



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

November 20, 1990

Mr. Tim Rodgers  
Wise County Auditor  
P. O. Box 899  
Decatur, Texas 76234

LO-90-93

Dear Mr. Rodgers:

You inform us that the county judge of Wise County was indicted in November 1988 for allegedly participating in illegal schemes involving billing and attempts to avoid various requirements of the competitive bidding statutes. You indicate that charges against the judge were dismissed in December 1989 and that he filed in January 1990 a claim with your office against the county for reimbursement of attorneys fees that he incurred defending himself against the indictment. You ask whether the county is obligated to pay this claim. We assume that your concern arises from the fact that section 53 of article III of the Texas Constitution has been construed to forbid payment by a county of a claim not made a legal charge against the county. See Howard v. Henderson County, 116 S.W.2d 479 (Tex. Civ. App. - Dallas 1938, writ ref'd). We conclude that it is not so obligated.

This office has discussed both common law and statutory authority that permits local political subdivisions to employ legal counsel to defend public officers and employees subjected to litigation in the course of their carrying out their public duties. See Attorney General Opinions JM-968 (1988); JM-824, JM-755 (1987). The common law rule that these opinions prescinded from Texas authority is that:

Where 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-824 at 2. We concluded that this does not mean that the officer or employee must have been correct in his course of action or that the suit must be defeated; the governing body only need determine that the public servant of the political subdivision acted in good faith within the scope of an official duty. City Nat'l Bank of Austin v. Presidio County, 26 S.W. 775 (Tex. Civ. App. 1894); Attorney General Opinions JM-755 (1987); M-726 (1970). But we have found no common law authority for the proposition that a political subdivision may reimburse a public official or employee after that person has incurred legal expenses.

Additionally, there is statutory authority permitting the county to employ private counsel to defend any public official or employee under certain circumstances. Section 102.004 of the Civil Practices and Remedies Code permits a local government, including a county, to provide legal counsel to represent a defendant for whom the local government may pay damages for tort liability under chapter 102 of that code. That section by its terms is inapplicable to your request, because the litigation involved did not involve tort liability.

Section 157.091 of the Local Government Code provides that, in certain circumstances, a public official or employee is entitled to be represented by the district attorney or the county attorney, or is entitled to have the commissioners court employ and pay a private attorney. We have construed this section not to supplant the common law rule, but rather to be in harmony with it. Attorney General Opinions JM-824, 755 (1987). This section is inapplicable to your request, because it requires the commissioners court to employ the private attorney; it does not authorize the public official or employee to employ a private attorney and then be reimbursed for expenses incurred. Neither statute, then, authorizes a public official or employee to hire and pay a private attorney to represent that person in litigation arising from the performance of that person's official duties and then be reimbursed for it by the governing body of the political subdivision by which that person is employed.

Thus we have found no authority, either common law or statutory, to support the proposition that a political subdivision is authorized, much less obligated, to reimburse a public official or employee after that person hired and paid a private attorney to represent that person in litigation arising from the performance of that person's official duties and then be reimbursed for it by the

governing body of the political subdivisions by which that person is employed. Therefore, we answer your question in the negative.

Very truly yours,



Jim Moellinger  
Assistant Attorney General  
Opinion Committee

APPROVED: Rick Gilpin, Chairman  
Opinion Committee

Sarah Woelk, Chief  
Letter Opinion Section

RG/SW/JM/mc

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