Attorney fees, unsuccessful ethics defense

Number: INFORMAL

Date: October 22, 2008

The Honorable Timothy Holmes
Commissioner, City of Opa-Locka
780 Fisherman Street
Opa-Locka, Florida 33054

Dear Commissioner Holmes:

You ask on behalf of a majority of the members of the Opa-Locka City Commission whether the city is responsible for the attorney fees for a city commissioner who was found guilty of an ethical violation by the Miami-Dade County Ethics Commission.

The courts of this state have recognized a common right of public officials to legal representation at public expense to defend themselves against charges arising from the performance of their official duties while serving a public purpose.[1] Such an obligation arises independent of statute, ordinance, or charter.[2] In *Ellison v. Reid,*[3] the court discussed the common law principles underlying this rule:

"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 controversy and should pay the reasonable and necessary legal fees incurred by the public officer in *successfully* defending against unfounded allegations of official misconduct." (e.s.)

Such a right is not limited to a public official's defense in civil or criminal litigation. The issue in *Ellison* was whether a public official was entitled to reimbursement for legal fees incurred in successfully defending himself against a complaint of official misconduct filed with the Florida Commission on Ethics. The right of public officials to a defense at public expense in defending charges of official misconduct filed with the Commission on Ethics was again recognized in *Chavez v. City of Tampa*,[4] in which the court stated that this obligation arises only when the conduct arises out of, or in connection with, the performance of the officer's official duties and while serving a public purpose.[5]

In *Thornber v. City of Fort Walton Beach*,[6] the Court upheld the public officer's right to reimbursement costs in successfully defending against a recall petition which arose out of the officer's alleged malfeasance in meeting in violation of the Government in the Sunshine Law, section 286.011, Florida Statutes, and in subsequently voting on the issues at a later public meeting. The Court recognized the principle that public officials are entitled to legal representation at public expense provided the litigation:

"1) arises out of or in connection with the performance of their official duties and

2) serves a public purpose."[7]

Both prongs of the test must be met. This office has consistently stated that the determination that the test has been satisfied is one which must be made by the public agency responsible for such reimbursement and not by this office.[8] As this office noted in Attorney General Opinion 91-58, however, the public agency's responsibility to pay such defense expenses is dependent upon the outcome of the defense being successful. As stated therein, this office is not aware of any decision which would obligate the city to pay the legal expenses of its officers found guilty of misconduct. However, section 112.08(2)(a), Florida Statutes, authorizes municipalities to provide their officers and employees, as part of their compensation, with legal expense insurance. This office has no information as to whether the city has purchased such insurance coverage for its officers and if so, what are the terms of such coverage.

You may wish to discuss this matter further with the city attorney. I hope, however, that the above informal comments may be of assistance in resolving this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

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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] *See Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. 4th DCA 1982), *petition for review dismissed*, 431 So. 2d 988 (Fla. 1983), stating that this common law right "is not subject to the discretion of the keepers of the city coffers."

[3] 397 So. 2d 352, 354 (Fla. 1st DCA 1981).

[4] 560 So. 2d 1214 (Fla. 2nd DCA 1990).

[5] In *Chavez*, however, the court held that reimbursement of a city council member's legal expenses in successfully defending a charge of unethical conduct before the Florida Commission on Ethics was not authorized. Although the charges against her arose from her vote on the city council, the court determined that her vote did not serve a "public purpose" but rather directly advanced her own private interests, *i.e.*, voting on her petition for an alcoholic beverage zoning classification at business premises she had leased.

[6] 568 So.2d 914, 917 (Fla. 1990).

[7] *And see Branca v. City of Miramar*, 602 So. 2d 1374 (Fla. 4th DCA 1992), concluding that former mayor was entitled to representation at public expense in city's action seeking to terminate his pension benefits following its repeal of ordinance authorizing such benefits, where mayor had initiated process of drafting ordinance.

[8] *See, e.g.*, Ops. Att'y Gen. Fla. 91-58 (1991), 91-59 (1991), and 90-74 (1990).