

Public employee, reimbursement of attorney's fees

Number: INFORMAL

Date: March 11, 1996

Ms. Kimberly Tucker
General Counsel
Department of Health and
Rehabilitative Services
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Dear Ms. Tucker:

You ask for clarification of the conclusions presented in Attorney General's Opinion 94-11. Specifically, you ask whether the Department of Health and Rehabilitative Services is authorized to reimburse a former employee of the department for attorneys fees she incurred in connection with a proceeding under section 905.28(1), Florida Statutes, to repress or expunge parts of a grand jury presentment.

As this office related in Attorney General's Opinion 94-11, it is a common law right of public officers to receive legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. The case law which has developed in this area supports a conclusion that this right is extended only to public officers.[1] As the court in the *Lomelo* case stated, this obligation arises independent of statute, ordinance, or charter and "is not subject to the discretion of the keepers of the city coffers." [2]

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. The responsibility for making the determination of whether this two-pronged test has been satisfied is the responsibility of the particular agency or governmental entity.

In *Chavez v. City of Tampa*, [3] 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. [4] 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.

There does not appear to be a concomitant common law right to reimbursement of attorney's

fees for public employees. Rather, as authorized by statute, the payment of such fees appears to be discretionary with the executive officer of the agency involved. Section 111.065(2), Florida Statutes, gives the employing agency of a law enforcement officer "the option to pay the legal costs and reasonable attorney's fees for any law enforcement officer in any civil or criminal action commenced against such law enforcement officer." Payment is authorized when the suit against the officer is dismissed by the plaintiff or the officer is found not liable or not guilty. For public employees who are not law enforcement officers, section 111.07, Florida Statutes, provides that:

"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. . . . Legal representation of an officer, employee, or agent of a state agency may be provided by the Department of Legal Affairs. 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 agency involved based on the facts of each individual case and cannot be delegated to this office. In those civil cases where a state employee prevails, payment of court costs and attorney's fees are the responsibility of the agency.

Therefore, as this is not a claim for legal expenses incurred by a public officer performing official duties and satisfying a public purpose the payment of these expenses is within the authority of the agency head. Even if the person involved were an officer there may be a question whether the repression or expungement of parts of a grand jury presentment critical of that employee and his or her performance would serve a public purpose as required by the courts. Rather such an action appears to be in the nature of name clearing and of particular benefit to the individual rather than the state or the agency involved.

I trust that these informal advisory comments will assist you in resolving this matter.

Sincerely,

Gerry Hammond

[1] See, e.g., *Nuzum v. Valdes*, 407 So. 2d 277 (Fla. 3d DCA 1981) (Director, Division of Alcoholic Beverages); *Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. 4th DCA 1982), *pet. rev. dismissed*, 431 So. 2d 988 (Fla. 1983) (city mayor); *Chavez v. City of Tampa*, 560 So. 2d 1214 (Fla. 2d DCA 1990), *rev. den.*, 576 So. 2d 285 (Fla. 1990) (city council member); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990) (city council members).

[2] *Lomelo*, *id.* at 976. And see *Ferrara v. Caves*, 475 So. 2d 1295 (Fla. 4th DCA 1985), stating that the town was required to pay reasonable attorneys fees incurred by the mayor and town commissioners seeking declaratory and injunctive relief against recall petitions.

[3] *Supra* at n.1.

[4] And see *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 917 (Fla. 1990), in which 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.