Municipalities -- Attorney's Fees

Number: AGO 2013-15

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Subject:
Municipalities -- Attorney's Fees

Ms. Darcee S. Siegel
City Attorney
City of North Miami Beach
17011 Northeast 19th Avenue
North Miami Beach, Florida 33162-3100

Dear Ms. Siegel:

On behalf of the City of North Miami Beach, you ask the following question:

May the city reimburse legal fees incurred by an individual councilmember for challenging a candidate's qualifications to run for the city council when the suit was filed after discovery of credible evidence that the candidate was not a bona fide resident of the city as required by the city's charter?

In sum:

Reimbursement of a councilmember's legal fees may be authorized only when the litigation arises from the exercise of official duties and fulfills a public purpose. While a city has the authority to bring suit to fulfill a municipal purpose, such action must be taken by a majority of the governing body and not at the initiative of an individual councilmember.

You state that a routine investigation of candidates' qualifications by the city's police department was inconclusive as to one candidate's residency. An individual councilmember, thereafter, conducted an online search and discovered evidence that the candidate resided in another town within the 12 months prior to filing her qualifying papers. The councilmember filed suit to enjoin the counting of votes for the candidate and for declaratory judgment as to the candidate's qualification to run for office. After an expedited hearing, the court found the candidate's testimony to not be credible, the candidate failed to show evidence of the required residency, and that competent evidence showed that the candidate resided in another city. The city now wishes to reimburse the councilmember for the legal fees incurred and as support, asserts that it supports the filing of the declaratory action.

While the courts of this state have recognized a common law right of public officials to legal representation at public expense to defend themselves against charges arising from the performance of their official duties and while serving a public purpose,[1] I am not aware of, nor have you drawn my attention to, any statute or case law suggesting that an individual councilmember is entitled to reimbursement of legal expenses incurred in prosecuting an action

against another party.

In Attorney General Opinion 91-59, this office considered whether a county was required to reimburse a county commissioner for legal fees incurred in defending the commissioner's qualifications to run for office. The opinion discusses a decision of the Supreme Court of Florida addressing the payment of attorney's fees incurred by public officials. In *Thornber v. City of Fort Walton Beach*,[2] the Court set forth the standard that "[f]or public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose." Applying this standard to the question presented, this office concluded that the charges against the county commissioner did not arise from misconduct while performing the official duties of the office, but rather occurred prior to the commissioner's election to that office. Accordingly, the commissioner was not entitled to reimbursement for attorney's fees incurred in defending an action challenging his or her qualifications to run for office.

You assert that the suit for declaratory judgment of a candidate's residency served a public purpose in assuring that the city's charter and ordinance, requiring residency in the city during the 12 months prior to qualification, were not violated. While the enforcement of the city's charter and ordinances may fulfill a public purpose, the second prong of the standard for reimbursement of attorney's fees set forth in *Thornber* requires that the action arise out of or in connection with the performance of official duties. A legal challenge to the qualifications of a candidate brought by a sitting councilmember would not appear to satisfy the *Thornber* test requiring a nexus to the performance of the sitting councilmember's official duties.

The filing of suits is an action which may be initiated and pursued by the city commission as a collegial body.[3] However, official action by a collegial body is taken by majority vote[4] and not by the initiative of a single member.[5]

Accordingly, it is my opinion that the city may not reimburse legal fees incurred by a councilmember individually prosecuting an action challenging a candidate's qualifications to run for the city council when such action was not taken while performing the official duties of the office.

Sincerely,

Pam Bondi
Attorney General

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[1] *See, e.g., Markham v. State, Department of Revenue*, 298 So. 2d 210 (Fla. 1st DCA 1974); *Ferrera v. Caves*, 475 So. 2d 1295 (Fla. 4th DCA 1985). *And see Maloy v. Board of County Commissioners of Leon County*, 946 So. 2d 1260 (Fla. 1st DCA 2007) (analyzing interplay of doctrine of sovereign immunity and common law right of public officials to receive legal representation at taxpayer expense in defending themselves against litigation arising out of their official duties and while serving a public purpose).

[2] 568 So. 2d 914 (Fla. 1990).

[3] *See* s. 166.021(1), Fla. Stat., recognizing that municipalities have "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law."

[4] *See* s. 166.041(4), Fla. Stat., providing:

"A majority of the members of the governing body shall constitute a quorum. An affirmative vote of a majority of a quorum present is necessary to enact any ordinance or adopt any resolution; except that two-thirds of the membership of the board is required to enact an emergency ordinance. On final passage, the vote of each member of the governing body voting shall be entered on the official record of the meeting. All ordinances or resolutions passed by the governing body shall become effective 10 days after passage or as otherwise provided therein."

[5] *Cf.* Op. Att'y Gen. Fla. 97-61 (1997) (attorney for a school board represents the board as a collegial body and acts at the request of the board as a collegial body and not at the request of an individual member).