Attorney fees, county's reimbursement to engineer

Number: INFORMAL

Date: December 18, 1995

Mr. Thomas V. Dannheisser
Santa Rosa County Attorney
6865 Caroline Street, Southeast
Milton, Florida 32570-4978

RE: COUNTIES--PUBLIC OFFICERS AND EMPLOYEES--AGENCY--ATTORNEYS FEES--LITIGATION--ability of county to reimburse attorneys fees to engineer who maintained private office and performed engineering services for the county from which litigation arose.

Dear Mr. Dannheisser:

This is in response to your inquiry as the whether the county may reimburse legal fees to a former county engineer, who maintained a private office and contracted with the county, in an action alleging that the engineer negligently reviewed a subdivision plat resulting in stormwater damage to a home.

In sum, the county must initially determine whether the nature of the engineer's employment is such that he is a public employee or an independent contractor and then, if it is determined that the engineer was a county employee acting within the scope of his employment, it must be determined that the litigation arose out of or in connection with the engineer's performance of official duties and that it serves a public purpose.

You state that an engineer, who maintained a private office and contracted with the county to perform engineering services, was sued by a homeowner for negligently reviewing a subdivision plat as required by a county ordinance. As a result of the engineer's alleged negligence, the homeowner claimed that her home was damaged by stormwater. While the lawsuit against the engineer has been dismissed, the engineer is claiming a right to reimbursement of his legal fees since the position of county engineer is recognized and regulated by law. You state that, typically, legal fees would not be reimbursed to a contractor.

Section 336.03, Florida Statutes, states:

"The county engineer must be a registered professional engineer or engineering firm qualified to do business in this state. This does not apply to any county engineer who:
(1) Was employed on or before June 30, 1967;
(2) Was employed on less than a full-time basis; and
(3) Was not employed to furnish professional engineering advice on road programs in the county."

Thus, unless the county engineer falls within the specified exceptions to the professional licensure requirements, he or she must, by statute, be a registered professional engineer. The

statute does not subject a county engineer to any greater regulation than that which is placed upon a professional engineer by Florida Law,[1] nor does the statute prescribe the nature of the employment between the county and a professional engineer who has been contracted to perform professional engineering services.

Section 768.28, Florida Statutes, in pertinent part, provides:

"No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."[2]

Accordingly, a person or entity must be an officer, employee or agent of a governmental unit in order to be protected by the provisions in section 768.28, Florida Statutes. Moreover, if a person or entity is performing activities within the scope of the duties of an enumerated position, the only remedy for injury or damage resulting from such actions is against the governmental entity employing such person or entity. Resolution of whether an individual or entity is an employee or agent of a governmental unit is a mixed question of law and fact that this office may not resolve.[3]

I will, however, make the following observations.

In Attorney General Opinion 89-70, this office considered whether the designation of a psychologist by the Board of Psychological Examiners to supervise or treat applicants for professional licensure or disciplined licensees placed on probation made the designated psychologist an employee or agent of the board who was immune from personal liability while performing duties within the scope of the employment or agency relationship. The opinion discussed the nature of an agency relationship, noting that the term "agency" as it applies in a principal/agent relationship has been interpreted to mean a contract either express or implied upon a consideration, or a gratuitous undertaking, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which that other assumes to do the business and render an account of it.[4]

The existence of an agency relationship is determined by the degree of control exercised by the

principal over the agent.[5] Ultimately, however, it is the right of control and not the actual control which a principal chooses to exercise over the agent that determines the relationship between the parties.[6]

As the court in *Farmers & Merchants Bank v. Vocelle*[7] stated:

"If the person serving is merely subject to the control or direction of the owner as to the result to be obtained, he is an independent contractor; if he is subject to the control or the person being served as to the means to be employed, he is not an independent contractor.

* * *

It is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and a servant. . . ."[8]

Given these considerations, the nature of the employment of the engineer by the county must be determined. If it is determined that the engineer was acting as an employee or agent of the county, then the provisions in section 768.28, Florida Statutes, would apply to those actions taken by the engineer within the scope of his employment or agency with the county.

Likewise, the ability of an individual to claim reimbursement for legal fees hinges initially upon his or her status as a public official or employee. As this office observed in Attorney General Opinion 93-21, 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 while serving a public purpose.[9]

The Supreme Court of Florida in *Thornber v. City of Fort Walton Beach*,[10] 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."[11]

Both prongs of the test, however, must be met. This office has consistently stated that the determination of whether the test has been satisfied is one that must be made by the public agency responsible for the reimbursement and not by this office.[12]

Accordingly, should the county find that the engineer was an employee or agent of the county, that the engineer's actions were within the scope of his employment or agency with the county, and that the defending the litigation serves a public purpose, it may properly reimburse the engineer for the legal fees incurred in defending the suit.

I trust these observations will assist you in making a determination in this matter. The informal comments were prepared by the Division of Opinions and do not constitute a formal opinion of the Attorney General.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Chapter 471, Florida Statutes, sets forth the requirements for a professional engineer practicing in Florida.

[2] Section 768.28(9)(a), Fla. Stat. (1994 Supp.).

[3] *See* Department of Legal Affairs, Attorney General Opinions, 1993 Annual Report of the Attorney General, ix.

[4] *King v. Young*, 107 So. 2d 751,753 (Fla. 2d DCA. 1958).

[5] *Collins v. Federated Mutual Implement and Hardware Insurance Company*, 247 So. 2d 461 (Fla. 4th DCA 1971), *cert. denied*, 249 So. 2d 689 (Fla. 1971).

[6] *Nazworth v. Swire Florida, Inc.*, 486 So. 2d 637 (Fla. 1st DCA 1986).

[7] 106 So. 2d 92 (Fla. 1st DCA 1958).

[8] *Id.* at 95. *And see La Grande v. B & L Services, Inc.*, 432 So. 2d 1364 (Fla. 1st DCA 1983) (decisive question is who has the right to direct what shall be done, and how and when it shall be done).

[9] *See 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).

[10] 568 So. 2d 914 (Fla. 1990).

[11] *Id.* 568 So. 2d at 917.

[12] *See* Ops. Att'y Gen. Fla. 91-58 (1991) and 90-74 (1990).