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October 15, 1985

ATTORNEY GENERAL OPINION NO. 85-140

W. R. Brenner, M.D.
Mayor, City of Larned
P.O. Box 70, 417 Broadway
Larned, Kansas 67550

Re: State Departments; Public Officers, Employees--Tort
Claims Act--Defense of Governmental Entity or
Employee; Requests to Provide Defense

Synopsis: Under the provisions of K.S.A. 75-6116 (as amended
by L. 1985, ch. 293, §1), the obligation of a city
to pay attorneys fees incurred by a city officer
in defending a civil rights action is subject to the
conditions and limitations prescribed by K.S.A.
75-6108. Those conditions include the filing of a
written request (within 15 days after service of
process upon the employee) that the city provide for
the defense of the employee. K.S.A. 75-6108(d) and
(e). Where no such request is filed, a city is not
liable for attorneys fees incurred by the employee;
however, the city governing body may, in its
discretion, pay attorneys fees notwithstanding the
failure to file a written request. Cited herein:
K.S.A. 75-6102, 75-6108; 75-6116; L. 1985, ch. 293,
§1.

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Dear Mr. Brenner:

You request our interpretation of K.S.A. 75-6116 (as amended by L. 1985, ch. 293, §1). Specifically, you ask whether a city is obligated to pay the attorneys fees incurred by a city officer in defending a civil rights action, where the officer failed to file a written request that the city provide for his defense.

You advise that a civil rights action filed by the former city manager of Larned was recently settled by the city's liability insurance carrier, and that you and four council members incurred attorneys fees as a result of the lawsuit. You indicate that the city attorney claimed "from the outset" of the lawsuit that the individual defendants (the mayor and four council members) were not acting within the scope of their employment, and that he would not be in a position to provide a defense for said individuals, due to a conflict of interest between the City of Larned and the individual defendants. You advise that no request for the city to provide a defense was filed because the "City Attorney had already denied a defense."

K.S.A. 75-6116 (as amended by L. 1985, ch. 293, §1) imposes an obligation upon governmental entities (which term includes cities) to provide for the defense of a city officer in a civil rights action, with subsection (a) providing as follows:

"If an employee of a governmental entity is or could be subject to personal civil liability on account of a noncriminal act or omission which is within the scope of the employee's employment and which allegedly violates the civil rights laws of the United States or of the state of Kansas, the governmental entity shall provide for the defense of any civil action or proceeding which arises out of the act or omission and which is brought against the employee in the employee's official or individual capacity or both to the extent and under the conditions and limitations provided by K.S.A. 75-6108 and amendments thereto for the defense of actions and proceedings under the Kansas tort claims act. If the employee's act or omission giving rise to the action or proceeding was not the result of actual fraud or actual malice and the employee reasonably cooperates in good faith in defense of the action or proceeding, the governmental entity,

subject to any procedural requirements imposed by statute, ordinance, resolution or written policy, shall pay or cause to be paid any judgment or settlement of the claim or suit, including any award of attorney fees, and all costs and fees incurred by the employee in defense thereof." (Emphasis added.)

As the underscored portion of the above-quoted statutory excerpt indicates, the obligation of a city to pay attorneys fees incurred by a city officer in defending a civil rights action is subject to the conditions and limitations prescribed by K.S.A. 75-6108. That statute provides that a governmental entity may refuse to provide for the defense of an action if it determines:

"(1) The act or omission was not within the scope of such employee's employment;

"(2) such employee acted or failed to act because of actual fraud or actual malice;

"(3) the defense of the action or proceeding by the governmental entity would create a conflict of interest between the governmental entity and the employee; or

"(4) the request was not made in accordance with subsection (e)." (Emphasis added.)

Under the above-quoted statutory excerpt, it is the governing body of the city, not the city attorney, which decides to refuse to provide a defense for any of the above-stated reasons. We would note that the complaint filed by the former city manager alleges, quite repetitively, that the defendants' actions were malicious and wanton. Such allegations raise a question (which could only be answered by a trier of fact) as to whether the individual defendants were acting within the scope of their employment. See Murphy v. City of Topeka, 6 Kan.App.2d 488, 493-494 (1981).

Subsection (e) of K.S.A. 75-6108 prescribes the procedure for requesting a city which to provide for the defense of an employee [which term includes officers - see K.S.A. 75-6102(d)]:

"An employee's request for a governmental entity to provide for the defense of the

employee shall be made in writing within fifteen (15) days after service of process upon the employee in the action. In actions involving employees of the state, such request shall be filed in the office of the attorney general. In actions involving employees of a municipality, such request shall be filed with the governing body thereof or as otherwise provided by such governing body. A governmental entity, in its discretion, may provide requested defense for any of its employees who failed to make a request within the time prescribed by this subsection." (Emphasis added.)

Subsection (d) of K.S.A. 75-6108 prescribes the circumstances under which a city which refuses to provide an employee with a defense is liable for the employee's attorneys fees:

"(d) If after a timely request in accordance with subsection (e), a governmental entity fails or refuses to provide an employee with a defense and the employee retains his or her own counsel to defend the action or proceeding, such employee is entitled to recover from the governmental entity such reasonable attorney's fees, costs and expenses as are necessarily incurred in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of employment as an employee of the governmental entity, but such employee is not entitled to such reimbursement if the trier of fact finds that such employee acted or failed to act because of actual fraud or actual malice.

"Nothing in this section shall be construed to deprive an employee of the right to petition a court of competent jurisdiction to compel the governmental entity or the governing body or an employee thereof to perform the duties imposed by this section." (Emphasis added.)

As the underscored portion of the above excerpt indicates, a timely request for defense under subsection (e), and refusal of the governmental entity to provide a defense, are conditions-
precedent to city liability for attorneys fees incurred by

an employee. As there was neither a request for defense, nor a refusal thereof by the governing body under the circumstances you describe, it is our opinion that the City of Larned is not liable for the subject attorneys fees. However, under the provisions of subsection (e) K.S.A. 75-6108, the governing body may, in its discretion, pay attorneys fees incurred by its members.

In the event the city governing body does vote on a motion to pay attorneys fees incurred by its members, you ask whether the fee for legal services should be presented as one "combined bill," or whether a separate bill should be presented for the legal services incurred by each member. In our opinion, as long as the legal services were actually incurred by the members, the city has authority to pay for the same, regardless of whether the bill is presented in one lump sum or segregated as to the legal fees incurred by each member. However, as indicated in Attorney General Opinion No. 141, a council member is disqualified from making or voting on a motion concerning the payment of attorneys fees which he or she has incurred in a civil action. Accordingly, if a bill is presented in one lump sum for services incurred by the mayor and four council members, those five individuals would be disqualified from making or voting on a motion to pay the bill.

In summary, under the provisions of K.S.A. 75-6116 (as amended by L. 1985, ch. 293, §1), the obligation of a city to pay attorneys fees incurred by a city officer in defending a civil rights action is subject to the conditions and limitations prescribed by K.S.A. 75-6108. Those conditions include the filing of a written request (within 15 days after service of process upon the employee) that the city provide for the defense of the employee. K.S.A. 75-6108(d) and (e). Where no such request is filed, a city is not liable for attorneys fees incurred by the employee; however, the city governing body may, in its discretion, pay attorneys fees notwithstanding the failure to file a written request.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General