WM. RD 20

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-3970

February 15, 1985

W. E. Jenkinson, III, Esquire
Williamsburg County Attorney
Post Office Drawer 669
Kingstree, South Carolina 29556

Dear Mr. Jenkinson:

You have asked our advice concerning the following situation. A legal dispute apparently arose between the Williamsburg County Council and the County Supervisor relative to the powers of the Supervisor. Such dispute resulted in litigation. 1/ County Council hired independent legal counsel to represent it, because the County Attorney deemed it a conflict of interest to represent either the Council or the Supervisor. Since the County Attorney was also unavailable to represent the Supervisor, he too hired independent counsel.

The litigation apparently was ended by settlement and attorneys bills were submitted to Council. County Council was apparently presented for payment with a bill for $3,600 for its

---

1/ As we understand it, County Council enacted an ordinance which the Supervisor deemed to be overly restrictive of the powers granted him under the Home Rule Act. § 4-9-10 et seq. The Supervisor brought a declaratory judgment action against the Council in an effort to determine the extent of Council's authority in this area. The action was apparently settled by Council's withdrawal of the questioned ordinance. No order was ever issued to our knowledge. We have not reviewed the specific allegations made in the pleadings and do not comment thereupon nor does this opinion attempt to comment upon insurance coverage or a carrier's representation pursuant thereto.

REQUEST LETTER

own representation. The Supervisor's legal fees were approximately $7,000. As we understand it, County Council took its bill, divided by seven and gave the Supervisor his prorata share, i.e. approximately $550.00. 2/

You have inquired "whether or not Council can appropriate monies to pay the legal expenses involved, whether these would be legal and valid expenditures, and whether or not the method of proration type payment of the bills would be proper." We have researched the general law relating to your questions and will summarize these legal authorities below. Such authorities indicate that, within the limitations set forth below, payment of reasonable attorneys fees, i.e. as to those fees involved both in the representation of Council and the Supervisor, would be proper.

County Council is generally represented by the County Attorney. While the Home Rule Act makes no specific mention of the County Attorney, it is well recognized that the counties of this State provide by ordinance or otherwise for the position of County Attorney and prescribe his duties. See, §§ 4-9-30(6) and (7); see also, Poore v. Guerard, 271 S.C. 1, 244 S.E.2d 510 (1978). It is our understanding that the County Attorney of Williamsburg County generally represents the county government in civil matters.

It is well recognized that

> Generally, where a statute [or ordinance] authorizes legal counsel charged with the duty of conducting the legal business of a governmental agency, contracts with other attorneys for legal services are void.

Board of Supervisors of Maricopa County v. Woodall, 120 Ariz. 379, 586 P.2d 628 (1978). See also, 10 McQuillin, Municipal Corporations, 29.12 (3d ed.). As one court has emphasized in explaining the general rule:

> The salient purpose underlying this rule is, of course to ensure responsible ... [local] government. Not only is it designed as a safeguard against the extravagence or

---

2/ We must, of course, assume these facts to be true as this Office does not possess the authority or the resources to make factual determinations.

> corruption of [local] ... officials, as well as their collusion with attorneys ... [citations omitted], but also, to prevent confusion and contradiction in the direction of the [local governments'] ... litigation... . [citations omitted].

Cahn v. Town of Huntington, 29 N.Y.2d 451, 278 N.E.2d 908, 910 (1972).

In certain extenuating circumstances, there is a well established exception to this general rule, however. Such exception

> recognizes the implied authority of a [local government] ... board or officer to hire counsel in the good faith prosecution or defense of an action taken in the public interest and in conjunction with its or his official duties where the ... [local government's] attorney refuses to act or is incapable of or is disqualified from acting.

Coventry School Committee v. Richtarik, 411 A.2d 912, 916 (R.I. 1980). This exception is recognized by a number of authorities. Board of Supervisors v. Woodall, supra; Cahn v. Town of Huntington, supra; City of Tukwila v. Todd, 17 Wash.App. 401, 563 P.2d 223 (1977); 10 McQuillin, Municipal Corporations, § 29.12; 56 Am.Jur.2d, Municipal Corporations, § 220; 20 C.J.S., Counties, § 213(b); 83 A.L.R. 135.

In this instance, the County Attorney was apparently unavailable to represent the County Council because he deemed himself to be in a position of conflict and could represent neither the Council nor the Supervisor. We assume Council agreed this was the case, because Council authorized the employment of independent counsel to represent it. Assuming also that such disqualification was proper, 3/ the foregoing exception

---

3/ This Office does not pass upon or comment on the County Attorney's disqualification of himself to represent either side in the litigation. Such is a matter properly between an attorney and his client. See, Ex Parte Greenville County, 190 S.C. 188, 2 S.E.2d 47 (1939). We only note that, because of the conflict, the county attorney has been unable to submit to us a memorandum of authority on the question raised, in compliance with the policy of this Office regarding opinions to local governments.

would be applicable. Since under the Home Rule Act County Council expressly possesses the authority to contract, see § 4-9-30(3), it would appear that Council was generally authorized to employ independent counsel for itself under the circumstances which you have described. See, Paslay v. Brooks, 198 S.C. 345, 17 S.E.2d 865 (1941).

Of course, the county still "may not employ counsel [or pay counsel with public funds] in matters in which it is not directly interested or which lie outside its corporate purpose." 56 Am.Jur.2d, Municipal Corporations, supra. No governing body may spend public funds for a private purpose, see, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) or beyond its corporate purpose, Paslay v. Brooks, supra. In a previous opinion, this Office has stated:

> ... determination of whether or not the [matter is one in which the local government] ... is directly interested, and consequently, a matter which involves public purpose ... is to be made by the governing body subject of course, to final determination by a court of competent jurisdiction if challenged.

Op. Atty. Gen., July 1, 1977. In this instance, County Council has apparently made such a determination with respect to its procuring independent counsel to represent it. Moreover, courts have usually held that legal questions surrounding the performance of official duties by one of its officers sufficiently meets this test. See, Waigand v. City of Nampa, 133 P.2d 738 (Ida. 1943); Cahn v. Town of Huntington, supra; Wiley v. City of Seattle, 35 P. 415 (Wash. 1894); Barnett v. City of Paterson, 48 N.J.L. 395, 6A. 15 (1886). Accordingly, based upon the information provided us, it would appear that expenditure of public funds to pay the attorneys' fees for representation of County Council would be proper.

There is also the apparent question of payment of the Supervisor's attorneys fees. For the same reasons as stated above, it would appear that expenditure of funds for payment of the attorneys fees of the Supervisor meets the public purpose and corporate purpose test. In our judgment, it would be anomalous to conclude otherwise since involved here is the same litigation for which Council approved the hiring of an attorney to represent it. Indeed, since Council has approved the expenditure of a portion of the Supervisor's fees, it is evident that Council deems such to be both a public and corporate purpose.

It is our understanding that Council did not initially approve the Supervisor's hiring an attorney to represent him in the action brought against County Council, although Council has apparently agreed to pay a portion of the fees for his representation. Thus, we must now address the issue of whether the Supervisor possessed the authority to employ independent counsel. We would advise that, in the extraordinary circumstances apparently present, the Supervisor would possess such authority, whether or not Council subsequently ratified the employment.

A number of cases have addressed the question of the authority of a local government officer to procure the services of an attorney to represent his official interests in litigation against either another local board or other officers, where there is a valid legal dispute as to that officer's official authority. One of the leading cases in this area is Cahn v. Huntington, supra. There, an attorney brought an action against a town council to recover the reasonable value of legal services performed by him as attorney for the town's Planning Board. In Cahn, a legal dispute existed between the town council and planning board as to which agency possessed the authority to appoint the chairman of the Planning Board. In the litigation which ensued, the town attorney represented the town council. The Planning Board thus concluded that the town attorney possessed a conflict of interest and therefore could not represent it. As a consequence, the Planning Board hired the plaintiff as its lawyer. Apparently, the Planning Board prevailed in the litigation and plaintiff sought the payment of his fees from the town council. The town council took the position "that since the plaintiff was not retained by the Town Board, nor was the Planning Board authorized by the Town Board to retain him, the Planning Board had no authority to bind the Town Board for the payment of legal fees." 278 N.E.2d at 910.

The New York Court of Appeals, that state's highest court, rejected such argument. Recognizing the general rule that there must be specific statutory authority for retaining counsel, the Court found that the aforementioned exception to the rule was applicable. The Court noted that where the local attorney "refused to act, or was incapable of, or was disqualified from, acting...", the Planning Board, "[n]ot withstanding lack of specific statutory authority"

> ... possesses implied authority to employ counsel in the good faith prosecution or defense of an action undertaken in the public interest, and in conjunction with its or his official duties... .

278 N.E.2d at 910.

The Court reasoned that "[t]his authority is necessarily implied in order to enable the board to affect the purposes of its creation and to allow it to properly function." Supra at 911. Thus, the Court concluded:

> Under the facts and circumstances of the case before us, we conclude that the Planning Board had implied authority to engage the services of an attorney for which the Town Board should be held liable. In the ... proceeding instituted by the Town Board against the Planning Board, the Huntington Town Attorney represented the Town Board. He could not, therefore, under the circumstances represent the Planning Board. The only possible recourse for the Planning Board was to employ special counsel, which it did. Only in this manner could the legal issues raised in said proceeding be properly resolved.

Supra. The Court further carefully noted that "there is no showing that the lawsuit, which raised an issue important to the town, was brought about owing to the Planning Board's bad faith or malice in the performance of its official duties. To the contrary, that the Planning Board acted in good faith is not questioned." Supra at n. 4.

Another closely analogous case is Waigand v. City of Nompa, supra. In that case, a city council held a meeting and appointed a certain individual as chief of police. The mayor refused to approve the appointment and also declined to sign salary warrants for the chief. Subsequently, the chief of police instituted an action against the mayor to compel him to sign the salary warrant. The City Attorney represented the police chief in the action. As a result, the mayor employed independent counsel to represent him.

The Court dismissed the action against the mayor and no appeal was taken. Attorneys fees in the amount of $250.00 were incurred by the mayor and he then presented the bill to city council which refused to pay it. Thereafter, the mayor brought an action against the council for payment of his fees, together with interest and costs.

The Idaho Supreme Court first addressed the question of whether the mayor should have sought approval by the council

to hire his attorney. Reasoning that such prior approval would have been futile under the circumstances, the Court observed:

> Is it necessary, as insisted by respondent, that an application be first made to the City Council "for legal assistance", where ... the City Council was the real actor in the proceeding against the appellant; where appellant was seeking to prevent and did prevent, the payment of an illegal claim against the city; where appellant was acting in the interest and for the sole benefit of the city; where no aid could have been expected from the real actor in the mandamus proceeding against appellant; where the City Attorney was not in position to represent appellant because he was prosecuting, as counsel, the proceeding against appellant; where all the facts and circumstances created an emergency making it necessary for appellant to employ counsel to aid him in preventing the payment of a void claim by the city?

133 P.2d at 740. Concluding that the city council was obligated to pay the attorneys fees for the mayor, the Court summarized:

> A conflict arose between the mayor on the one hand and the city council on the other. The council ordered a warrant drawn in favor of one they had pretended to appoint as chief of police. The mayor refused to sign the warrant. The council used the services of the regular city attorney in an effort to mandamus the mayor to sign the warrant. The mayor employed special counsel and successfully defended the action. The action presented an emergency not contemplated by the statute; and still it was one that had to be met by the Mayor or else let the city suffer to the extent of the invalid claim. This unquestionably presented a special emergency, which justified the action of the mayor, and is not unlike a case where the city attorney might have been absent, ill or disqualified from acting ... in which case the Mayor

> would have had a right to at least nominate an attorney, and since the conflict was between him and the council, whose duty it was to ratify the appointment, it would doubtless have been impossible for the mayor to procure an approval of his appointment. In the instant case the Mayor was acting wholly and solely in the interest of the municipality he represented as its chief executive officer. (emphasis added).

133 P.2d at 741. 4/

In your situation, unlike the two cases discussed above, the Supervisor brought the action rather than it being brought against him; unlike here, in Cahn and Nampia the public officer who obtained representation was the defendant in the questioned action. However, other cases make it clear that such a distinction is meaningless. For example, in Braslow v. Barnett, 74 Misc.2d 26, 343 N.Y.S.2d 819 (1973), a member of city council on her own initiative employed counsel to bring an action against a zoning board for permitting a variance beyond that authorized by the zoning ordinance. The town attorney represented the zoning board which moved for dismissal on the basis that the councilman had no standing to bring the action. Subsequently, the New York courts ruled that the councilman did possess the requisite standing under a relevant New York statute.

Attorneys for the councilman then brought an action against the town for recovery of legal fees. Plaintiffs relied upon Town of Huntington, supra and the town attempted to distinguish the case on the basis that in Cahn "... the Planning Board ... was a defendant and the Town Councilman in the case at bar was a plaintiff." 343 N.Y.S.2d at 822. The Court concluded however that such a distinction had little meaning in light of cases decided prior to the Cahn case. The Court noted:

> Cahn cites Matter of Fleischmann v. Graves, 235 N.Y. 84, 138 N.E. 745 in support of the proposition that implied authority exists in favor of a municipal officer to employ legal counsel in cases where town counsel

---

4/ In Waigand, the office of mayor was very similar in its duties to that of County Supervisor.

> has refused to act or was incapable of, or disqualified from acting. The Board of Education in the Fleischmann case had brought a mandamus proceeding against the city council. Town counsel properly refused to appear in behalf of the board because his interests were antagonistic to the claims of the board.

343 N.Y.S.2d at 823. Citing other New York decisions as well, the Court noted that with respect to the employment of counsel, "[t]he authority to make the appointments was sustained in all of the cited cases without restriction to the role in which the officer was cast in the litigation, whether as plaintiff of otherwise." (emphasis added). Supra. Accordingly, said the Court, the councilman "had implied authority to procure the services of the plaintiffs." Supra.

CONCLUSION

Assuming then, that the action in question was undertaken in good faith, the foregoing authorities clearly indicate that payment by County Council of reasonable attorneys fees for services rendered both the Council and the Supervisor would be proper. Based upon the information presented to us, the County Attorney was unavailable to either side in litigation which sought to clarify the official duties of the Supervisor in relation to County Council. 5/ Our research indicates that in

---

5/ Apparently, the authority of the Supervisor himself to bring the action is not in issue. It is well recognized that "[e]very public officer, although not expressly so authorized by statute, has implied authority to bring any suit, which may be required for the proper discharge of his official duties...". Throop, Public Officers, § 544. See also, 67 C.J.S., Officers, § 250; State ex rel. Hoagland v. School Dist., 151 P.2d 168 (Mont. 1944). In Fleischmann v. Graves, supra, it was stated that "[i]f any of the duties or privileges given to the board of education ... were ... interfered with by any other branch of the government, it was bound to take such legal steps as would permit it to properly function." 138 N.E.2d at 947. This reasoning was cited with approval in Cahn, supra. Such a situation is in marked contrast to that addressed in Ex Parte Greenville County, supra.

such extraordinary circumstances, 6/ both Council and the Supervisor would possess authority to hire independent counsel to represent their respective positions in the litigation and to have such counsel reasonably compensated out of public funds. Such authority is consistent with both the Supervisor and Council's general statutory authority. See, Poore v. Guerard, supra; § 4-9-420; compare, Ex Parte Greenville County, supra.

Of course, we also recognize that County Council possesses broad powers to appropriate monies where the matter in question is within the scope of the county's corporate authority. Its discretion to appropriate funds within the sphere of its authority is virtually unlimited.

Moreover, County Council "cannot, like a private litigant, agree to pay any amount it may see fit... ." 20 C.J.S., Counties, § 181. Instead, "its authority and duty is to fix and pay a reasonable compensation commensurate with the importance of the litigation and consistent with all the facts and circumstances." Supra. 7/ Since this Office cannot make factual determinations, see, Op. Atty. Gen., December 12, 1984, we cannot, of course, conclude whether any particular sum for attorney's fees is or is not reasonable; such would require Council to examine all of the relevant criteria for the payment of reasonable fees. In making such determination, County Council would want to consider the following factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances;

6/ We limit the conclusions herein to the extraordinary circumstances found here. We do not comment generally upon a public officer's authority to bring suit against another agency or his authority to employ counsel in other circumstances. Nor do we address the situation where a court in litigation might award attorneys fees; the issue present here is the authority to employ an attorney and pay for his services from public funds.

7/ Since the Council must look into all the relevant facts and circumstances surrounding both its own employment of an attorney as well as that of the Supervisor in order to determine what fees are reasonable, it would appear that merely prorating fees to each member of Council and the Supervisor would be insufficient.

(8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; (12) fees in similar cases. See, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

If we may be of further assistance to you, please let us know. With kindest regards, I am

Sincerely yours,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg