Opinion No. 65-233

December 8, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Gary O'Dowd, Assistant Attorney General

TO: Mr. Richard C. Barela, Superintendent, La Joya School District, La Joya, New Mexico

QUESTION

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May a school board expend public funds to hire an attorney for the purpose of defending a member of that board whose right to that office has been challenged in a quo warranto proceedings?

CONCLUSION

No.

OPINION

*{*380}* ANALYSIS

The facts of this case show that *{*381}* following the school board election for La Joya Consolidated School District No. 5, a quo warranto action was filed against Mr. Sisto P. Griego. This action challenged Mr. Griego's right to the office of school board member for want of certain qualifications a candidate must possess. At an official meeting the Board employed counsel to defend Mr. Griego in the action. The counsel so employed engaged in the active defense of Mr. Griego and now seeks compensation.

We have been referred to the case of **Neal v. Board of Education,** 40 N.M. 13, 52 P. 2d 614. That case merely held a school board did not need to take bids before hiring an attorney. Also note that the case involved hiring an attorney for **school board business.**

We do not question the authority to hire an attorney for **school board business.** Also, under our earlier opinions, we do not doubt that a school board member could be defended by expending public funds where he has been charged with doing a wrongful act **in his official capacity** provided that he wins the suit. See Attorney General's Opinions 57-128, 57-320 and 59-209.

Since the New Mexico Supreme Court has not ruled on this question an examination of the authorities from other jurisdictions is in order.

In the case of **Smith v. Nashville,** 4 Lea (Tenn.) 69, (1879), an attorney sued the city for his fee in defending its mayor and a number of members of the city council in a suit against them and in which he: (1) called in question the right of the mayor and council members to hold office for lack of certain qualifications and; (2) charged all with gross malfeasance in office.

The trial court found the attorney had been retained for the defense by the mayor and this had been ratified by the City Council. It also found the city had no interest in the proceeding except as it might be protected from further harm. Also it found that the defendants were the only parties "against whom relief was sought, or who had any interest in defending the bill." The court held at page 72:

"Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, it would seem clear that it could not assume the defense of the suit, or appropriate its money for the payment of the expenses incurred."

The attorney lost.

The case of **Peck v. Spencer,** 26 Fla. 23, 7 S. 642 (1890), involved a bill to contest the legality of an election of city officers of the Town of Daytona, Florida. The suit was directed against one Buckman, elected mayor at said election. It appears that the Daytona town council appropriated a sum of $ 200 to defend said suit. The trial court granted an order prohibiting application of the Daytona funds to pay the attorney.

On appeal the Supreme Court of Florida directed itself to the question and held:

"There is but one other question to be considered, which is, did the Court below err in granting the order prohibiting the application of the corporation funds to the payment of the expenses of said suits? We think not. It is contended for counsel for appellants, that municipal corporations have the right to sue and be sued, to employ counsel to bring and defend suits to protect its officers, and to indemnify them against acts done in the discharge of their duty, and cite McClellan's Digest, 247; 13 Cal., 531; 1 Dillon on Municipal Corporations, Section 98; 12 N.H., 278; 14 Gray, 240; 8 R.I., 431; 6 Vt. 95.

*{*382}* "This contention is partly correct, and it is supported by the authorities cited. **The right of a corporation, when it is interested, to sue and defend suits is indisputable, and that municipal officers will be protected so long as they keep strictly within the discharge of their duties, is equally true; but all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred.** 1 Dillon on Municipal Corporations, Section 90. And now, admitting the right of corporations to sue and to defend suits, and to protect their officers in the lawful discharge of their duties, to be correct, still, where did the Town Council of Daytona derive their powers to appropriate money in the defense of contested elections, in the result of which, the corporation had no pecuniary interest whatever? Such power is not given in its charter, either expressly or by reasonable implication. **These contests are**

personal, and the corporation can have no interest in the result, and an appropriation to pay any one of the parties the expenses he may be put to, is without legal authority. (Emphasis supplied).

"The judgment of the Court below is affirmed."

In **Stearns v. Zion,** 160 Ill. App. 414 (1911), it appeared that the City of Zion, Illinois, held an election of municipal officers in Spring, 1909. Following the election **two** groups organized as city councils. One group had the mayor and the other had the clerk. The former claimed to take legal proceedings. Now the attorney seeks payment. The Court held:

"This was not a litigation instituted by the city through its city council, but a litigation instituted by individuals who claimed to have been elected to certain offices, and they sought the aid of the court to compel the production of the documents which would show the canvassing committee that they were so elected. Several of these men were holding over after an expired previous term. **We are of opinion that the city could not lawfully contract to pay for legal services rendered in a suit to which the city was not a party, brought for the purpose of establishing the title of the petitioners to certain city offices to which they claimed to have been elected.** If the city had power to have counsel to defend the city clerk in his official capacity, these attorneys were not hired for that purpose, but, on the contrary, to conduct a litigation against the city clerk in behalf of individuals. This lack of authority to make such a contract is announced in **City of Chicago vs. Williams,** 182 Ill. 135. Whether these observations also apply to the suit in the Supreme Court, where a part of the fees here sued for are alleged to have been earned, will doubtless more fully appear upon another trial. More than one-half of the sum here recovered was for services rendered, in the mandamus case in the Circuit Court of Lake county, and the record does not show a case authorizing the city to contract for these services.

"The judgment is therefore reversed and the cause remanded." (Emphasis supplied).

The preceding cases are in point since the quo warranto action here was nothing more than an action directed toward Mr. Griego in his personal capacity. In **State v. Rodriguez,** 65 N.M. 80, 33 P. 2d 1005, the Court held that a complaint in quo warranto, alleging that defendants were unlawfully usurping, holding and exercising the public offices of members of the board of education of the municipal school district was a proper *{*383}* means of attacking the office holder's qualifications to hold office.

Moreover, it cannot successfully be argued that this suit was in the public benefit since a quo warrant proceeding has been held to be purely personal. **State ex rel. Holloman vs. Leib,** 17 N.M. 270, 125 P. 601.

Payment of attorney's fees should not be allowed.