



STATE OF KANSAS

*Office of the Attorney General*

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

*Curt T. Schneider*  
*Attorney General*

February 1, 1977

ATTORNEY GENERAL OPINION NO. 77- 38

Mr. Steve Pigg  
Assistant City Attorney  
215 East 7th Street  
Topeka, Kansas 66603

Re: Cities--Funds--Judgments

Synopsis: Ordinance Nos. 13793 and 13971, providing for the payment of defense costs and for the satisfaction of civil judgments entered against city police officers arising out of false arrests by such officers while acting within the scope of such officers' duty, and providing for the payment of defense costs and for the satisfaction of civil judgments entered against certain other city officers arising out of errors or omissions committed by such members while acting within the scope of their authority, both conform fully to settled principles of the law of municipal corporations, and the use of municipal funds to pay such costs and judgments does not constitute a diversion of public funds to private purposes.

\* \* \*

Dear Mr. Pigg:

You inquire as to the validity of Ordinance Nos. 13793 and 13971 of the City of Topeka.

Section 1 of Ordinance No. 13797 establishes a City False Arrest Self-Insurance Fund in the city treasury, which shall be liable for the payment of

Mr., Steve Pigg  
Page Two  
February 1, 1977

"(1) All valid and enforceable claims and judgments against the City of Topeka and/or against the members of the Topeka Police Department in their official capacity arising out of a false arrest committed by any such member while acting within the scope of his or her duty after January 1, 1976; (2) all court costs and other litigation related expenses incurred in the defending of any such false arrest claim; and (3) attorney's fees for the services rendered by any outside counsel retained by the City of Topeka. . . ."

Under section 2, the fund is to be supported by transfers from the budget of the city police department. Section 3 provides for the defense of such actions thus:

"All false arrest claims against the City of Topeka shall be processed and defended by the Legal Department of the City of Topeka. PROVIDED, nothing contained herein shall prohibit the Legal Department from obtaining from the Governing Body the authority to retain outside counsel for additional assistance whenever the need arises."

Section 1 of Ordinance No. 13971 provides that the city judgment fund

"shall be liable for the payment of the following: all enforceable civil claims and judgments against the City of Topeka Commissioners or Department Heads in the official capacity arising out of errors or omissions committed by any such member while acting within the scope of his or her authority; and all enforceable civil claims and judgments against the members of the Board appointed by the City Commissioners excepting the Metropolitan Airport Authority."

Mr. Steve Pigg  
Page Three  
February 1, 1977

Section 2 provides for the defense of such claims by the city legal department or outside counsel, as the case may be.

You advise that the validity of these ordinance has been questioned by some individuals, following entry of judgment against the Topeka city attorney based upon discriminatory employment practices.

There is an abundance of authority supporting the use of public funds to pay judgments within the compass of both ordinances. See 3 McQuillin, Municipal Corporations, § 12.137 (3d ed.) One of the most apt statements of justification for the rule permitting such payments is 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 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 a 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."

Mr. Steve Pigg  
Page Four  
February 1, 1977

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."

At 3 McQuillin, Municipal Corporations, § 12.137, the writer summarizes the reported decisions thus:

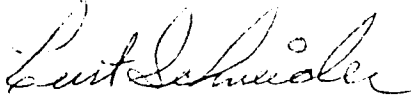
"Where a municipal officer incurs a loss in the discharge of his official duty in a matter in which the corporation has an interest, and in the discharge of a duty imposed or authorized by law, and in good faith, the municipal corporation has the power to appropriate funds to reimburse him, unless expressly forbidden. And this it may do, although it may turn out that the officer exceeded his legal rights and authority."

Ordinance Nos. 13793 and 13971 conform fully to these settled principles, and although we find no Kansas cases squarely in point, the foregoing represents a statement of settled law which would, in my judgment, be followed in this jurisdiction were the question presented. It has long been settled that the expenditure of public funds for the satisfaction of such judgments does not constitute the diversion of those moneys to a private use, for the loss to be indemnified is incurred by the officer while acting in behalf of the municipality itself. The payment of defense costs stands on a par with satisfaction of the judgment or indemnification therefor, and indeed, was authorized by the 1972 Kansas legislature for the defense of elected state, county and school district officers, as well as city officers. K.S.A. 1976 Supp. 75-4356 et seq.

Mr. Steve Pigg  
Page Five  
February 1, 1977

Thus, to recapitulate, in my judgment, both ordinances are entirely within the lawful exercise of the city's municipal legislative powers, and the expenditure of funds as provided in these ordinances both for the payment of defense costs and the satisfaction of judgments or indemnification therefor is a permissible use of city funds.

Yours very truly,



CURT T. SCHNEIDER  
Attorney General

CTS:JRM:kj