



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

February 27, 1975

Opinion No. 75- 86

Mr. Rodney L. Turner
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Kansas City, Kansas 66101

Dear Mr. Turner:

We have your letter of February 18, concerning one portion of Opinion No. 75-34, and its applicability to Ordinance No. 53107.

In that opinion, we considered the question whether, if a judgment for an award of money were entered against a county officer for acts performed either within or beyond the scope of his authority, it was the responsibility of the county to pay such a judgment or any part thereof. We stated categorically that because the judgment created only a personal liability on the part of the officer or employee, it would be an improper use of public funds to volunteer, as it were, payment of such a judgment from public funds. This statement may have been somewhat more categorical than is justified.

You enclose a copy of Ordinance No. 53107, which authorizes the city in the discretion of the governing body to pay certain expenses of officers and employees of the city

"that may be incurred by such person in connection with or resulting from any claim, action, suit or proceeding, civil, administrative or investigative, or threat thereof, or in connection with an appeal relating thereto, in which such person may become involved as a party or otherwise, by reason of being or having been an officer or employee of the city."

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Such expenses payable by the city under the ordinance may include payment of "judgments or amounts . . . in settlement by or on behalf of such person." In order to authorize payment of such expense, the governing body must find the following:

- 1) That the claim, action or proceeding arose out of and in the line of duty or employment of such person by the city.
- 2) That the officer or employee acted in good faith and had reasonable cause to believe that his conduct was lawful.
- 3) That it would be in the interests of the city to authorize the payment of such expense."

Upon reconsideration, we think that our earlier generalization, that a judgment against an officer or employee of the city may never be satisfied by the city out of public funds, was overbroad. A number of instances in which such payments have been upheld are cited at 3 McQuillin, Municipal Corporations, 12.137 (3d ed.). One of the most apt statements of the justification for the rule permitting, although not requiring, such payments, is to be found at Roper v. Laurinburg, 90 N.C. 427 (1884), quoting from Sherman v. Carr, 8 R.I. 431, thus:

"Is it then one of the usual and ordinary expenses of a city to protect its officers, who, while exercising in good faith the functions of their office, have been found by the verdict of a jury to have exceeded the lawful powers of that office and to have trespassed upon the rights of a citizen? If the power to indemnify an officer under these circumstances does not rest in that body who appropriate the money for all the legitimate duties of a municipality within its own province, the various executive officers of a city perform their duties at the peril of an individual responsibility for all their mistakes of law and of fact, however honest and intelligent they may be, and also at the peril of the possible mistakes of a jury naturally jealous of the rights of the

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citizen when brought in conflict with the exercise of official power. If the officer is thus responsible, he will naturally be too cautious, if not timid, in the exercise of his powers which must be frequently exercised for the protection of society, before and not after a thorough investigation of the case in which he is called upon to act.

* * *

We know of no case in which, while the officer continues to act in behalf of the community, and not in his own behalf, it is held that the community cannot indemnify him."

In State ex rel. Crow v. City of St. Louis, 174 Mo. 125, 73 S.W. 623 (1903), the court stated thus:

"The true test in all such cases is, did the act done by the officer relate directly to a matter in which the city had an interest, or affect municipal rights or property, or the rights or property of the citizen, which the officer was charged with a duty to protect or defend? If it did, the city had a right to employ counsel to defend the officer, and to appropriate funds to pay a judgment rendered against the officer."

Ordinance No. 53107 conforms fully to these settled principles, and although we have found no Kansas cases squarely in point, the foregoing represents a statement of settled law which would, in our view, be followed in this jurisdiction.

The same principles are applicable to the county, which, absent specific statutory authority therefor, make adequate provision for payment of such expenses in the exercise of the powers of local self-government granted by K.S.A. 19-101a.

Accordingly, those statements contained in the last paragraph but one on page three of Opinion No. 75-34 are hereby withdrawn,

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the foregoing being, in our view, a correct statement of the governing principles. It should be noted that although payments of such judgments is not required, generally speaking, it is a permissible exercise of discretionary power. See, e.g., Roberts v. City of St. Louis, 242 S.W.2d 293 (1951).

We appreciate your writing, and calling this question to our attention.

Yours very truly,



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