

Public employees, payment of attorney's fees

Number: INFORMAL

Date: January 27, 1998

Mr. David G. Tucker
Escambia County Attorney
Room 411, County Court House Annex
14 West Government Street
Pensacola, Florida 32501

RE: ATTORNEYS FEES--COUNTIES--PUBLIC OFFICERS AND EMPLOYEES--authority of county to pay attorney's fees for former employees.

Dear Mr. Tucker:

You have asked for my opinion regarding whether Escambia County is obligated to pay attorney's fees for two former county officials or employees against whom administrative complaints have been filed with the Department of Business and Professional Regulation.

According to your letter, two former Escambia County building officials have been served with administrative complaints alleging that they failed to enforce standard building codes. Possible penalties if these charges are proven include discipline and the penalties described in section 455.227, Florida Statutes, and Part XII, Chapter 468, Florida Statutes. Included within the penalties described in Chapter 468 are possible criminal penalties for violations of those provisions.

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 the "chilling effect" that a denial of representation might have on a public official in performing his duties properly and diligently.[2] As stated by the Fourth District Court of Appeal in *Lomelo v. City of Sunrise*, such an obligation arises independent of statute, ordinance or charter and "is not subject to the discretion of the keepers of the city coffers." [3]

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 that was subsequently dismissed for no probable cause. Payment of these expenses, however, was conditioned on 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 on the common law principles discussed in *Ellison v. Reid*, [4] 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." [5]

The courts have stated, however, that this obligation arises only when the conduct complained of arises out of, or in connection with, the performance of the officer's official duties and while serving a public purpose. 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.

Recently, 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 in order 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 out of their alleged malfeasance in meeting in violation of the Sunshine Law and in subsequently voting on the issues at a public meeting. Since the vote taken at the public meeting fell within their official duties, the Court held that the first part of the test had been met. The Court found that the second part 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 served the elected officials' personal interest in maintaining their positions. While the city had no interest in the outcome of a recall petition, the Court held that the public did have an interest and the city had a responsibility to ensure that the recall petition procedures were properly followed.

While the courts had previously generally considered whether a public official was serving a public purpose at the time of the act underlying the litigation, the *Thornber* Court considered whether the litigation served a public purpose. As discussed above, however, the Court referred to *Chavez v. City of Tampa, supra*, as authority for the test. Until this matter is clarified by the Court, this office must presume that the standard or test expressed in *Thornber*, as the latest expression by the Florida Supreme Court, governs the payment of legal fees incurred by a public official in successfully defending against an ethics complaint. [10]

As is reflected in the *Chavez* and *Thornber* cases and the pertinent Attorney General Opinions, reimbursement of attorney's fees to public officers and employees is not limited exclusively to litigation situations but has been extended to other situations where civil or criminal liability may arise from the performance of official duties while serving a public purpose.

Further, section 111.07, Florida Statutes, provides:

"Any agency of the state, or any county, municipality, or political subdivision of the state, is authorized to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. . . . However, any attorney's fees paid from public funds for any officer, employee, or agent who is found to be personally liable by virtue of acting outside the scope of his or her employment, or was acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, may be recovered by the state, county, municipality, or political subdivision in a civil action against such officer, employee, or agent. If any agency of the state or any county, municipality, or political subdivision of the state is authorized pursuant to this section to provide an attorney to defend a civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents and fails to provide such attorney, such agency, county, municipality, or political subdivision shall reimburse any such defendant who prevails in the action for court costs and reasonable attorney's fees."

Thus, the authority to approve or deny payment of attorney's fees or to provide legal representation for public employees in civil cases is provided by statute and the decision is one which must be made by the governmental entity involved based on the facts of each case. In those civil cases where a public employee prevails, payment of court costs and attorney's fees are the responsibility of the governmental entity.

I trust that these informal comments will assist you in resolving this matter to the county's satisfaction.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

[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] *And see Ferrara v. Caves, supra* at footnote 1, 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.

[4] *Ellison v. Reid*, 397 So. 2d 352 (Fla. 1st DCA 1981).

[5] *Id.* at 354.

[6] *Chavez v. City of Tampa*, 560 So. 2d 1214 (Fla. 2d DCA 1990).

[7] *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990).

[8] *Id.* at 917.

[9] *Supra* at footnote 5.

[10] See Op. Att'y Gen. Fla. 91-58 (1991), concluding that if a city commission determines that an ethics proceeding arose out of or in connection with the performance of the officer's official duties and serves a public purpose, the official is entitled to legal representation at public expense.