



DALLAS COUNTY
DISTRICT ATTORNEY
SUSAN HAWK
Federal Section

RECEIVED
FEB 12 2015
OPINION COMMITTEE

FILE # ML-47698-15
I.D. # 47698

Via CMRRR and email: Opinion_committee@texasattorneygeneral.gov

RQ-0011-KP

February 10, 2015

Honorable Ken Paxton
Office of the Attorney General
Attn: Opinion Committee
P. O. Box 12548
Austin, TX 78711-2548

RE: *Request for an opinion regarding a county's duty to employ and pay private legal counsel to defend a former county employee in a civil suit for alleged misconduct which is also the basis of a pending criminal charge against the employee pursuant to the Tex. Local Gov't Code Section 157.901*

Dear Attorney General Paxton:

I respectfully request your opinion on behalf of the Dallas County Commissioners Court and myself.

QUESTION PRESENTED

A former Detention Service Officer (DSO) employed by the Dallas County Sheriff's Department (DCSD) has requested Dallas County to employ and pay for private legal counsel to represent him in a civil suit brought against him in the United States District Court for the Northern District of Texas under 42 U.S.C. §1983 arising from an alleged improper sexual relationship with an inmate of the Dallas County Jail (DCJ).

The alleged misconduct of the DSO occurred on the premises of the DCJ during the regular working hours of the DSO. This alleged misconduct is also the basis of a pending criminal charge against the DSO by the Dallas County District Attorney (DA) in state district court. The DSO has pled not guilty to the criminal charge and has also denied the alleged misconduct in the civil suit.

Does the Dallas County Commissioners Court have a legal duty to employ and pay for private legal counsel to represent the DSO in the civil suit under Tex. Local Gov't Code §157.901(a) and (b)?

DISCUSSION

Dallas County has a statutory duty to provide a legal defense to elected county officials and county employees under specific circumstances enumerated in Tex. Local Gov't Code §157.901 which provides as follows:

Tex. Loc. Gov't Code §157.901. Legal Defense of Employees

- (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.
- (c) A county official or employee or employee is not required to accept the legal counsel provided in this section.

Under Section 157.901(a) and (b) Dallas County has a legal duty to employ and pay for private counsel to represent a county official or employee “for an action arising from the performance of public duty” and “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.”

In construing a statute, a court first looks at the statute's plain and common meaning. *National Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). A reviewing court presumes that the Legislature intended the plain meaning of the words it uses. *Id.* And if the statute is unambiguous, the reviewing court generally adopts the interpretation supported by the plain meaning of the statute's words. *Fitzgerald v. Advanced Spine Fixation*, 996 S.W.2d 864, 865 (Tex. 1999).

Because the alleged misconduct of the DSO in the federal civil suit is also the basis of a pending criminal charge against him in state court, it seems clear that the DA has a conflict of interest which disqualifies her from representing the DSO in the civil case.

It is less clear, however, whether the alleged misconduct of the DSO “arises from the performance of a public duty” which would trigger the county's legal obligation to employ and pay private counsel to represent him in the civil suit under §157.901(a).

The Texas Constitution prohibits using public money to aid an individual or private interest except in limited circumstances. Tex. Const. art III §52.

Section 157.901(a) does not impose a statutory duty to provide legal representation unless the actions of the county official or employee arise from the performance of a public duty. Your Office has engrafted the requirements of the common law duty to defend on the statutory duty to

defend mandated by §157.901(a). “The suits must concern events occurring during the course of the public servants’ performance of public duties and within the scope of authority of the public office or position.” Tex. Atty. Gen. Op. No. JM-755 (1987). Thus, it appears that for purposes of a county’s duty to defend under §157.901(a), a county official or employee’s performance of public duties must also be within the scope of authority of the public office or position.

Here the question is whether the alleged misconduct of the DSO in having an improper sexual relationship with a DCJ inmate arising from the performance of his official duties is also acting within the scope of his authority in that position.

There is scant judicial authority regarding the proper interpretation of §157.901(a) and a county’s duty to provide legal representation to elected officials and employees.

Only two (2) cases interpreting this statute by Texas courts have been found by this office. In the case of *In re Reed*, 137 S.W.3d 676, 679-80 (Tex. App.–San Antonio no writ) the San Antonio Court of Appeals concluded that the district attorney’s office had no duty to defend a Texas Justice of the Peace in an appeal from a CJC suspension proceeding because the allegations of indecent exposure did not “arise out of the performance of a public duty.” It was undisputed in this case that the alleged misconduct did not occur during or in connection with the performance of the JP’s public duties.

In *Burns v. Eastland County*, 12 S.W.3d 97 (Tex. App.–Eastland no writ) the Eastland Court of Appeals held that Tex. Loc. Gov’t Code §157.901(a) did not impose a duty on a Texas county to employ or pay private counsel for the former sheriff of Eastland County to defend him in a state criminal case.

It is unclear how the Texas courts would apply §157.901(a) and (b) to the alleged misconduct of the DSO in this case and if Dallas County has a legal duty to employ and pay private counsel to represent him in the pending civil suit.

Conclusion

Section 157.901(a) of the Texas Local Gov’t Code requires a Texas county to provide legal counsel to defend any “**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 a public duty.**”

Section 157.901(b) also expressly provides that “**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.**”

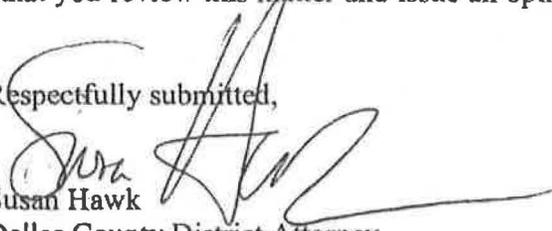
It appears that the plain language of the statute requires Dallas County “to employ and pay for private counsel” in this case because the alleged misconduct of the DSO is also the basis of a pending criminal charge against him in state court. Clearly the DA has a conflict of interest which disqualifies her from representing the DSO in the pending civil case.

Honorable Ken Paxton
Page 4 of 4

Your Office has stated, however, that §157.901(a) merely codifies the common law duty to defend which is mandated by this statute. **“The suits must concern events occurring during the course of the public servant’s performance of public duties and within the scope of the public office or position.”** Tex. Atty. Gen. Op. No. JM-755(1987). It is unclear whether the alleged misconduct of the DSO in this case (improper sexual relationship with a DCJ inmate), even assuming it arises from the performance of his public duties is also within the scope of his authority in that position or employment.

Accordingly, this office respectfully requests that you review this matter and issue an opinion at your earliest opportunity.

Respectfully submitted,


Susan Hawk
Dallas County District Attorney