



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 9, 1997

The Honorable José R. Rodríguez
El Paso County Attorney
500 East San Antonio, Room 203
El Paso, Texas 79901

Letter Opinion No. 97-049

Re: Whether a school district is authorized to pay legal defense costs incurred by an employee in a criminal proceeding (ID# 39382)

Dear Mr. Rodríguez:

You ask whether a school district is authorized to pay legal defense costs incurred by an employee in a criminal proceeding. We conclude that a school district is authorized to provide legal representation for an employee in a criminal proceeding in certain limited circumstances.

As you point out, a school district does not have statutory authority to pay legal defense costs incurred by an employee in a criminal proceeding.¹ This office has recognized in several opinions, however, that political subdivisions have common-law authority to employ counsel to provide legal representation for their officers and employees. Prior opinions restate the common-law rule that

[w]here a Texas governing body believes in good faith that the public interest is at stake, even though an officer is sued individually, it is permissible for the body to employ attorneys to defend the action. . . . The propriety of such a step is not made dependent upon the outcome of the litigation, but upon the bona fides of the governing body's motive.

Attorney General Opinion JM-755 (1987) at 1-2. This common-law rule has been applied in situations involving school district officers and employees² and to representation of public officers and employees in criminal proceedings.³

¹The Education Code provides that a court may award costs and reasonable attorney's fees incurred by a school district officer or employee to defend a frivolous suit in certain circumstances. Educ. Code §§ 11.161, 22.055. Education Code section 22.054 authorizes a school district to provide or pay for attorney services for the defense of a private or independent institution of higher education that assists in the provision of volunteer services to schools in the district.

²See, e.g., Attorney General Opinions JM-968 (1988) (school district expenditure of public funds for defense of trustee in action for intentional tort); JM-685 (1987) (concluding that although school district may retain attorney to protect its interests in legal action against officer or employee, school district may not pay trustee's legal expenses incurred in defending election contest); H-1313 (1978) (school district representation of teacher in hearing before Professional Practices Commission); H-70 (1973) (school district purchase of trustee liability insurance).

³See, e.g., *City of Corsicana v. Babb*, 290 S.W. 736 (Tex. Comm'n App. 1927, judgment adopted) (representation of city peace officer in criminal proceeding); Attorney General Opinion DM-107 (1992) (representation of county hospital

(continued...)

These prior opinions emphasize that the authority of a political subdivision to employ counsel to defend officers and employees

is limited to situations where the legitimate interests of the [political subdivision] -- and not just the personal interests of the officers or employees -- require the assertion of a vigorous legal defense on behalf of the public interest. . . . [A political subdivision] may not use public funds when the principal interest to be defended is a purely private one.

Attorney General Opinion JM-824 (1987) at 2 (citations omitted). A political subdivision's governing body "need only determine that the public servant . . . acted in good faith within the scope of an official duty." *Id.* at 3 (citing *City Nat'l Bank of Austin v. Presidio County*, 26 S.W. 775 (Tex. Civ. App.--1894, no writ); Attorney General Opinion M-726 (1970)). Such a determination may be justified even if the suit contains allegations that the officer or employee acted outside the scope of his or her authority. *Id.* Whether or not defense of a suit implicates a legitimate public interest is a question of fact to be resolved by the political subdivision's governing body in the first instance; this question cannot, as a general matter, be resolved in an attorney general opinion. *Id.* But see Attorney General Opinions DM-431 (1996) (county precluded as a matter of law from paying legal expenses of county officer incurred in defending an election contest), JM-685 (1987) (concluding that school district may not pay trustee's legal expenses incurred in defending election contest).

Significantly, prior opinions of this office also indicate that although political subdivisions are authorized under the common law to employ counsel to provide officers and employees with legal representation, political subdivisions have no authority under the common law to reimburse their officers and employees for legal expenses after the expenses have been incurred. See Letter Opinion No. 90-93 (1990); see also Attorney General Opinion DM-107 (1992) at 4.

Finally, we note that a school district's expenditure of funds is limited by Education Code section 45.105. Your inquiry suggests that the school district would use local school funds to pay for counsel. In order to pay counsel with local school funds, the board of trustees of the school district must determine that employment of counsel to represent an officer or employee is a "service[] necessary in the conduct of the public schools," Educ. Code § 45.105(c), in addition to the findings required by the common-law doctrine. See Letter Opinion No. 97-024 (1997) (discussing Educ. Code § 45.105(c) reference to "goods and services").

In sum, common law recognized by this office authorizes a school district to employ counsel to defend a school district employee in a criminal proceeding if the board of trustees determines in good faith that the legitimate interests of the school district require the assertion of a vigorous legal defense. A school district is not authorized under the common law to reimburse an employee for legal expenses after the expenses have been incurred. In order to pay counsel with local school funds,

³(...continued)

district employee against misdemeanor charges arising from conduct allegedly committed during course of duties); Letter Opinion No. 90-93 (1990) (representation of county judge in indictment for illegal billing schemes and competitive bidding violations).

the board of trustees must determine that employment of counsel to represent the employee in a criminal proceeding is a "service[] necessary in the conduct of the public schools," Educ. Code § 45.105(c).

S U M M A R Y

Common law recognized by this office authorizes a school district to employ counsel to defend a school district employee in a criminal proceeding if the board of trustees determines in good faith that the legitimate interests of the school district require the assertion of a vigorous legal defense. A school district is not authorized under the common law to reimburse an employee for legal expenses after the expenses have been incurred. In order to pay counsel with local school funds, the board of trustees must determine that employment of counsel to represent the employee in a criminal proceeding is a "service[] necessary in the conduct of the public schools," Educ. Code § 45.105(c).

Yours very truly,



Mary R. Cruter
Assistant Attorney General
Opinion Committee