



TEXAS EDUCATION AGENCY

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Felipe T. Alanis
Commissioner of Education
April 14, 2003

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The Honorable Gregg Abbott
Attorney General of Texas
Office of the Attorney General
PO Box 12548
Austin, TX 78711-2548

RO-0041-GA

FILE # ML-43061-03

I.D. # 43061

Re: Request for Attorney General Opinion

Dear General Abbott:

On behalf of the D'Hanis Independent School District (the "District") I am submitting a request for an Attorney General Opinion concerning the following question.

Whether an Independent School District is authorized to consider reimbursement of a school board trustee for certain personal legal expenses incurred in connection with defense in a suit involving certain voting rights claims, when such claims arise in the context of an election contest.

A detailed analysis of the question is presented in the accompanying correspondence from the District. While the District is generally aware that the Attorney General has held that it is inappropriate to reimburse a school trustee for a successful defense of an election contest, it is the District's further understanding that the general rule of law in reimbursing Public Officials in suits is that a district may expend funds for defense in a private suit if a majority of the disinterested members of the school board make a good faith determination that a defense of the action is in the public interest.

Because of existing opinions, the agency believes it would be prudent to ask the Attorney General for a ruling based on the unusual circumstances presented by the case before the district makes any decision on reimbursement on the requested expenses. The District asked me, as the Commissioner of Education, to consider making this request on their behalf. Although the situation presented is unusual, the issue it raises is important to this District. The District seeks to balance its obligations for the appropriate use of public funds with its obligation to consider reimbursement of individual trustees on their appropriate defense of issues affecting District policies as matters of public interest.

Sincerely,

Felipe Alanis
Commissioner of Education

ISD/DA/mw

Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.

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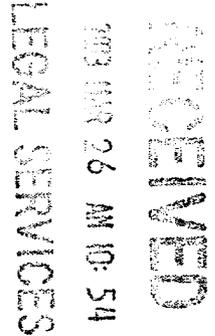
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March 26, 2003



Via Hand Delivery

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

RE: Request for Attorney General Opinion

Dear Mr. Anderson:

On behalf of the D'Hanis Independent School District ("District"), I am requesting that Commissioner Alaniz, as the Head of the Texas Education Agency, submit a request for an Attorney General Opinion concerning the following question:

Whether an Independent School District is authorized to consider reimbursement of a school board trustee for certain personal legal expenses incurred in connection with defense in a suit involving certain voting rights claims, when such claims arise in the context of an election contest.

The Board of Trustees of D'Hanis Independent School District ("District"), has been presented with such a request for reimbursement. However, before the Trustees proceed to make a determination whether the factual circumstances suggest that the defense of the action is in the public interest, they want to confirm that the Attorney General Opinions holding that reimbursement of a trustee in the context of an election contest, will not otherwise preclude consideration of the issue raised to the Board.

All matters relating to the underlying lawsuit have been disposed of and judgment in the case has become final. The suit in question was initially brought by Ronald Koch as an election contest against Trustee Rick Rothe.¹ Trustee Rothe retained counsel to represent him in that contest. However, shortly thereafter, the suit was amended by the plaintiff/contestant, adding certain voting rights allegations under the Voting Rights Act of 1965 as against Trustee Rothe, and joining the District and the remainder of the Board of Trustees as defendants. In addition another Plaintiff was named in the suit. The District retained legal counsel to represent the District and the other Trustees

¹ *Ronald Koch and Gilbert Ortiz v. Rick Rothe and D'Hanis Independent School District, et al.*, Cause No. 02-05-16001-CV; 38th Judicial District Court, Medina County, Texas. Pursuant to the Texas Election Code, Rick Rothe assumed the elected post of Trustee upon the canvass of the election, notwithstanding the pending Election Contest and has been serving in the capacity of Trustee since that canvass.

who were added to the suit as defendants in connection with the Voting Rights claims.

Because of the pre-existing election contest claims in the suit, Trustee Rothe's legal counsel represented him in connection with both the contest and with respect to the voting rights claims. Legal counsel for the District and the remaining Trustees did not represent or otherwise advise Trustee Rothe in the case. Because of the manner in which the case was pled by Plaintiffs, and the manner in which it proceeded towards trial, it was not clear until after pretrial motions were heard on the day of trial whether the voting rights claims had been resolved as against all parties. Plaintiffs literally dismissed their voting rights claims as against the District and the Trustees, including Trustee Rothe during their oral presentation during the pretrial hearings minutes before trial began on the morning when trial was to begin. Trustee Rothe asserts that the situation forced him to make preparations for trial on the potential voting rights issues, as they may have affected him as trustee, as well as for the election contest.

Trustee Rothe has requested that the District reimburse him for that portion of legal expenses incurred by him and paid from his personal funds, related to advice and representation on the voting rights issues raised by the litigation. Trustee Rothe does not seek reimbursement for any legal expenses associated with the election contest.

While the District is generally aware that the Attorney General has held that it is inappropriate to reimburse a school trustee for a successful defense of an election contest, it is the District's further understanding that the general rule of law in reimbursing Public Officials in suits is that a district may expend funds for defense in a private suit if a majority of the disinterested members of the school board make a good faith determination that a defense of the action is in the public interest. While the District is prepared to determine whether defense of the voting rights claims by Trustee Rothe is in the public interest, the purpose and intent in making this request for an Attorney General Opinion, is to confirm that the District is not precluded in considering Trustee Rothe's request for reimbursement simply because it arises in the context of the otherwise ineligible election contest.

The matter, although unusual, is a matter of importance to the District in that instruction from the Attorney General will provide guidance to political subdivisions concerning treatment of reimbursement questions in litigation involving multiple claims. The District is also concerned about balancing the use of limited resources for public education with the interests of protecting the District from legal claims that affect the overall operation of the district, even when such claims brought in the form of suits against individual trustees.

Background Information on the Suit

The issues raised in *Koch et al., v. Rothe, et al.*, were not those raised in a typical election contest. While the allegations relating solely to the election contest clearly related to the winning trustee, it was not clear from the suit as amended whether the voting rights claims were being raised as against the six other trustees or whether they included the contestee.

In particular, after the initial contest was filed, the suit was amended. An additional plaintiff was added to the case and the District and the other six members of the Board of Trustees were also joined in the suit raising for the first time various voting rights claims. The allegations in the suit made it unclear which defendants were accused of particular actions. The School District filed an answer in the case and sought to have the voting rights claims dismissed as to the District and the six trustees in pretrial motions.

At pretrial hearings on the District's Motion to Dismiss, the Contestant/Plaintiffs agreed to dismiss the suit as against the District and other six trustees based on certain actions to be taken by the District concerning future elections. However, Plaintiff did not actually move to dismiss until the parties announced ready for trial and it was never clear from Contestant/Plaintiff's position whether that agreement on the voting rights claims extended as to Trustee Rothe. The trial on the election contest then proceeded with the trustee successfully defending the contest and the court ultimately denying the relief sought by the contestant as to the results of the election. As a consequence, from the time the voting rights claims were added, through the point in time the court dismissed the District and other six trustees, the contestee and his counsel were not sure whether they had to defend against those claims and thus had to prepare for and address those issues, along with issues arising from the contest itself.

While the Attorney General has held that it is inappropriate to reimburse a school trustee for a successful defense of an election contest, the general rule of law in reimbursing Public Officials in suits is that a district may expend funds for such a defense in a private suit "...[I]f a majority of the disinterested members of the school board make a good faith determination that a defense of the action is in the public interest. A school district may not expend public funds to represent the purely personal interest of an individual trustee." JM-968 (1988) at page 3. The District wants to insure that, if it determine that Trustee Rothe has incurred expense in connection with his defense in the suit related to the voting rights claims, and if it further finds that such defense was in the public interest, such reimbursement would not be otherwise precluded as a matter of law because they arise in the context of an election contest.

The District's Understanding of Reimbursement Principles

The District's trustees are elected pursuant to §11.052 of the Texas Education Code, a general statute applicable to independent school districts selecting their trustees for single-member trustee districts, and they serve in accordance with the provisions of Chapter 11 of the same Code, which, among other matters provides that trustees serve without pay. Specifically:

- (d) The trustees serve without compensation.

TEX. EDUC. CODE ANN. § 11.061(d). Not only do trustees serve without pay, but the District is further restricted by the Texas Constitution, article 3, section 52 in its expenditure of public funds for the benefit of any individual, including a trustee:

(a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or *to grant public money or thing of value in aid of, or to any individual,* Emphasis Added.

TEX. CONST. art. III, § 52. Thus, the District's ability to indemnify a trustee or other employee for loss or damage to them resulting from their service to the District is substantially limited. Indemnification of public servants generally arises when civil and criminal lawsuits are brought against public servants about the exercise of their public office.

Persons elected to serve on the Board of Trustees of the District enjoy substantial immunity from suits arising from their actions within the course and scope of their employment. To the extent that the legislature has provided limited waiver of that immunity, public servants may be entitled to indemnification for certain losses or damage and reimbursement for legal expenses imposed on them by the courts. For example, in the area of tort claims Chapter 102 of the Texas Civil Practice and Remedies Code provides for indemnification and reimbursement for legal expenses incurred by public servants from claims arising from alleged acts, omissions, or negligence of officials from actions within the course and scope of their office.

However, the mere fact that public servants may enjoy qualified immunity from other types of suits, of course, does not prevent suits from being filed. The Texas Attorney General and courts have recognized that in many instances suits are brought against public officials in their individual capacity "when they are really designed to obstruct or control the legitimate performance of official duties." Tex. Att'y Gen. LA-24 (1973) at 2. Public Servants may be entitled to have their legal expenses paid for in certain suits brought against them personally for actions arising from carrying out the duties of their office, if a majority of the disinterested members of the Board of Trustees of the District make a good faith determination that a defense of the action is in the public interest.

The Texas Legislature has addressed the issue of indemnification for public officials in a number of different statutes. For example, in Section 102.002 of the Texas Civil Practice and Remedies Code, the legislature has authorized local governments to pay actual damages awarded against an employee² of the political subdivision resulting from an act or omission of the employee in the course and scope of his employment and the related court costs and attorney fees awarded against the employee. Section 102.004 of the Texas Civil Practices and Remedies Code authorizes the political subdivision to provide defense counsel for public servants in these circumstances. Purchasing insurance contracts to provide coverage for these types of cases is common practice among political subdivisions.

² The definition of "Employee" in the Civil Practice & Remedies Code encompasses an officer of the political subdivision. TEX. CIV. PRAC. & REM. CODE section 102.001(1).

On suits brought against a public officer in their individual capacity, the Attorney General has held that a political subdivision's authority to employ attorneys to defend that official, is limited to those situations where the legitimate interests of the district, and not merely the personal interests of the officer, require the assertion of a vigorous legal defense on behalf of the public interest.

Typical of these is JM-968 (1988) wherein a trustee of an independent school district is sued in his individual capacity in a private suit by a teacher alleging an intentional tort occurring in the parking lot of the school district following a school board meeting. In this 1988 opinion, the Attorney General stressed that the decision to expend public funds to protect the public interest in the suit brought against the officer of the district will always be a question of fact. *Id.* at 2. The opinion holds that a district may expend funds for such a defense in a private suit "...[I]f a majority of the disinterested members of the school board make a good faith determination that a defense of the action is in the public interest. A school district may not expend public funds to represent the purely personal interest of an individual trustee." *Id.* at 3.

The Attorney General has generally found no public interest in reimbursing an elected public official for defense of an election contest. Attorney General Opinion JM-685 (1987), for example, holds that while a school district can expend public funds to defend its interests in an election contest where officials of the district are named in their official capacities, the school district has no authority to pay the legal expenses of an individual school trustee in defending an election contest involving the vote count in his election as trustee. Likewise, in Attorney General Opinion DM-431 (1997), the Attorney General concluded that a county is prohibited by article 3, sections 50, 51 and 52 of the Texas Constitution, from reimbursing the incumbent Sheriff for attorney's fees incurred in defending an election contest suit.

This case differs from the typical election contest

While on their face, AG Ops JM-685 and DM-431 appear to prohibit reimbursement of a candidate for successful defense of an election contest, the facts in the District's situation appear to be sufficiently different from the facts underlying the two attorney general opinions to warrant a different result. In a typical election contest, the sole issue presented to the courts is simply whether the winning candidate received the requisite number of votes required for election. The election contest filed against Mr. Rothe was not a typical one in the sense that it only arose from the unfortunate utilization of a ballot which made it impossible to determine whether only eligible voters voted in the contested election. In particular, the election contest arises from problems a defective ballot utilized by the District in the election.

While the Contestant in the case initially couched his lawsuit as an election contest, at its root was the complaint that the ballot was allegedly made available to voters who were ineligible to vote in the particular race in which he and Rick Rothe were candidates. To underscore this point, the Contestant amended the lawsuit to raise the voting rights issues of the illegal ballot. The Contestant also joined the District and the other six trustees and the District. The bulk of the pretrial activity surrounded disposition of these voting rights issues. The District, by voluntarily changing the ballot

Mr. David Anderson
March 26, 2003
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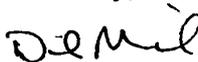
and preclearing the new procedures, persuaded the Contestant to dismiss the lawsuit as against the District and the six trustees although the Contestant did not dismiss these parties until the morning of trial. Further, when the election contest was finally tried, the Contestant was utterly unsuccessful in persuading the court to overturn the election. These facts suggest that the situation in which Mr. Rothe found himself for the majority of the time was not the typical election contest. It was not until the day of trial, when all of the voting rights issues were stripped from the case that the case finally resolved itself into an election contest.

The Attorney General Opinions have stressed that the decision to expend public funds to protect the public interest in the suit brought against the officer of the district will always be a question of fact. Thus, the other six members of the Board of Trustees believe that they have the opportunity to consider whether reimbursement of the trustee may be appropriate for expenditures made in connection with the case that do not relate directly to the election contest. In particular, it seems appropriate for the board to determine whether the legitimate interests of the district, and not merely the personal interests of the officer, required the assertion of a vigorous legal defense on behalf of the public interest as related to the voting rights claims. Stated differently, the issue before the board is whether it is in the public interest to expend public funds to reimburse Trustee Rothe for assistance in a successful defense of the voting rights claims since these issues remained in the case up until the final day of trial when the Plaintiffs finally dismissed those claims and proceeded with the remaining election contest.

However, because of the existing opinions holding it improper to reimburse a candidate in a successful defense of an election contest, the trustee believed it would be prudent to ask the Attorney General for a ruling based on the unusual circumstances presented by the case before making any decision on reimbursement on the requested expenses.

The District has asked me to prepare a proposed draft request for Commissioner Alaniz' consideration and that I urge the Texas Education Agency to consider formalizing and transmitting the request and this letter to the Attorney General for consideration of this question. Although the situation presented is unusual, the issue it raises is important to this District. The District seeks to balance its obligations for the appropriate use of public funds with its authority to consider reimbursement of individual trustees on their appropriate defense of issues affecting District policies. Please do not hesitate to contact me concerning any question you may have about the request or should you wish to examine a set of the pleadings in the suit giving rise to the request.

Sincerely,



David Méndez

DM/cg

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Enclosure