



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

November 26, 1975

ATTORNEY GENERAL OPINION NO. 75- 442

William B. Elliott
City Attorney
City of Hill City
105 East Cherry
Hill City, Kansas 67642

Re: Cities--Funds, Use Of--Cash-Basis

Synopsis: The payment of an indebtedness incurred for legal services retained by and rendered to a municipality for representation of the City as a party defendant in civil litigation is subject to the Kansas cash-basis law, and any such indebtedness incurred in excess of funds on hand and available for payment thereof is in violation of the cash basis law and is void.

* * *

Dear Mr. Elliott:

You inquire concerning payment of litigation expenses incurred by the City of Hill City, Kansas, in defense of the city in the case of *Gra-Co Sanitation, Inc. v. Hill City, Harold Critchfield, Leon Fink and Don Spencer*.

This suit, you advise, arose out of controversy surrounding a contract entered into in 1973 between the City and Gra-Co, whereunder the latter had contracted with the city to provide trash and refuse collection to residents of the city. On April 11, 1974, you advise, the Graham County District Court, in a suit before it, held that the contract was a valid and binding contract. Subsequently, there was a change in the composition of the city council, the new members having pledged, if elected, to breach the contract between the city and Gra-Co. Upon being elected, the council as newly constituted vindicated this pledge, and did breach the contract. On September 6, 1974, Gra-Co Sanitation, Inc. filed suit against the city and individual defendants

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named above, seeking damages in the amount of \$93,000 for breach of contract. The court determined that the individual council members were not personally liable for breach of contract. However, after a trial and pursuant to a jury verdict, judgment was rendered against the City in the amount of \$20,000. No appeal was taken.

On September 1, 1975, the city applied to the Board of Tax Appeals for authorization to issue no fund warrants to pay attorney's fees and auditor's fees, all incurred in the defense in this case. A group of taxpayers filed a protest with the Board of Tax Appeals against the issuance of such no fund warrants. As of this date, the Board has not issued an order regarding the issuance of these warrants, and the litigation expenses incurred by the City in defense of the action have not yet been paid. Presently, a group of taxpayers are threatening to file suit against members of the city council to hold them personally liable for the judgment of \$20,000 rendered against the City, and for all litigation expenses which the governing body might authorize to be paid.

You ask, first, whether members of the council will be personally liable to the taxpayers of the City of Hill City for payment of litigation expenses incurred by the City in the defense of the City as a party defendant, if the Board of Tax Appeals should authorize issuance of no fund warrants. Clearly, the City of Hill City, as a municipal corporation, has the power and authority to contract for the services of an attorney, and is authorized to pay for the services of such attorney rendered in defending the city when it is a party defendant to a lawsuit. Such expenditures are a valid expenditure of public funds, and members of the governing body clearly incur no personal liability for any such expenditure which they authorize to be made in the defense of the City. Obviously, it is beyond the scope of this opinion to anticipate the outcome of any particular lawsuit, which is necessarily dependent upon the proof of facts which we are in no position to anticipate. However, as a general principle of law, clearly, members of the city governing body incur no personal liability to taxpayers of the city, or anyone else, for that matter, for expenditures incurred by and approved by them for legal services rendered to the city for its defense as a party defendant in a pending lawsuit. It is almost too obvious to need stating, that the city certainly has the

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power to employ an attorney to defend the city when it is sued. Members of the city governing body certainly incur no personal liability for the costs of counsel employed to represent the city in such an instance, for they are clearly acting within the scope of their authority and responsibility.

However, the payment of any claim or indebtedness, although for a valid public purpose, must comply with the Kansas cash-basis law. K.S.A. 1974 Supp. 10-1113 states in pertinent part as follows:

"Unless otherwise provided in this act, it shall be unlawful for any member of any governing body of any municipality to knowingly vote for or in any manner aid or promote the passage or adoption of any order, motion, ordinance, resolution, legislation or other act of said governing body, creating an indebtedness in excess of the amount of funds actually on hand in the treasury of such municipality at the time for such purpose, or to knowingly vote for the drawing of any order, warrant or check, or other evidence of such indebtedness, in excess of the amount of funds actually on hand in the treasury at the time for such purpose."

K.S.A. 1974 Supp. 10-1116 sets forth certain exemptions from this prohibition:

"The provisions of this act shall not apply to contracts and indebtedness created, when payment has been authorized by a vote of the electors of the municipality, or . . . when provision has been made for payment by the issuance of no-fund warrants authorized by law and in the manner, and limited in amount as prescribed by law"

Thus, under the cash-basis law, there must be available funds on hand in the treasury at the time any indebtedness is created against the municipality, unless provision is made for payment thereof by the issuance of no-fund warrants. At the time a contract is signed for the purchase of an automobile, for example, there must be available funds on hand sufficient to cover that indebtedness. Similarly, at the time a contract

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for personal services is signed, there also must be adequate funds in the treasury available for that purpose, or alternatively, provision must have been made for payment of such indebtedness by no-fund warrants. If, in this instance, the City of Hill City contracted with an attorney to represent it in the matter of *Gra-Co Sanitation, Inc. v. City of Hill City, et al.*, and there were not in the treasury sufficient funds available for that purpose to satisfy the indebtedness thus created, the contractual obligation is void.

If the City has entered into a contract with an attorney to provide representation in defense of the City at a specified rate per hour or day, and as a result of the services so rendered, an indebtedness now exists against the City under such contract in excess of funds available in the treasury for payment thereof, the contractual obligation has been incurred in violation of the cash-basis law, and is void. It remains void notwithstanding a belated attempt to obtain authorization for the issuance of no-fund warrants from the Board of Tax Appeals. Under K.S.A. 1974 Supp. 10-1116, an indebtedness is excepted from the cash-basis requirement when, at the time it is created, provision has been made for payment thereof by the issuance of no-fund warrants. Whether a particular indebtedness is valid or invalid under the cash-basis law does not depend upon after-the-fact action by the Board of Tax Appeals. This is determined by the state of affairs, and the condition of the municipal treasury, at the time the indebtedness is incurred. A municipality which seeks to retain an attorney to represent it in litigation may prescribe the terms of compensation in such a manner as to assure that the services rendered do not create an indebtedness in excess of a prescribed amount, that is, the funds presently on hand and available for that purpose. Where no contractual protective provision is agreed upon, however, and an indebtedness is incurred for services rendered under such contract in excess of funds on hand and available for payment thereof, obviously, an indebtedness has been created in violation of the cash-basis law, and such indebtedness, that which is created in excess of those funds in the treasury and available for payment thereof at the time the contract for services was executed, is void.

Thus, if the indebtedness which is presently outstanding and for which no fund warrants have been applied for is in excess of funds which were in the municipal treasury and available for that purpose at the time the contract for attorney's

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services in *Gra-Co Sanitation, Inc. v. City of Hill City, et al.*, was executed, the payment of that indebtedness is prohibited by law, whether the Board of Tax Appeals authorizes issuance of no fund warrants or denies such authorization. You ask whether, if permission is not granted by the Board of Tax Appeals for the issuance of no fund warrants, the indebtedness may be paid from the 1976 budget. Once again, if the indebtedness for services which is sought to be paid is in excess of funds presently available for that purpose, it is a void indebtedness, and may not be paid from the budget for any fiscal year, whether it be 1975, 1976, or 1977.

You ask whether members of the governing body may be personally liable for the amount of any money paid by the City for attorney's fees for services rendered the City in its defense in the *Gra-Co* case. Payment of any indebtedness which has been incurred in violation of the cash-basis law, knowing such payment to be applied to an indebtedness incurred in violation of the cash-basis law, constitutes malfeasance in office, and any member of the governing body participating in any official action thereof providing for the payment of such indebtedness is subject to removal from office, and is subject to a fine of not more than \$1,000. K.S.A. 10-1121. Moreover, K.S.A. 10-1119 states thus:

"Any contract entered into between the governing body of any municipality and any person, which violates the provisions of this act, shall be void, and any order[,] warrant, check or other evidence of indebtedness was drawn on the treasurer of any municipality in violation of the provisions of this act shall be void."

The payment of any void indebtedness is held to be an act beyond the authority of the members of the governing body, an act *ultra vires*. The amount so paid is recoverable from the recipient. The members of the governing body may be subject to liability for an amount equal to that unlawfully paid, although if the amount unlawfully paid is recovered from the recipient, the loss has been restored, and there may be, at that point, little basis for liability. Clearly, it is not productive to speculate as to possible liability on the basis of unforeseeable circumstances. However, the legal penalties for violation of the cash-basis law are those set out above.

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Lastly, you ask whether the "Council members [will] be personally liable for payment of the \$20,000 judgment rendered against the City of Hill City in District Court Case No. 8243 entitled *Gra-Co Sanitation, Inc. v. City of Hill City*." The liability is that of the City, as determined by the Court, and no action by the members of the governing body respecting payment of attorney's fees for the defense services rendered to the City could shift that liability to the individual members of the council, in my judgment.

Accordingly, it is my opinion that payment of attorney's fees for services retained by and rendered to the City in its defense when a party defendant in civil litigation is a lawful and valid expenditure of public funds. It is further my opinion that any such indebtedness is subject to the Kansas cash-basis law, and that any such indebtedness incurred in excess of funds on hand in the municipal treasury and available for payment thereof at the time the indebtedness was incurred in an indebtedness incurred in violation of the Kansas cash-basis law, and is void. If the indebtedness is in fact found to be in excess of funds on hand and available for payment thereof at the time the indebtedness was incurred, it may not be paid by the City, whether from the proceeds of no fund warrants authorized by the Board of Tax Appeals, or from the budget of the present or any subsequent fiscal year. The penalties for knowing violation of the cash-basis law are those prescribed by K.S.A. 10-1121.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:en