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OPINION COMMITTEE

November 06, 2014

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OPEN RECORDS DIVISION

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via Certified Mail, Return Receipt Requested

FILE # ML-47663-14
I.D. # 47663

Re: Request for Attorney General's Opinion Concerning Payment of Attorney's Fees for Representation of Commissioners in a Criminal Investigation and Authority of Commissioners Court members to Authorize Payment of Attorney's Fees for Representation of Themselves and Each Other

Dear General Abbott:

We respectfully request your opinion on the following issues concerning payment of attorney's fees for members of the Waller County Commissioners Court:

1. May a county pay the attorney's fees for members of a commissioners court who sought legal representation for a criminal investigation under section 157.901 of the Local Government Code that did not result in any criminal charges filed?
2. If a county may pay the attorney's fees of the members of a commissioners court that were under criminal investigation may the individual members of the court that were under investigation vote in favor of payment of attorney's fees for themselves and other members of commissioners court who were under investigation for the same violations?

A. Factual Background

A criminal complaint alleging violations of the Texas Open Meetings Act was filed against three current and one former member of the Waller County Commissioners Court. The Waller County District Attorney's office recused itself from this matter and requested the assignment of a Special Prosecutor. Judge Jeff Steinhauser of the 155th Judicial District Court of Waller County, Texas appointed the Fort Bend County District Attorney as a prosecutor pro tem. On May 08, 2013, the Commissioners Court voted to retain counsel to defend county officials

who may be subject to claims or litigation for actions arising from the performance of a public duty in which the public interest requires a defense of such matters. Thereafter, on May 15, 2013, a retainer agreement was presented authorizing legal services for each of the members under investigation. This office advised the Waller County Commissioners' Court that such a retainer and expenditure of public funds was inappropriate. See legal opinion of Charlotte Kim, Assistant Waller County District Attorney attached hereto as Exhibit A.

The investigation by the Special Prosecutors was submitted to a Waller County grand jury for its deliberation. The grand jury completed its service on January 17, 2014, and did not return indictments on any member of the court. On November 05, 2014, the Waller County Commissioners Court, citing section 157.901 of the Texas Local Government Code, voted in favor of an Order authorizing payment for retained legal counsel that defended county officials who were the subject of claims, investigations and potential litigation for actions arising from the performance of their public duties in which the public interest requires a defense. In the Order itself, the Commissioners Court made the following findings: (1) Certain allegations were made which implicated one or more county employees and/or officials in civil or criminal investigations, claims, or litigation involving acts or actions by said employees and/or officials in the performance of their public duties; (2) the commissioners court reasonably believes that the public interest in these matters required a vigorous defense; (3) the District Attorney or County Attorney, or both could have provided such representation, except there was a conflict of interest arising from the potential allegations of a violation of a criminal law of this state. Although all liability for any form of misconduct, civil or criminal, was denied, ultimately, the defense of such allegations required outside counsel and all such investigations have been concluded with no findings of misconduct; (4) An elected or appointed county official, or a county employee, who is accused or implicated in an investigation into acts or actions taken in the course and scope of their employment and in the performance of their public duties, or who is named in a complaint, or who is personally involved in any such litigation should be afforded legal counsel at the County's expense. See order and attachments attached hereto as Exhibit B.

As part of the Order, three current sitting members of the court, and one former commissioner, submitted invoices from defense counsel to the Waller County auditor for approval and payment. The approval of the invoices was tabled so that our office could request an AG Opinion as to both the propriety of the county paying the legal fees of a public official involved in a criminal investigation, and the validity of counting votes from certain members of commissioners court who were part of the criminal investigation.

B. Law and Analysis

1. Section 157.901, Local Government Code.

A court has determined that a county does not have a general duty to provide for the criminal defense of any of its officers and employees under section 157.901 of the Local Government Code. See *White v. Eastland County*, 12 S.W.3d 97, 102 (Tex. App.—Eastland 1999, no pet.). The court in *White* determined that section 157.901 creates a duty to provide a defense in *civil* cases, but does not create a duty to defend an official or employee against a criminal charge. See *White*, 12 S.W.3d at 102. Section 157.901 states:

(a) A county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of public duty is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both.

(b) If additional counsel is necessary or proper in the case of an official or employee provided legal counsel under Subsection (a) or if it reasonably appears that the act complained of may form the basis for the filing of a criminal charge against the official or employee, the official or employee is entitled to have the commissioners court of the county employ and pay private counsel.

Reading the statute as a whole, the court reasoned that additional counsel under subsection (b) of section 157.901 is required to be provided in a “suit” as referred to in subsection (a), not in the criminal case that may arise under the same facts. Consistent with *White*, the Texas Attorney General’s office has concluded that a county does not have either a statutory or common-law duty to provide for criminal defense expenses of an officer or employee. *See* Op. Tex. Att’y Gen. No. GA-0523 (2007).

2. Common Law Authority

There is another authority under the common law which allows governmental entities to provide counsel for public officials and employees. *See* Op. Tex. Att’y Gen. No. JC-0047 (1999), at 2; *accord City of Corsicana v. Babb*, 290 S.W. 736 (Tex. Comm’n App. 1927, judgment adopted). This authority is primarily limited by the constitutional prohibitions against use of public money to aid any individual or private interest and provision of extra compensation, fee or allowance to a public office. *See* TEX. CONST. art. III, §§ 52(a), 53; *cf. White*, 12 S.W.3d at 103 (noting constitutional provisions as check on common law authority to provide counsel).

In Opinion JC-0294, the Attorney General considered whether city council members could lawfully vote to provide themselves with city-funded criminal defense counsel in an Open Meetings Act prosecution. *See* Op. Tex. Att’y Gen. No. JC-0294, at 1-2. The Attorney General declared that “the outcome is particularly important when a public official faces criminal charges brought by the state, rather than a civil suit brought by a private individual.” *Id.*, at 6. The Attorney General declared that a city council could, but it not required to, reimburse a member of the council for attorney’s fees incurred in defending against criminal charges if the act for which the council member was charged was done in a bona fide performance of official duties and a public interest, rather than a private interest of the individual officer, would be served by the expenditure. *Id.*, at 9. “Most important,” the opinion continued, “we believe that a Texas court would hold...that there is no public interest in defending a guilty official from prosecution.” *Id.* Accordingly, the Attorney General declared that a city council may not pay reimbursement of a city council member’s legal expenses in defending against an Open Meetings Act prosecution until it knows the outcome of the criminal case and the council member is not found guilty. *Id.* at 11. The court in *White* also determined that the common law does not impose a duty on a county to pay for the criminal defense of its officers and employees. *White*, 12 S.W.3d at 103.

Under the common law, a county may pay legal fees incurred in an action only if the Commissioners Court makes two findings. First, the Commissioners Court must find that the legal action involved a county interest requiring a vigorous defense, or, conversely, that paying the legal fees serves a county – and not merely the official’s private – interest. Op. Tex. Att’y Gen. No. JC-0047, at 5. Second, the Commissioners Court must find that the official committed the alleged act or omission that was the basis of the legal action while acting in good faith and within the scope of official duties. *Id.* Importantly, a commissioners court’s determination to spend county funds may be reviewed by a district court for clear abuse of the discretion conferred upon commissioners by law.

It is established law in Texas that a public official is not eligible to participate in a matter which affects his personal pecuniary interest. *Hager v. State ex rel. TeVault*, 446 S.W.2d 43, 49 (Tex. Civ. App.—Beaumont 1969, writ ref’d n.r.e.). Based on that reasoning, a court in *City of Del Rio v. Lowe* held that a city council member could not vote in favor of paying out public funds for his own legal representation in a criminal prosecution. 111 S.W.2d at 1219 (Tex. Civ. App.—San Antonio 1937), *rev’d on other grounds*, 132 Tex. 111, 122 S.W.2d 191 (1938). Thus, a member of a governing body is disqualified from voting on payment of attorney’s fees for his or her defense. A vote in violation of this self-interest principle would likely be invalid.

In Opinion JC-0294, the Attorney General stated that it was “extremely doubtful that an indicted council member could address these questions disinterestedly when payment for his or her defense is at stake.” See Op. Tex. Att’y Gen. No. JC-0294 (2000). Accordingly, your office reasoned that an indicted city council member was disqualified from voting on payment of attorney’s fees for his or her defense. Because three sitting members of the commissioners court would have to make the two above-mentioned findings prior to authorizing payment of legal fees, our office believes these three commissioners themselves would be disqualified from voting because it is extremely doubtful that they could address these questions free from bias and partiality. Following Opinion JC-0294, just as the council members were disqualified from approving the payment of attorney’s fees for any of the other council members indicted for the same offense, it would follow that the three commissioners who were under investigation are also barred in voting on payment for each other the other commissioner’s legal fees. After all, the commissioners have similar, if not identical, personal interests in receiving adequate defenses. It would be extremely difficult for any of the members to make a disinterested determination as to the other members for the same offenses. Accordingly, any Order authorizing payment of attorney’s fees would be deemed invalid since there is not a majority of the disinterested court to authorize the payment.

C. Conclusion

Section 157.901, Local Government Code does not require county-funded defense of county officials or employees in criminal cases. Furthermore, since no criminal charges were filed, our office suggests that the county does not have the authority to hire and pay for defense counsel to provide criminal legal defense services to county officials. Additionally, common law authority for the county to provide defense counsel exists if the criminal proceedings against the official or employee at issue have concluded and the official or employee was not found guilty. In this scenario, the Commissioners Court must determine that (1) the criminal action involved a

county interest requiring a vigorous defense or, conversely, paying the legal fees serves a county – not merely the official’s or employee’s – interest and (2) the official or employee committed the alleged act or omission that was the basis of the criminal action while acting in good faith and within the scope of official duties. In this instance, no members of the court was charged with any criminal violations, they simply chose to retain legal counsel to act on their behalf instead of answering questions and providing information requested by the special prosecutors directly themselves. Here, an interested member on the Commissioners Court is disqualified from voting on payment of attorney’s fees for his or her defense as well as the defense of the other interested members. Therefore, any order authorizing payment of legal fees for a criminal investigation would be deemed invalid since there is no quorum of the court present to authorize such payments.

Your guidance on these issues is respectfully requested.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruhee G. Leonard', written in a cursive style.

Ruhee G. Leonard

Assistant Criminal District Attorney

Enclosures:

Exhibit “A” – Legal Opinion of Charlotte Kim, W.C.A.D.A.

Exhibit “B” – Order Authorizing Payment of Legal Fees and Attached Invoices

cc: Hon. Glenn Beckendorff
Hon. John A. Amsler
Hon. Frank Pokluda
Hon. Jeron Barnett
Hon. Stanley Kitzman