a plaintiff (i.e., the one filing the lawsuit) or defendant (i.e., the one who is being sued) in a civil case (i.e., not a criminal case). This requirement is triggered when the chief judge of the superior court determines that the county attorney has an ethical conflict that prohibits him or her from representing the county, the board of commissioners (or other county official or employee), and the constitutional officer.<sup>127</sup>

Once the court determines that there is a conflict, there is no requirement that the constitutional officer be successful in his or her action.<sup>128</sup> All that is required is (1) that the board of commissioners denies the constitutional officer's written request for representation; and (2) that the superior court judge determines that a conflict of interest exists.<sup>129</sup>

It is important to note that the constitutional officer is not required to proceed pro se (i.e., without an attorney) until the trial judge determines a conflict. Nonetheless, a judicial determination is still necessary to qualify under the statute.<sup>130</sup> The amount of attorneys' fees must be based on a rate that is no more than the rate paid to the county attorney for similar representation or in accordance with a schedule of rates for outside attorneys, if one has been adopted by the board of commissioners.<sup>131</sup>

127 O.C.G.A. § 45-9-21(e).

128 Saba, 278 Ga. at 180.

129 O.C.G.A. § 45-9-21(e); Haralson County v. Kimball, 243 Ga. App. 559, 560 (2000).

130 *Id.*

131 O.C.G.A. § 45-9-21(e)(2).

# Purchasing

Procurement or purchasing has several facets from the determination of the specifications for an item or service to be purchased, to the choice and evaluation of vendors, as well as the time and manner of payment and acceptance of the items or service. Many boards of commissioners and constitutional officers acknowledge that having centralized purchasing for the county saves taxpayer money by standardization, elimination of duplication of effort, and lower prices as a result of volume purchasing.

Centralized purchasing allows a county to hire an individual professionally trained in purchasing. This allows vendors and the public to go to one professional staff person for information and assurance that the county's purchases are being properly and economically handled.

Many counties have purchasing policies or ordinances requiring some form of competitive bidding. Such policies help to ensure that taxpayer money is spent wisely, that contracts are not awarded for less-than-legitimate reasons, and that all businesses are provided with a fair opportunity to make their case for the contract in question. Formal procurement rules also prevent both favoritism and appearance of favoritism.

## PURCHASING ISSUES

Purchasing (or procurement) of supplies, equipment, and services can cause conflict between constitutional officers and county commissioners. The courts have given constitutional officers the power to make purchases from third parties in the pursuit of their duties.<sup>132</sup> Unfortunately, they have put no restrictions on constitutional officers to be fiscally responsible. Once the board of commissioners has approved a budget for a constitutional officer, the board cannot dictate to the constitutional officer how to spend the allocated funds, as long as such expenses do not exceed the approved budget. This means that commissioners are not authorized to interfere when a constitutional officer chooses the high bidder, does not get the best product for the best price, or shows favoritism to a particular vendor. Unless the constitutional officer's actions are criminal, these are issues between the constitutional officer and the voters.

Essentially, constitutional officers each have the power to make use of the resources that have been allocated to their departments by the board of commissioners without interference, as long as it is in the reasonable performance of their duties.<sup>133</sup> While some constitutional officers feel that centralized purchasing and competitive bidding of products and services is an appropriate county service supporting the constitutional officer's operations, others view it as an attempt by the board of commissioners to control how the constitutional officer performs his or her duties.

In the following cases, from a fiscal standpoint, the board of commissioners was being a good steward of taxpayer funds. They were also acting as a responsible fiscal authority. Unfortunately, even with the best intentions and justifications, the Georgia appellate courts have sacrificed wise use of taxpayer dollars in favor of giving constitutional officers fiscal power without fiscal responsibility.

132 Hill v. Clayton Bd. Of Comm'rs, 283 Ga. App. 15 (2006).

133 Griffies v. Coweta County, 272 Ga. 506, 508-09 (2000).

### *Griffies v. Coweta County*

A superior court clerk bought bottled water for her department with available funds in the budget. The commissioners refused to approve the purchase—and lost.<sup>134</sup> The Georgia Supreme Court held that the board of commissioners did not have the unilateral authority to determine that the clerk's purchase of bottled water was not in the exercise of her duties and to decline to pay the expense on that basis.

### *Board of Commissioners of Spalding County v. Stewart*

A sheriff wanted to terminate the services of a medical provider for the jail and hire a different company. The board of commissioners refused to approve the change—and lost.<sup>135</sup> Here, the Georgia Supreme Court held that the board of commissioners could not control the sheriff's choice.

### *Hill v. Clayton County Board of Commissioners*

The sheriff purchased painting and remarking services for the sheriff's vehicles, rather than using the county's vehicle maintenance department. The board of commissioners objected—and lost.<sup>136</sup> Here, the Georgia Court of Appeals held that the board of commissioners' authority over county property was limited in the context of motor vehicles and equipment owned by the county but assigned to the sheriff for his exclusive use by local legislation. In contrast, in the same case, the Court agreed with the county that the sheriff did not have the authority to paint his offices in the courthouse without approval from the board of commissioners.<sup>137</sup>

## IMPLEMENTATION OF PURCHASING PROCEDURES

The board of commissioners has the legislative power to “adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with the [Georgia] Constitution.”<sup>138</sup> However, the appellate courts have drawn a distinction between property that belongs to the county and property that is assigned to the exclusive use of a constitutional officer.<sup>139</sup> The former is still in control of the board of commissioners and the latter in the control of the constitutional officer.

Presumably, the board of commissioners still has the authority to establish certain procurement rules and forms for all county government branches. In this context, procurement rules refers to procedural rules on how purchases are processed and paid. For instance, the amount of the purchase and budget line item number is necessary to determine whether there are funds available in the budget. Before paying for a product or service, the board needs to know if the constitutional officer received the product or service and if there are any reasons to withhold payment. Use of such procurement rules are designed to unify county government purchase requests, monitor the budget, and account for expenditure of county funds.

134       Id.

135       Bd. Comm'r's of Spalding County v. Stewart, 284 Ga. 573 (2008).

136       Hill v. Clayton County Bd. of Comm'r's, 283 Ga. App. 15 (2006).

137       Id.; see also Keener v. Kimble, 170 Ga. App. 674, 675 (1984) (the act requiring the county to provide supplies and equipment to the sheriff's department did not give the county commissioners control over the use of the equipment); Clayton v. Taylor, 223 Ga. 346, 348-349 (1967).

138       GA. CONST. art. IX, § 2, para. 1(a).

139       Hill v. Clayton County Bd. Comm'r's, 283 Ga. App. 15 (2006).

Some constitutional officers object to being forced to abide by such rules, claiming that forced compliance amounts to a usurpation of constitutional officers' authority to manage their offices separately from the board of commissioners. However, the board should ensure that procurement rules and forms are not being used to divest constitutional officers of their statutory duties or to deny officers of the ability to make department purchases within his or her discretion.

Implementation of these provisions should be accomplished by adoption of a proper procurement ordinance. Merely enacting a procurement procedure policy—not officially adopted through the county's legislative process—is not likely to be a sufficient legal basis for the board of commissioners to require a constitutional officer to abide by a policy. An ordinance, on the other hand, is an authoritative law or decree and serves as law within the boundaries of the county.<sup>140</sup> Constitutional officers are bound by the law of the jurisdiction like any other official and would be required to follow the purchasing ordinance, as long as the ordinance was not drafted in a way that attempted to control where the constitutional officer spent the money in his or her budget. To avoid unnecessary conflict with constitutional officers regarding the exercise of their authority, the board of commissioners should ensure that procurement procedures in the ordinance apply to all branches of the county government. Moreover, nothing in such an ordinance should give an employee of the board of commissioners authority to question the wisdom of a particular purchase.

## PURCHASE AND CREDIT CARD USAGE

Purchase cards (P-card) and credit cards can be used by authorized, elected government officials and certain employees to purchase items and services that are directly related to their duties. State law provides the procedures required for a board of commissioners or county officials to separately enact P-card and credit card policies.<sup>141</sup> These policies, which must be authorized through a public vote, have to be in place prior to the issuance of P-card and credit cards. Documents related to purchases made by these cards are subject to public inspection.

P-card and credit card policies adopted by boards of commissioners or county officials must include the following:

- A list of officials to be issued cards
- Authorized user agreements
- Transaction limits
- Description of authorized purchases
- Description of purchases not authorized
- Designation of a card administrator
- A process for audits and purchase review
- A process for handling violations of purchasing card policies

140 Black's Law Dictionary 1132 (9th ed. 2004).

141 O.C.G.A. § 36-80-24. While constitutional officers must create separate policies, the board of commissioners can include other elected county officials such as the coroner, magistrate and state court judge, surveyor, solicitor, and treasurer in their policy.

While both county commissioners and constitutional officers have the authority to enact policies, there are a few differences in the requirements. P-card and credit card policies for constitutional officers must cover both the officer and their employees. Policies for the board of commissioners do not cover their employees. Constitutional officers are also required to submit a copy of their policies to the board of commissioners before they can be enacted.

ACCG has prepared a sample resolution, ordinance, and user agreement for counties to govern the use of P-cards and credit cards by the board of commissioners and other local elected officials, excluding constitutional officers. These documents are available on the ACCG website at [www.accg.org](http://www.accg.org).

# Fees

County officers are authorized by statute to collect a variety of fees associated with their individual departments. Disputes as to who controls these fees (i.e., the constitutional officer or the board of commissioners) arise occasionally. These disputes have been generated, in part, because of a change in the nature of these fees over time. Initially, constitutional officers were allowed to keep the fees they collected as part of their compensation for carrying out their duties. As discussed previously, the General Assembly has established minimum salaries in lieu of fees for all constitutional officers. Constitutional officer salary information can be found in Compensation of County Officials, p.19.

## FEES PAID INTO COUNTY TREASURY

County officers are responsible for collecting fees for their services, but all statutes are quite clear that virtually all funds are eventually deposited in the county treasury.

For example, Georgia sheriffs are no longer paid according to the fee system. The law states, “no sheriff shall receive as any portion of his compensation for his services as such any fees, fines, forfeitures, costs, commissions, emoluments, or perquisites of any nature whatsoever.”<sup>142</sup> Although a sheriff is authorized by the General Assembly to collect fees for transporting prisoners, summoning witnesses attending court, etc., “all such fees shall be turned over to the county treasurer or fiscal officer of the county.”<sup>143</sup>

The fact that fee revenues are under the control of the board of commissioners is in keeping with the well-established fact that the board is the county fiscal and budget authority and in charge of county property and assets.<sup>144</sup>

## FEES GENERATED FROM USE OF COUNTY PROPERTY

In the past, many sheriffs received commissions, fees, or other revenue generated by the inmates’ use of the telephone or telephone cards. In *Lawson v. Lincoln County*, the Georgia Court of Appeals held that a sheriff may not use county property, facilities, or other resources to earn revenue independent from the county budgeting process or keep that revenue in separate accounts exclusively for use of the sheriff’s department.<sup>145</sup> The court reasoned that the revenue earned depended upon the existence of the jail facilities, which is county property and therefore subject to the board of commissioners’ budget authority.<sup>146</sup> To allow the sheriff to use county property or facilities to earn and keep revenue independent from the county’s budgeting process would, in the extreme, undermine the county’s broad discretion to exercise control of its property.<sup>147</sup>

142 O.C.G.A. § 15-16-19(a).

143 O.C.G.A. § 15-16-21 (a); *Lawson v. Lincoln County*, 292 Ga. App. 527 (2008).

144 O.C.G.A. § 36-5-22.1; Stephenson, 261 Ga. at 401.

145 *Lawson v. Lincoln County*, 292 Ga. App. 527 (2008).

146 *Id.*; O.C.G.A. § 36-5-22.1(a)(7).

147 *Lawson v. Lincoln County*, 292 Ga. App. 527 (2008).

## FEES KEPT AS PERSONAL COMPENSATION BY THE CONSTITUTIONAL OFFICER

In most cases, when constitutional officers collect fees, the money is county property that must be turned over to the county. However, the law specifically provides certain instances where the fees are not turned over to the county. For instance, the probate judge may keep vital records fees (e.g., fees for birth and death certificates) that he or she collects as personal compensation. However, the commissioners, by enacting a resolution or ordinance, may cap any vital records fees collected at \$7,500 per year. Any excess must go to the general fund.<sup>148</sup> Tax commissioners may receive additional compensation for collecting city taxes.<sup>149</sup> Additionally, superior court clerks who receive passport applications on behalf of the U.S. State Department are authorized to keep a passport fee as part of their compensation.<sup>150</sup>

## ACCOUNTING OF FEES

Not only does money collected by constitutional officers need to be turned over to the county treasury, but also officers are required to make an accounting of all funds received. All county officials must make a return, under oath, in front of the grand juries of their respective counties on the first day of each term of the superior court.<sup>151</sup> The return must contain a true statement of the amount and source of money belonging to the county that they received since the last return, along with their expenditures and the most recent financial statement or annual audit of the financial affairs of their office. In addition, tax commissioners and sheriffs turn over all taxes collected by them on a weekly basis in counties with a population of 30,000 or more and every two weeks in counties with a population under 30,000.<sup>152</sup> Tax commissioners must also render an accounting to the governing authority annually and make their books and accounts available for inspection.<sup>153</sup>

148 O.C.G.A. § 15-9-68.

149 O.C.G.A. § 48-5-359.1.

150 O.C.G.A. § 15-6-77(c); 22 CFR § 51.51 (b).

151 O.C.G.A. § 36-1-7(a).

152 O.C.G.A. § 48-5-141.

153 O.C.G.A. § 48-5-140.

# Forfeitures and Drug Fund Money

When assets or property (i.e., currency, vehicles, real estate, firearms, etc.) linked to drug-related crimes and certain other crimes are seized by law enforcement, a forfeiture action may be commenced and the court may order that the property be sold. The money resulting from this property is often referred to as “drug fund” money. Some boards of commissioners encourage sheriffs to use drug fund money to pay for items to keep budgets down. However, there are several state and federal laws that limit the sheriff’s use of drug fund monies. To complicate matters, how drug funds are handled depends on whether the assets were forfeited under state law or federal law. Regardless of whether it is forfeited under state or federal forfeiture law, there are two principles that apply: (1) money distributed to the sheriff may be used at his or her discretion; and (2) the sheriff’s budget may not be reduced to offset the amount of drug and forfeiture money received.

## FORFEITURE UNDER STATE LAW

Under Georgia law, property, money, or other things of value that are either directly or indirectly linked to a violation of the Georgia Controlled Substances Act<sup>154</sup> are subject to forfeiture. Property and money is submitted to the district attorney for court approval. Assets are distributed to state and local government law enforcement agencies pro rata according to the role their law enforcement agencies play in the seizure. A copy of the distribution order is required to be provided to the board of commissioners. There is no limit to the amount that state law enforcement agencies may receive in judicial forfeitures.

## FUNDING FOR SHERIFFS

The sheriff’s office may receive up to 33 1/3 percent of its regular budget in drug funds. At the sheriff’s discretion, drug funds may be used for any official law enforcement purpose, but may not be used to pay salaries or bonuses to law enforcement officers.<sup>155</sup> In other words, it is up to the sheriff to determine how drug funds he or she receives are spent—not the board of commissioners. Drug funds in excess of the one-third amount may be used for indigent defense, drug and mental health treatment, drug and substance abuse prevention or education programs, and victim-witness assistance programs. Sheriffs who are not running again for re-election or who have been defeated cannot transfer forfeiture funds, but may continue to use existing funds for official law enforcement purposes within his or her office.<sup>156</sup>

154 O.C.G.A. §§ 16-13-20 to 16-13-49.

155 O.C.G.A. §§ 9-16-19(f)(4)(A)(ii); 9-16-19(a)(4).

156 O.C.G.A. § 9-16-19(f)(4)(A)(iv).

Drug and forfeiture fund money may not be used to supplant (i.e. replace) any other funds appropriated to the sheriff's office for staff or operations.<sup>157</sup> This means that commissioners may not reduce the amount of funding budgeted for the sheriff's office to offset the amount of drug and forfeiture funds received. The sheriff is required to submit an annual report to the board of commissioners and district attorney with his or her budget request that itemizes the forfeiture and drug money received in the fiscal year and the way that it was used.<sup>158</sup> This report must be submitted on a form prepared by the Prosecuting Attorneys Council. Failure to provide the annual report, as well as any misuse of drug funds, will impose a two-year moratorium on that sheriff's office from receiving any forfeiture property.

### FUNDING FOR DISTRICT ATTORNEYS

Up to 10 percent of the seized drug and forfeiture money may also be used to fund official prosecutorial purposes for the district attorney's office.<sup>159</sup> Unlike the restriction for salaries in the sheriff's office, the district attorney may use the money for salaries, as long as it does not go for salaries of employees who are acting in a law enforcement capacity (i.e., an assistant district attorney overseeing a multiagency narcotics squad).<sup>160</sup> However, just like the board of commissioners cannot use forfeiture funds to supplant the sheriff's budget, the board also cannot use these funds to supplant the district attorney's budget. District attorneys who are not running again for re-election or who have been defeated cannot transfer forfeiture funds, but may continue to use existing funds for official prosecutorial duties within his or her office expenses.<sup>161</sup>

### OTHER USES

Drug money may also be used to fund victim witness assistance programs or a state law enforcement museum.<sup>162</sup> If the sheriff receives more than 33 1/3 percent of his budget in drug money, then any additional drug money allocated to the county may be spent for any official law enforcement purposes, indigent defense, drug and mental health treatment, drug and substance abuse rehabilitation, prevention or education, victim assistance programs, or certain grants.<sup>163</sup> If real property is forfeited, the board of commissioners may transfer the property to a land bank authority.

### FORFEITURE UNDER FEDERAL LAW

The sheriff's office may also receive drug and forfeiture money pursuant to federal law.<sup>164</sup> Federally forfeited property is generally left to the discretion of the U.S. Attorney General or the Secretary of the Treasury, depending upon the nature of the forfeiture.<sup>165</sup> These officials transfer forfeited property to the sheriff if his or her law enforcement agency participated directly in any acts leading to seizure or forfeiture of the property.<sup>165</sup>

157 O.C.G.A. § 9-16-19(g)(2)(A)(ii) and (iii).

158 O.C.G.A. § 9-16-19(a)(5).

159 O.C.G.A. §§ 9-16-19(f)(3)(B); 9-16-19(a)(5).

160 1992 Ga. Att'y Gen. Op. No. U92-22; O.C.G.A. § 9-16-19(a)(5).

161 O.C.G.A. § 9-16-19 (f)(4)(B)(iii).

162 O.C.G.A. § 9-16-19(a)(4).

163 O.C.G.A. § 9-16-19 (f)(4)(A)(iv).

164 18 U.S.C. § 981; 19 U.S.C. §§ 1613b(a)(1)(F); 1616a(c)(1)(B)(ii); 21 U.S.C. § 881; O.C.G.A. § 9-16-2.

165 18 U.S.C. § 981(e).

166 18 U.S.C. § 981(e)(2).

Many of the federal government's rules for handling federal drug money are provided in a federal equitable sharing agreement with the Department of Justice and the Department of Treasury.<sup>167</sup> These agreements require the county to agree to abide by federal statutes and guidelines<sup>168</sup> in the use of the funds. For instance, according to the guidelines, the money may be used for law enforcement purposes that include the following:

- Training and education
- Operations and investigations
- Law enforcement facilities
- Equipment
- Detention facilities
- Contracting for services
- Travel and per diem
- Awards and memorials
- Drug and gang education and awareness
- Matching funds
- Community based programs

The guidelines from the U.S. Attorney General and the Department of Treasury further provide that the forfeited funds may only be used to supplement the sheriff's budget. As with state drug forfeitures, federal drug fund money cannot be used to supplant moneys otherwise provided by the board of commissioners. To this point, *The Guide to Equitable Sharing for Foreign Countries and Federal, State, and Local Law Enforcement Agencies*<sup>169</sup> states the following:

Shared funds must be used to increase or supplement the resources of the receiving state or local law enforcement agency... Shared resources **shall not be used to** replace or supplant the appropriated resources of the recipient.

The recipient agency must benefit directly from the sharing. In determining whether supplantation has occurred, the Department of Justice will examine the law enforcement agency's budget as a whole and allow agencies to use equitable sharing funds for any permissible purpose as long as shared funds **increase the entire law enforcement budget**. The Department of Justice may terminate sharing with local law enforcement agencies that are not permitted by their governing body to directly benefit from equitable sharing.

<sup>167</sup> Federal equitable sharing resource information is available on the United States Department of Justice website at [www.justice.gov/criminal-afmls/equitable-sharing-program](http://www.justice.gov/criminal-afmls/equitable-sharing-program).

<sup>168</sup> *Hill v. Clayton County Bd. Of Comm'r's*, 283 Ga. App. 15 (2006); see O.C.G.A. § 16-13-48.1.

<sup>169</sup> Interim policy guidance regarding the use of equitable sharing funds has been issued to replace existing policies included in the *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (2009), Section VIII. A.1 and 2. The quoted information provided is based on the interim policy guidance.

***Example of Improper Supplantation:*** A police department receives \$100,000 in federal sharing money, only to have its budget cut \$100,000 by the city council. In this instance, the police department has received no direct benefit from equitable sharing whatsoever. Rather, the city as a whole has received the benefit of the equitable sharing.

Although the example above refers to police departments and city councils, the same logic applies to the offices of boards of commissioners and sheriffs.

One major difference between federal drug money and state drug money is that the sheriffs' federal drug money is not subject to the county's budget process. The Georgia appellate courts have held that, since the sheriff is the only authorized user of federal drug funds, these funds are not required to go through the board of commissioners' budgeting process.

## Cooperation and Assistance

Over the years, Georgia's appellate courts have rendered decisions that have effectively limited the board of commissioners' authority over the fiscal affairs of the county. The diminished authority of the county commission over the county budget has not been matched by any measure that would protect the public from favoritism or wasteful use of tax dollars by constitutional officers. In effect, although the Georgia Constitution demands that the board of commissioners bear fiduciary responsibility for the use of public funds, the courts have short-circuited their ability to function in that capacity.

Because of the potential for liability, it is imperative that the board of commissioners and the various other county officials cooperate in regard to matters addressed in this guide. Although county commissioners and constitutional officers have differing powers and responsibilities, they serve the same constituencies and should have equal interest in providing a well-managed and financially sound county government. While the board of commissioners must allow constitutional officers to manage their departments, they should offer assistance in developing sound policies and practices with the intent of protecting both constitutional officers and taxpayers. Good working relationships established between the board of commissioners and constitutional officers increase the prospect that the system can work.



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