



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 85- 42

Don Vsetecka  
Holcomb City Attorney  
311 Campus Drive, Suite 101  
Garden City, Kansas 67846

Re: Constitution of the State of Kansas--Corporations--  
Cities' Power of Home Rule; Payment of Attorney's Fees  
Incurred by City Official in Defending a Criminal Action

Synopsis: Pursuant to authority granted by Article 12, Section 5  
of the Kansas Constitution, the governing body of a  
city may pay attorney's fees of a city official who  
is acquitted of criminal charges, provided the govern-  
ing body finds that the criminal charges arose from  
the discharge of an official duty in which the city  
had an interest, and that the officer acted in good  
faith. Cited herein: K.S.A. 75-6108, 75-6116; Kan.  
Const., Art. 12, §5.

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Dear Mr. Vsetecka:

You request our opinion as to whether the City of Holcomb may pay the legal fees and expenses incurred by Mayor Ivan Myers and Police Chief Donald Nevin for defense of criminal charges brought against them for two class A misdemeanors, eavesdropping and breach of privacy, and conspiracy, a class C misdemeanor. You indicate that the criminal charges arose out of a wiretapping incident in which city telephone lines were allegedly tapped and telephone conversations of a city employee recorded.

In response, we first note that the Kansas Tort Claims Act prescribes that governmental entities, including cities, shall provide for the defense of any civil action brought against a public employee. See K.S.A. 75-6108 and 75-6116. However, the act is silent as to defense of employees in criminal actions, and neither obligates a governmental entity to provide for the defense of such an action, nor prescribes circumstances under which the same is permissible. Further, we are unaware of any reported Kansas case which has considered the power of a city to provide for the defense of a city official charged with a crime. In the absence of any Kansas statute or case which provides guidance, we must examine pertinent cases from other jurisdictions.

The decisions of the various state courts which have considered the authority to expend public moneys to defend a public official charged with a crime appear to be in some degree of conflict. See 130 A.L.R. 736 and A.L.R. Blue Book of Supplemental Decisions, Volumes 1-6. A number of courts have held that expenditures for such a purpose constitute a mere gratuity and are not for a public purpose. See, e.g., Guerine v. City of Northlake, 274 N.E.2d 625 (Ill. App. 1971); In re Jensen, 60 N.Y.S. 933 (N.Y. App. 1899). Other courts have upheld such expenditures when made pursuant to statute, or independent of statute or ordinance. See, e.g., Valerius v. Newark, 423 A.2d 988 (N.J. Sup. Ct. 1980); Lomelo v. City of Sunrise, 423 So.2d 974 (Fla. App. 1982).

In Powers v. Goodwin, 291 S.E.2d 466 (W.Va. Sup. Ct. 1982), the West Virginia Supreme Court stated that the majority rule concerning the power to indemnify a public officer for attorney's fees incurred in defending a criminal action was as follows.

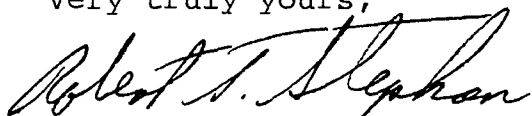
"In order to justify indemnification from public funds the underlying action must arise from the discharge of an official duty in which the government has an interest; the officer must have acted in good faith; and the agency seeking to indemnify the officer must have either the express or implied power to do so." Id., Syl. ¶3.

The court further stated in Powers that "the conviction of a common law or statutory crime is conclusive proof that the official was not acting in good faith and was outside the scope of his official duties." 291 S.E.2d at 474.

We are persuaded by these pronouncements of the West Virginia court, and accordingly conclude that the City of Holcomb may not consider a request for payment of attorney's fees incurred in defending the subject criminal actions until and unless the defendants are acquitted. If the defendants are acquitted, it is our opinion that the governing body may, pursuant to home rule powers granted by Article 12, §5 of the Kansas Constitution, pay the individual's attorneys fees if it finds that the underlying criminal actions arose from the discharge of an official duty in which the city had an interest, and that the officer acted in good faith. It should be noted that, under common law principles recognized in this state, Mayor Ivan Myers would be disqualified from participating in any deliberations of the governing body concerning a request for reimbursement of attorneys fees which he has incurred. See Anderson v. City of Parsons, 209 Kan. 337, 341-342 (1972).

Finally, it should be noted that the conclusions reached herein do not address the question of whether a city may provide counsel in advance for police officers charged in illegal arrest or excessive force cases. As one court has noted, the provision of counsel in such cases may serve a public purpose in that such charges occur more frequently, arise from the performance of duties, and thus affect the morale of a police department. See Moya v. New Brunswick, 448 A.2d 999, 1004-1005 (N.J. Sup. Ct. 1982). In contrast, charges of illegal wiretapping by police officials occur less frequently, and it is our opinion that the advance provision of counsel in such cases would not have a substantial effect on the morale of a police department.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

RTS:JSS:TRH:jm