

Opinion No. 59-209

December 18, 1959

BY: OPINION OF HILTON A. DICKSON, JR., Attorney General

TO: Mr. Albert O. Lebeck, Jr. Town Attorney /- Gallup P. O. Box 1111 Gallup, New Mexico

QUESTION

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May the attorney for the Town of Gallup be legally retained at Town expense, to defend the Town Manager in a civil suit for libel brought against him by a discharged Town employee, the statements alleged to have been libelous having arisen out of such discharge?

CONCLUSION

See analysis:

OPINION

{*322} ANALYSIS

The courts have generally held that a municipal corporation such as the Town of Gallup may expend public monies for the defense of officials of the corporation against whom suit is brought individually for acts committed in the discharge and arising within the scope of their official duties. Annotation, 130 A.L.R. 736; **State ex rel. Crow vs. St. Louis**, 174 Mo. 125, 73 S.W. 623 (1903). Conversely, where the acts of the officials are not within the scope of the discharge of their duties to the municipal corporation, public monies may not be expended for the purpose of defense of such lawsuit. McQuillin, *Municipal Corporations*, § 29.14; **People ex rel. Underhill vs. Skinner**, 74 App. Div. 58, 77 N.Y.S. 36 (1903). The real problem underlying any answer to your question is, therefore, under which of the above rules does the fact situation referred to above fall.

In this connection, it is clear that public monies cannot be expended to help defend an official from the consequences of his own unlawful acts. **Birmingham v. Wilkinson**, 239 Ala. 199, 144 So. 548 (1940); **Del Rio v. Lowe**, 111 S. W. 2d 1208 (Tex. Civ. App., 1937). As a Pennsylvania court said in **Roofner's Appeal**, 81 Pa. Super. Ct. 482 (1923):

"It is not the duty of the public to defend or aid in the defense of one charged with official misconduct. **When one accepts a public office, he assumes the risk of defending himself even against unfounded accusations at his own expense.** Personal liability

of public officers for misconduct in office tends to protect the public and to secure the honest and faithful service by such servants. It requires no extended argument to show the fallacy of the proposition that the township was liable to save the appellants harmless from the consequences of their own misconduct. Payment of these counsel fees by the township was a mere gratuity without even the sanction of custom or precedent. We agree with the learned court below that to permit such use of public funds is but to encourage a disregard of duty and to put a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law." (Emphasis Supplied)

{*323} However, it has also been held that a municipal corporation had the right to defend members of its governing body from completely unfounded charges of corruption and fraud. **Birmingham v. Wilkinson**, supra; **Natroma County v. Casper National Bank**, 55 Wyo. 144, 105 P. 2d 578 (1940).

In the case of **Maitland v. Town of Thompson**, 129 Conn. 186, 27 A. 2d 160 (1942), the Connecticut court held that **a municipality could legally reimburse counsel** for legal fees incident to defending members of the local Board of Education in a successful defense of a suit for libel. In so holding, the court stated that such a reimbursement could be made if the individual sued for libel acted in a matter which the municipality was concerned with, if that matter was imposed upon the officer by law and if the officer acted in good faith.

You have orally informed us that in your opinion, the Town Manager acted in good faith in the discharge of the employee and that such discharge was accomplished in the course of the Town Manager's duties. In view of this information, we find no objection in allowing town funds to be paid for the defense of the Town Manager in this libel suit. However, we do feel that a procedure such as that followed in the Maitland case should be followed, i.e., payment of public funds can only be made in the form of a reimbursement after completion of the lawsuit if the Town Manager is successful in defending such suit. Thus, we feel that the Town Manager must assume the risk of defending himself in tortious manner while performing official duties. However, if the officer or employee is successful in defending himself against such a charge, we see no objection to public funds being expended for such a defense.

We come now to the further question of whether you, as Town Attorney, may be the counsel for the Town Manager, to be reimbursed by Town funds in the event the Town Manager is successful in his defense of the suit. In our opinion, you may be hired by the Town Manager and in the event you are successful in defending the suit, be paid reasonable attorney's fees for such defense from Town funds provided there is nothing in your contract with the Town precluding the payment of such additional fees. We see no objection to this procedure despite Article IV, Section 27 of the New Mexico Constitution containing a provision against the enactment of laws providing for extra compensation to public officers, servants, agents or contractors after services are rendered or contract made. In our opinion No. 5985 we held that this prohibition did not

apply to public officials serving without a fixed term and at the pleasure of the appointing authority.

We wish to make it clear that we do not intimate that the Town Manager must retain you as his attorney in order to be reimbursed if successful, or that the town may only so reimburse the Town Manager if you are his attorney. The Town Manager may retain any attorney he desires and the Town may reimburse the Manager for such attorney's services if the governing body of the Town so desires.

By: Philip R. Ashby

Assistant Attorney General