Attorneys' fees, defense of local ethics complaint

Number: INFORMAL

Date: July 11, 2011

Ms. Tracy J. Robin
Straley & Robin
1510 West Cleveland Street
Tampa, Florida 33606

Dear Ms. Robin:

On behalf of the Hillsborough County City-County Planning Commission (the commission) you have asked for assistance in determining whether the commission is authorized to reimburse an officer of the commission for legal fees incurred in defense of a claim concerning an alleged violation of the agency's ethical standards. You also ask whether this duty to pay legal fees may extend to claims relating to an action that was dismissed. Attorney General Bondi has asked me to respond to your letter.

Florida courts have recognized a common law right of public officials to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose.[1] The purpose of this rule is to avoid a potential "chilling effect" that a denial of representation might have on a public official in performing his duties properly and diligently.[2] As was noted by the Fourth District Court of Appeal in *Lomelo v. City of Sunrise*,[3] such an obligation arises independent of statute, ordinance, or charter and "is not subject to the discretion of the keepers of the city coffers."[4]

In Attorney General Opinion 85-51, this office concluded that a municipality was authorized to pay for the defense of a former municipal officer charged with an ethics violation which was subsequently dismissed for no probable cause. Payment of such expenses, however, was conditioned upon the city commission determining that the alleged misconduct arose from the performance of the manager's official duties while he was serving a public purpose. The conclusions reached in the opinion were based upon the common law principles discussed in *Ellison v. Reid*,[5] which concluded:

"There is no doubt a valuable public purpose is served in protecting the effective operation and maintenance of the administration of a public office. If a public officer is charged with misconduct while performing his official duties and while serving a public purpose, the public has a primary interest in such a controversy and should pay the reasonable and necessary legal fees incurred by the public officer in successfully defending against unfounded allegations of official misconduct."

The courts have stated, however, that this obligation arises only when the conduct complained of arises out of, or in connection with, the performances of the officer's official duties and while serving a public purpose. For example, in *Chavez v. City of Tampa*,[6] a city council member filed suit seeking reimbursement from the city for legal expenses she had incurred in

successfully defending a charge of unethical conduct before the Florida Commission on Ethics. The charge arose from her vote as a city council member on her petition for an alcoholic beverage zoning classification at business premises she had leased.

While the council member was performing her official duties by voting and thus satisfied the first part of the test, the court determined that the second part of the test was not met since her vote did not serve a "public purpose," but rather directly advanced her own private interests. Thus, the court concluded that under the common law, the city was not required to reimburse the city council member for the legal expenditures she incurred in defending the charges.

Based on a consideration of these cases, this office stated in Attorney General Opinion 90-74 that if a county determines that the acts alleged in an ethics complaint against a county official arose from the officer's official duties and that a public purpose was being served at the time of such acts, the reimbursement of legal expenses for the officer was permitted. However, the office stated that the determination must be made by the county commission based upon such factual evidence as the governing body may require as such a determination is beyond the authority of this office.

The Supreme Court of Florida, in *Thornber v. City of Fort Walton Beach*,[7] recognized the common law principle that "public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose." Citing *Chavez v. City of Tampa*, *supra*, the Court held that for 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."[8]

In *Thornber*, the officers' legal defense against a recall petition arose from the officers' alleged malfeasance in meeting in violation of the Government in the Sunshine Law and in subsequently voting on the issues at a later public meeting. Since the vote taken at the public meeting fell within their official duties, the Court held that the first prong of the test had been met.

The Court found that the second prong was satisfied as well since "[t]he council members' action in defending against the recall petition also served a public purpose[.]"[9] The Court rejected the city's contention that defending against a recall petition only serves the elected officials' personal interests in maintaining their position. While the city has no interest in the outcome of a recall petition, the Court held that the public does have an interest--and the city has a responsibility--to ensure that the recall petition procedures are properly followed.

While previously the courts had generally considered whether the public official was serving a public purpose at the time of the act on which the litigation was based, the *Thornber* Court considered whether the litigation served a public purpose. As noted above, however, the Court referred to *Chavez v. City of Tampa*, *supra*, as authority for the test.

I am aware of no case law or Attorney General Opinions utilizing these considerations when attempting to determine whether to pay the legal expenses of an officer alleged to have violated

a locally adopted ethics code, but would suggest that these tests would apply equally to such a situation. Therefore, it would appear that if the planning commission determines that these ethics code proceedings arose out of or in connection with the performance of the officer's official duties and served a public purpose,[10] the official's legal fees incurred in successfully defending against such action must be paid by the commission. The determination, however, that both prongs of the test have been met is one which must be made by the governing body of the commission and cannot be delegated to this office.[11]

These informal advisory comments are provided to you by the Department of Legal Affairs in an effort to be of assistance. The opinions and conclusions contained herein are those of the writer and do not constitute a formal opinion of the Attorney General.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See, e.g., Markham v. State, Department of Revenue*, 298 So. 2d 210 (Fla. 1st DCA 1974); *Ferrara v. Caves*, 475 So. 2d 1295 (Fla. 4th DCA 1985).

[2] *Nuzum v. Valdes*, 407 So. 2d 277, 279 (Fla. 3d DCA 1981).

[3] 423 So. 2d 974, 976 (Fla. 4th DCA 1982), *petition for review dismissed*, 431 So. 2d 988 (Fla. 1983).

[4] *And see Ferrara v. Caves, supra,* stating that the town was required to pay reasonable attorney fees incurred by the mayor and town commissioners seeking declaratory and injunctive relief against recall petitions.

[5] 397 So. 2d 352, 354 (Fla. 1st DCA 1981).

[6] 560 So. 2d 1214 (Fla. 2d DCA 1990).

[7] 568 So. 2d 914, 916-917 (Fla. 1990).

[8] *Id.* at 917.

[9] *Id.*

[10] *And see Maloy v. Board of County Commissioners of Leon County*, 946 So. 2d 1260, 1265 (Fla. 1st DCA 2007), *review denied,* 962 So. 2d 337 (Fla. 2007), ("Under *Thornber*, a public official is not entitled to taxpayer funded representation simply because an allegation of misconduct arises in the course of his public duties. Rather, the context out of which the alleged misconduct arose must also serve a public purpose.").

[11] *See, e.g.,* Ops. Att'y Gen. Fla. 86-35 (1986) and 90-74 (1990).