



A SELECTED READING

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Paying Legal Expenses of Officers and Employees

From time to time the League receives questions concerning the payment of legal expenses for the defense of its officers or employees involved in civil suits or criminal actions. The officer or employee may be the subject of a suit by or against the municipality or may be defending a suit for actions rendered on behalf of the municipality. The officer or employee might be the subject of a criminal action for actions taken in his or her official position.

The overriding question is whether the council has the power to pay such legal expenses when requisitioned to do so by the officer or employee. Also, what are the steps or procedures involved to approve the payment of such legal expenses? And then there is always the question of whether the city must pay the expenses or whether the city has merely the discretion to pay such expenses.

These issues become very complicated when the officials being sued are members of the governing body that has to decide whether to pay the charges.

The Three Part Test

This issue was first examined in the case of *City of Birmingham v. Wilkinson*, 194 So. 548 (Ala. 1940), where the question was raised of whether a city was obligated to employ an attorney to defend two members of the governing body against charges of fraud, corruption and graft. The charges were never proved and the complaint was dismissed at trial.

The Alabama Supreme Court set out a three-part test as to when a municipality can pay legal expenses. The court held that a municipal corporation has the implied power to employ counsel to render services in: (1) matters of proper corporate interest, including the prosecution or defense of suits by or against the corporation, (2) and the defense of suits against municipal officers or employees for acts done on behalf of the corporation (3) while in the honest discharge of their duties. *Id.* at 552.

The court stated that members of the governing body cannot employ legal counsel to shield themselves from the consequences of their own unlawful and corrupt acts. However, the city has the power and the duty to defend the members of its governing body against unfounded and unsupported charges of corruption and fraud. If a proper corporate interest is found and the officer or employee acts on behalf of a municipality in the line and scope of his or her duties and furthermore the duty was discharged in honest and good faith, then the city has the power and discretion to pay the legal expenses involved. *Id.* at 552.

The court in *City of Birmingham* pointed out that a difficult situation arises when the officials charged with fraud and corruption are members of the governing body who must decide whether to defend the suit at public expense while the suit is still pending. The court points out that while the suit is still pending, it is questionable whether the city can pay the legal fees. *Id.* at 552.

The officials being accused are called upon as members of the governing body to act on the propriety of defending the suit at public expense. Little guidance is provided by the court as to whether such fees can be paid while the suit is pending, so it puts the burden on municipalities to determine on their own the truthfulness of the accusations. Of course, where the suit ends favorably to the city and its officers – and the legal fees are then requisitioned – there is no problem with the city paying the expenses if it wishes to do so and if it meets the test for paying such expenses.

In the end, the *City of Birmingham* court cast doubt upon the payment of expenses while a suit is pending. It suggests that a city wait until the outcome of the suit to determine whether to pay the legal expenses. But, the court never states that a city is prohibited from paying legal expenses while a suit is pending. Arguably, as long as there are matters of proper corporate interest involved and the officer or employee is being sued for actions done on behalf of the municipality while in the honest discharge of his or duty, a municipality can pay for legal counsel expenses while the case is still pending. *Id.*

Of course, it is a difficult task for a municipality to come to the conclusion of whether or not the allegations are true. The governing body should make this determination as to the three-part test before any expenses are paid and such findings should

be put into the minutes. Is the city, however, *required* to pay the expenses? What if the municipality determines there is a corporate interest involved, and the officer or employee is being sued for actions taken on behalf of the municipality while in the honest discharge of his or her duty? Nowhere does the *City of Birmingham* court state it is mandatory that the cities pay such expenses. Therefore, it should be remembered that a city retains the discretion to pay the expenses or not to pay them. Further, the Alabama Supreme Court has held that a former city councilor's claim against city for bad-faith failure to pay legal expenses was precluded by local-governmental immunity. *Ex parte City of Bessemer*, 142 So.3d 543 (Ala.2013).

What Is Proper Corporate Interest?

The phrase "proper corporate interest" was interpreted in the case of *City of Montgomery v. Collins*, 355 So.2d 1111 (Ala. 1978). In that case, city taxpayers brought a class action to enjoin the city of Montgomery from expending municipal funds to defend city police officers indicted for perjury.

In looking at the issue, the Alabama Supreme Court had to decide whether it was in the proper corporate interest for the city to defend its police officers who were not only accused but indicted for the crime of perjury. The court held that it was in the proper corporate interest for the city to do so. *Id.* at 1114-5.

The initial charges against the police officers included a claim of conspiracy by the officers to violate the civil rights of the plaintiffs. The court reasoned that a claim of violation of civil rights might also later include the city as a defendant under agency principles. It would be within the reasonable scope of proper corporate interest for the municipality to then attempt to protect itself and its officers against future civil litigation brought under agency principles by defending their agents against criminal charges arising out of the same general circumstances in order to gain their acquittal. *Id.* at 1114-5.

The city's stake in gaining the officers' acquittal was high, since a judgment of conviction in a criminal case against its officers could be later admissible in a civil action brought against the city based on the officers' conduct on behalf of the city.

Therefore, the *City of Montgomery* court concluded that a matter of "proper corporate interest" might depend upon the existence of a risk of litigation against the city itself should the perjury prosecutions have proved successful. Moreover, the *City of Montgomery* court saw that the officials in charge of the administration of the city could reasonably conclude that defending the officers was necessary to the good morale of the police department or for recruitment and retention purposes. *Id.*

There may exist other equally compelling reasons that fall within the proper corporate interest. Even though the *City of Montgomery* court did not give a clear definition of the phrase "proper corporate interest," it gave good examples of situations in which it considered the phrase applicable. *Id.*

Even if Indicted?

The fact that the officer was indicted in the *City of Montgomery* case made no difference to the court. It held that an indictment casts not a single pebble of guilt in the scale against a criminal defendant. Its function is merely to inform the accused of the crime with which he is charged. *Id.* at 1115.

Since an indictment is merely informational, the court held that a city retains the discretion to determine whether the city's interests required a defense to the charges against the officers. The court stated that whether the city's decision is wrong in these types of cases is for their constituency to decide. The Attorney General's officer has ruled along the same lines. *Id.* at 1115.

In an Attorney General's Opinion (AGO) to Hon. Willard Pienezza, February 1, 1978, that office decided that the city of Tallassee had the discretion to pay for the legal defense of an employee, the driver of a city ambulance, which crashed into and killed two women. That the driver was indicted in a criminal action arising from the crash made no difference in the opinion of the Attorney General. The opinion stated that the discretion to pay the legal expenses of the employee, as long as the three part test set out in the *City of Birmingham* is met, does not cease when city officials or employees are indicted for the commission of a crime.

During a Pending Investigation?

In AGO 2012-029, the Attorney General opined that a county commission may, in its discretion, pay the legal costs of defending county commissioners and employees during a pending investigation and in litigation if the county commission determines that a proper corporate interest is involved and the actions do not involve a willful or wanton personal tort or a criminal offense.

What Is Not Proper Corporate Interest?

In *Greenough v. Huffstutler*, 443 So.2d 886 (1983), the Alabama Supreme Court touched on the issue of proper corporate interest when it looked at a case in which a civil action was brought in order to determine the eligibility of two newly appointed

board members to the personnel board of the city of Mobile. The suit sought to enjoin the personnel board from holding meetings or acting unless and until replacements were appointed.

The essential allegations charged a lack of legal qualification to hold the positions on the board. The trial court found that the two members lacked the qualifications to hold the positions and removed them from the board. When the board requisitioned the city of Mobile for the payment of expenses incurred in defending the two men, the city refused to pay. *Id.* at 890.

The court held that a municipality cannot provide funds for the defense of an official in a criminal action or even in a civil action where there is no benefit to the municipality. Thus, a city has no such interest in a suit exclusively directed against its officers, charging lack of legal qualifications to hold office. In fact, the *Greenough* court states that paying such expenses would not only be outside the power of the city to do, it would offend Section 94 of the Alabama Constitution of 1901, which prohibits the grant of public funds for any individual purpose. *Id.* at 890.

So Section 94, which most city officials will recognize as a factor in many municipal problems, is also a factor to consider when deciding to pay legal expenses for officers and employees and should be a consideration in determining whether a proper corporate interest exists.

In AGO 2008-020, the Attorney General determined that public funds cannot be used to pay legal fees incurred by an elected official in the defense of an election. Since a candidate who is an incumbent is not acting in his official capacity when he runs for re-election, a city does not have a proper corporate interest in an election contest between an incumbent and his or her opposition.

It is important to note that with regard to proper corporate interest, the Ethics Commission has concluded that a public official charged with violating the Ethics Law and who was cleared of wrongdoing could not obtain reimbursement for legal expenses from the State because no proper corporate interest was involved. See Alabama Ethics Commission Advisory Op. No. 97-15.

Other Decisions

In other situations the Attorney General's office has ruled that the payment of legal expenses is not within the proper corporate interest.

In an AGO to Hon. Perry C. Roquemore, January 11, 1978, the city of East Brewton attempted to dismiss the police chief. At the termination hearing, the police chief attended the hearing with his attorney and the council decided to retain the services of the chief. The city asked the Attorney General's office if it could pay the attorney's bill in the matter. That office replied that there is no authority for the expenditure of such funds in circumstances where the council institutes the action against which the officer or employee is to be defended.

In AGO 89-00048, the City of Sumiton asked whether it could pay all legal expenses incurred on behalf of two incumbent candidates as a result of election contests. The Attorney General's opinion replied that the city did not have a proper interest in an election contest between the incumbent and his opponent because a candidate who is an incumbent is not acting in his official capacity when he runs for reelection.

In AGO 1992-073, the Pike County Commission asked whether it must pay the legal expenses for three Pike County commissioners who were sued by the county district attorney as a result of an overpayment of salary compensation. The Attorney General's opinion replied that no corporate interest could possibly be served by the county's payment of legal fees spent defending an action filed on behalf of the county.

In AGO 2001-210, a municipality was not required to pay the legal expenses incurred by an employee to appeal a disciplinary action to the personnel board; however, a municipality may pay the legal fees if the city council determines that: (1) the city has a proper corporate interest in the action; (2) the actions allegedly committed were done in the discharge of official duties; and (3) the official acted honestly in good faith. A city may also pay the legal expenses in anticipation of litigation if the city council determines that it is in the best interests of the city to settle the anticipated litigation. *See also*, AGO 2006-116.

AGO 2002-274 opined that a municipality may, but is not required to, reimburse the municipal clerk for legal fees incurred by the clerk when he or she is suspended without pay from his or her position, but is later restored and reimbursed for lost pay by the council.

In AGO 2008-020, the Attorney General's Office opined that county funds could not be used to pay the legal fees incurred by a county commissioner in the defense of an election contest because a proper corporate interest did not exist.

Conclusion

Municipal officials should be extraordinarily cautious before deciding to pay the legal expenses of its officers and employees. Not only is it difficult to decide whether allegations are true but whether the actions taken were in the line and scope of their duties or whether there is a proper corporate interest in paying the bills. This can be extremely difficult where allegations are against officials who are members of the governing body deciding whether to pay the bills.

It is important for officials making such determinations to remember the three-part test outlined in *City of Birmingham*. A determination based upon the three-part test must be made by the council and put into the minutes. Since Section 94 is yet again a factor that must be considered in these types of problems, a council must make sure it is not just individual interests that are being served and that a proper corporate interest is found and written into the minutes.

As always, care must be taken in making these determinations as a council would not want the liability of making unauthorized expenditures coming back to haunt them.

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