

OPINION NO. 98-001

Syllabus:

Pursuant to R.C. 309.09(B), a board of township trustees has discretionary authority to reimburse a township trustee for legal fees incurred in defending a removal action under R.C. 3.07-10, provided that the board of township trustees first makes a determination that the charges in the removal action arose from actions of the trustee that occurred or were prompted as part of a good faith, well-intended attempt to perform official duties and responsibilities, and provided further that a decision to provide reimbursement is made by order of the board, duly entered on its journal, in which the compensation to be paid for the legal services is fixed.

To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio
By: Betty D. Montgomery, Attorney General, January 20, 1998

We have received your request for an opinion regarding whether township funds may be used to reimburse a township trustee for the legal fees he incurred in defending a removal action brought against him pursuant to R.C. 3.07 and 3.08. Your letter limits this inquiry to situations where the trustee has not violated any official duties.

Your letter summarizes the facts giving rise to this question as follows. A removal petition was filed against a township trustee after he and the other members of the board of township trustees participated in a public question and comment session concerning a pending rezoning request. The question and comment session was part of a regularly scheduled board meeting. The trustee in question owns land near, but not in, the area covered by the rezoning request. The removal petition was filed by electors who alleged, based on the trustee's land ownership and participation in the question and comment session, that the trustee was supporting the rezoning request for purposes of personal gain associated with the development of his own property.

Your letter specifically states, however, that the trustee's only action at the meeting was to provide public information about the rezoning request on behalf of the board; that no action or words of the trustee constituted either support for the rezoning request or benefit to his own property; that no vote was taken on the rezoning request at the meeting; and that the trustee violated no duty imposed upon him under R.C. Title 5 (townships). The removal action ultimately was dismissed by the court for lack of sufficient signatures on the petition, and thus there was no formal adjudication of the propriety of the trustee's actions. Nonetheless, the trustee incurred legal fees in defending the removal action and obtaining its dismissal.

It is our further understanding, based on phone conversations with a member of your staff, that upon receiving notice of the removal action, the trustee sought representation from your office. He was advised to retain legal counsel at his own expense, which he did. He then inquired whether the township could reimburse his legal expenses. Your office advised him and the board of township trustees that certain opinions of the Attorneys General suggested that township funds could not be used to reimburse legal expenses incurred by a public officer in a removal proceeding. You have asked us to consider whether,

in the context of the above-stated facts, such a prohibition does exist with respect to removal actions.

The removal action in your question is governed by the provisions of R.C. 3.07-.10. Such a removal action is initiated by the filing of a complaint signed by the required number of electors. The action is then tried in the court of common pleas, by judge or jury, to determine whether there exists statutory cause for removal. R.C. 3.07-.08. While no specific provision is made for representation by legal counsel, the statutes contemplate that both the public officer and the prosecuting complainants will be so represented. *See, e.g.*, R.C. 3.09.

It is axiomatic that a board of township trustees may exercise only such powers as are expressly conferred by statute, or necessarily implied therefrom. *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875). The representation of township officers by legal counsel is governed by the following provisions of R.C. 309.09(B):

[The] prosecuting attorney shall be the legal adviser for all township officers....¹ When the board of township trustees finds it advisable or necessary to have additional legal counsel it may employ an attorney other than ... the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund. (Foot-note and emphasis added.)

R.C. 309.09(B) initially imposes a duty on the county prosecuting attorney to provide representation to township officers. This duty is not absolute, however. It is conditioned upon a determination by the prosecuting attorney that the matter is one in which the township has an official interest or in which an individual officer was acting in an official capacity. *See* 1988 Op. Att'y Gen. No. 88-088 (syllabus, paragraph two); 1980 Op. Att'y Gen. No. 80-076; 1954 Op. Att'y Gen. No. 4567, p. 570, 574; 1913 Op. Att'y Gen. No. 231, vol. II, p. 1222. *See generally State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981). The facts you have provided indicate that you made a determination not to provide representation to the township trustee in this instance.

With respect to obtaining counsel other than that assigned by statute, the applicable general rule is that public funds may not be used to pay another person to perform duties that are assigned by law to a specific public officer, unless there is express statutory authority to do so, or the designated public officer has refused to perform a duty or has an adverse interest in the matter. *State ex rel. Hunt v. Board of County Comm'rs*, 8 Ohio N.P. (n.s.) 281, 283, 20 Ohio Dec. 679, 681 (C.P. Hamilton County 1909), *aff'd sub nom. Ireton v. State*, 21 Ohio Cir. Dec. 412, 12 Ohio C.C. (n.s.) 202 (Cir. Ct. App. Hamilton County 1909), *aff'd*, 81 Ohio St. 562, 91 N.E. 1131 (1910) (mem.); *accord* 1977 Op. Att'y Gen. No. 77-039. R.C. 309.09(B) expressly provides that a board of township trustees has discretionary authority to employ legal counsel other than the prosecuting attorney at township expense. *See State ex rel. Pease v. Monclova Township Bd. of Trustees*, No. L-84-181, 1984 Ohio App. LEXIS 9880, at *2 (Lucas County June 1, 1984) ("the appointment of additional legal counsel lies within the sound discretion of the township trustees"); *see also* 1965 Op. Att'y Gen. No. 65-205

¹In limited self-government townships, this duty is imposed on the township law director. R.C. 309.09(B). Your question does not involve a limited self-government township.

(syllabus, paragraph two) (concluding that similar authority of a municipal legislative body is discretionary).

Public bodies with similar grants of discretionary power have been permitted to employ other counsel without regard to whether or not their statutory counsel has a duty or authority to provide representation in the matter. *See, e.g., Knepper v. French*, 125 Ohio St. 613, 183 N.E. 869 (1932) (holding that a school board could employ other counsel for a particular matter, even though the board's statutory counsel, the county prosecuting attorney, was available to provide representation); 1980 Op. Att'y Gen. No. 80-064 (syllabus) (same); 1971 Op. Att'y Gen. No. 71-080 at 2-275 (noting that a municipal legislative authority may appoint counsel to defend municipal police officers if the city solicitor cannot or will not do so). It follows that a board of township trustees, acting pursuant to R.C. 309.09(B), is not bound by the determination made by the county prosecuting attorney with respect to representation of a township officer. Rather, the board of township trustees may, in the exercise of a reasonable and sound discretion, make an independent determination of whether to employ counsel at township expense. Absent a showing of abuse of discretion, the board of township trustees cannot be compelled or enjoined to employ such counsel. *See generally State ex rel. Flagg v. City of Bedford*, 7 Ohio St. 2d 45, 218 N.E.2d 601 (1966); *State ex rel. Pease v. Monclova Township Bd. of Trustees*, No. L-84-181, 1984 Ohio App. LEXIS 9880, at *3-4.

The discretion of the board of township trustees in the employment of legal counsel is subject, however, to the two conditions set out in R.C. 309.09(B). First, legal counsel may be employed "only when those services are to be utilized to aid the township or its officers in their official capacities." 1966 Op. Att'y Gen. No. 66-061 at 2-101 (emphasis added). Second, legal counsel may be employed only on express order of the board of township trustees, in which the compensation for the legal services is fixed. The first condition is a substantive limitation, whereas the second is procedural in nature.

In order to satisfy the first condition, the board of township trustees must determine that any legal services provided to a township trustee would aid the trustee in his official capacity. For purposes of providing legal representation at public expense, "the action of a particular public entity or public officer is generally considered undertaken in an official capacity if the facts and circumstances of that action clearly demonstrate that it occurred or was prompted as part of a good faith, well-intended attempt to perform official duties and responsibilities." 1993 Op. Att'y Gen. No. 93-001 at 2-10. *See also* 1985 Op. Att'y Gen. No. 85-014; 1980 Op. Att'y Gen. No. 80-076; 1977 Op. Att'y Gen. No. 77-039 at 2-139 through 2-141; 1971 Op. Att'y Gen. No. 71-080 (providing an extensive review of opinions dating from 1912 through 1970).² When litigation results from such good faith acts, it is considered that the public officer is involved in an official capacity, even though the complaint asserts a theory of individual or personal liability. Thus, when the good faith standard is met, legal representation at public expense may be available to a public officer in both criminal cases and civil cases.³ *See, e.g., State ex rel. Jefferson County Children Services Bd. v. Hallock*, 28 Ohio St. 3d 179, 502 N.E.2d 1036 (1986); *State ex rel. Corrigan v. Seminatore*; *State ex rel.*

²The analysis of what constitutes official capacity is the same for purposes of determining both discretionary authority and duty to provide legal representation. *Compare* 1993 Op. Att'y Gen. No. 93-001 (discretionary authority) *with* 1985 Op. Att'y Gen. No. 85-014 (mandatory duty). As discussed previously, however, the determination made by statutory counsel with respect to any duty to provide representation is not binding on a public entity that has discretionary authority to hire other counsel.

³Representation in certain types of civil actions is now governed by the standard codified at R.C. 2744.07(A)(1) (defense and indemnification of public employees), which is part of the

Flagg v. City of Bedford; *State ex rel. Henderson v. Board of Comm'rs*, No. 943, 1982 Ohio App. LEXIS 12073 (Geauga County May 14, 1982); 1980 Op. Att'y Gen. No. 80-076; 1971 Op. Att'y Gen. No. 71-080 (quoted in *Henderson*); 1965 Op. Att'y Gen. No. 65-205; 1951 Op. Att'y Gen. No. 4567, p. 570. See generally *State ex rel. Gill v. Winters*, 68 Ohio App. 3d 497, 504, 589 N.E.2d 68, 74 (Jackson County 1990) (“[a] public officer sued as an individual nevertheless participates in the action in his official capacity if the remedy sought is that of ... making declarations concerning the performance of acts in the course of his official duties” (quoting Restatement (Second) of Judgments § 36, comment e (1982))); *Board of Education v. Board of Education*, 4 Ohio App. 165, 169, 22 Ohio C.C. (n.s.) 439, 442 (Hamilton County 1915) (public officers may be reimbursed for legal fees in quo warranto action, where the case involved “procuring the judgment of the proper court as to their official duties”); Annotation, *Payment of Attorneys’ Services in Defending Action Brought Against Officials Individually as Within Power or Obligation of Public Body*, 130 A.L.R. 736, 736 (1941) (“[t]he general rule is that a municipal corporation or other public body may indemnify public officials, acting in good faith, for legal expenses incurred in suits brought against them for acts committed in the discharge of their duties”).

The focus of the good faith inquiry is on the intent and purpose of the officer involved, not on the ultimate legal determination, if any, of whether the public officer was acting within the scope of official duties. Where a reasonable and sound basis exists for concluding that the conduct of an officer constituted a good faith effort to perform official duties, the expenditure of public funds for legal representation will be upheld, even if it is ultimately determined that the officer was mistaken in his understanding of the nature of his official duties. See *Kloeb v. Mercer County Comm'rs*, 16 Ohio Cir. Dec. 152, 4 Ohio C.C. (n.s.) 565 (Cir. Ct. Mercer County 1903); 1928 Op. Att'y Gen. No. 2835, vol. IV, p. 2541.⁴

Application of the good faith standard in such cases is grounded in established public policy. The duties and responsibilities of public office require public officers to exercise their judgment and discretion in the best interests of the public in situations that often require prompt action on controversial issues. The risk of personally incurring the legal expense of defending unpopular actions in court would both intimidate officers from pursuing what they perceive to be their duty and discourage many qualified persons from seeking public office at all. *Kloeb v. Mercer County Comm'rs*, 16 Ohio Cir. Dec. at 160, 4 Ohio C.C. (n.s.) at 573; 1912 Op. Att'y Gen. No. 40, vol II, p. 1107, 1108. Thus, sound public policy suggests that honest, well-intended mistakes should not render officers personally responsible for such legal costs. In most instances, disagreements with the judgment of elected officials should be expressed at the ballot box rather than in the courtroom.

There is no reason that removal actions should be judged by a different standard than that applicable to civil and criminal cases generally. The statutes governing removal actions are quasi-penal in nature, *State ex rel. Stokes v. Probate Court*, 22 Ohio St. 2d 120, 258 N.E.2d 594 (1970) (syllabus, paragraph one); *McMillen v. Diehl*, 128 Ohio St. 212, 214, 190 N.E. 567, 568 (1934), and it is recognized that removal actions have both criminal and civil

political subdivision tort liability law. This statutory standard also includes a good faith element. See generally 1987 Op. Att'y Gen. No. 87-024.

⁴Conversely, the fact that a public officer ultimately is found innocent of criminal charges does not necessarily reverse a determination made by the county prosecuting attorney, under R.C. 309.09, that the officer was not entitled to public representation. 1980 Op. Att'y Gen. No. 80-076 (syllabus, paragraph two) (partially overruled on other grounds by 1988 Op. Att'y Gen. No. 88-055).

characteristics, see, e.g. *Layshock v. Phillips*, 93 Ohio App. 3d 604, 639 N.E.2d 510 (Trumbull County 1994); *Village of Mantua ex rel. Webb v. Clavner*, 88 Ohio App. 3d 492, 624 N.E.2d 317 (Portage County 1993). We note further that courts have authorized public payment of legal expenses in actions similar to removal actions. See *State ex rel. Evans v. Bainbridge Township Trustees*, 5 Ohio St. 3d 41, 448 N.E.2d 1159 (1983) (authorizing payment of township funds to attorney hired to defend trustee and zoning officer in an ouster proceeding); *Board of Education v. Board of Education*, 4 Ohio App. 165, 22 Ohio C.C. (n.s.) 439 (Hamilton County 1915) (legal expenses in defense of *quo warranto* proceeding payable from public funds).

To the extent that several older opinions of the Attorneys General mentioned in your letter suggested that legal representation at public expense was not available in removal actions, those opinions either have been clarified by subsequent opinions or are distinguishable from the situation you have presented. For example, the syllabus paragraph of 1965 Op. Att'y Gen. No. 65-66 concluded that a school board could not pay for the defense of a board member in a removal action under R.C. 3.07-.08 "where the board of education has no official interest in the adjudication of the charges." Additional language in the opinion implied that removal actions are inherently personal in nature, and for that reason neither the board nor the board member could have any official interest in such an action. *Id.* at 2-130 to 2-131. It was soon clarified, however, that the required official interest does exist when the charges arise from a good faith effort to perform official duties. 1965 Op. Att'y Gen. No. 65-205 at 2-450 and 2-451 (expressly referencing 1965 Op. Att'y Gen. No. 65-66); accord 1971 Op. Att'y Gen. No. 71-080 at 2-273; see also *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d at 465, 423 N.E.2d at 110 (stating that when a county prosecuting attorney brings charges against a county officer in an official capacity, the county has an interest in ensuring proper representation on both sides of the issue).⁵

The remaining opinion cited in your request, 1933 Op. Att'y Gen. No. 169, vol. I, p. 200 (syllabus, paragraph one), concluded that township trustees had no authority to employ an attorney to prosecute a removal action under R.C. 3.08 (at that time G.C. 10-2) against another trustee. The opinion reasoned that by statute, removal actions must be filed by electors, thus the trustees have no authority to bring such an action in their official capacity. This is essentially an analysis of whether the trustees have standing or capacity to bring suit as a plaintiff. It does not follow, however, that absent express authority to do so, the trustees may not raise an available defense in an action in which they are defendants. Therefore, the reasoning of 1933 Op. Att'y Gen. No. 169, vol. I, p. 200 is not applicable to a removal action in which one or more township trustees, as defendants, are involuntary parties to the action. In such situations, the availability of legal representation at public expense should be determined by application of the good faith standard.

Accordingly, a board of township trustees has discretionary authority pursuant to R.C. 309.09(B) to hire counsel at township expense to represent a township trustee in a removal action under R.C. 3.07-.10, provided the board of township trustees makes a determination that the charges in the removal action arise from actions of the trustee that occurred or were prompted as part of a good faith, well-intended attempt to perform official duties and responsibilities. The authority to make this factual determination is vested in the board of

⁵Only one subsequent opinion, 1989 Op. Att'y Gen. No. 89-083, has suggested that removal actions are so inherently personal in nature that there is no need to apply the good faith standard. To the extent that 1989 Op. Att'y Gen. No. 89-083 returns to this older view, we conclude that, like 1965 Op. Att'y Gen. No. 65-66, it is inconsistent with current law and does not control.

township trustees. It is not appropriate for us to substitute our judgment for that of the board with respect to this determination. *See generally* 1989 Op. Att'y Gen. No. 89-090 at 2-429; 1989 Op. Att'y Gen. No. 89-038 at 2-168. Your presentation of the facts, however, emphasizes that the trustee in question neither intended to, nor in fact did, perform any acts beyond his official duties and responsibilities. Absent other countervailing facts, it would not appear to be an abuse of discretion for the board of township trustees to determine that the resulting removal action involved the trustee in his official capacity.

This does not end the analysis, however. The second condition imposed upon the provision of counsel at township expense is that "[n]o such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed." R.C. 309.09(B). In the context of the authority of a board of county commissioners to hire counsel other than the prosecuting attorney for county officers, opinions of the Attorneys General have concluded that the authority to employ counsel does not include the authority to reimburse, in instances where a county officer has employed counsel on his own initiative, without prior board approval, and other than in accordance with the specific terms and procedures set out by statute. 1990 Op. Att'y Gen. No. 90-096; 1988 Op. Att'y Gen. No. 88-055; *accord* 1993 Op. Att'y Gen. No. 93-001, at 2-6 n.2. Although R.C. 309.09(B) establishes procedures for a board of township trustees to follow in employing counsel other than the prosecuting attorney, it must be noted that these procedures are not as restrictive as those applicable to county officers or boards. R.C. 309.09(A) provides that no county officer may employ an attorney other than the prosecuting attorney at county expense except as provided in R.C. 305.14. R.C. 305.14(A), in turn, provides a procedure for making application to the court of common pleas, which determines whether to authorize the employment of other counsel. In contrast, there is no provision expressly limiting township officers to the procedure set out in R.C. 309.09(B), and R.C. 309.09(B) vests the entire authority to hire counsel at township expense in the board of township trustees. 1993 Op. Att'y Gen. No. 93-001 concluded that the authority to provide reimbursement for legal fees is reasonably incidental to the general authority to employ counsel, absent statutory restrictions on that authority. *Id.* at 2-11.⁶ Accordingly, it appears that a board of township trustees may consider a claim for reimbursement of legal fees in the situation you have described, provided that any decision to provide such reimbursement is "on the order of the board of township trustees, duly entered

⁶We also note that, in this instance, the township trustee and the board believed that the board had no authority to consider hiring counsel at township expense. Thus, at the time the trustee hired counsel at his own expense, it would have been futile to present the issue of hiring counsel to the board of township trustees. In cases involving the legal representation of county officers or boards, futility has been accepted as a legitimate reason for failing to follow the statutory procedure. *See generally State ex. rel. Jefferson County Children Services Bd. v. Hallcock*, 28 Ohio St. 3d 179, 502 N.E.2d 1036 (1986); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981). Additionally, in the case of *Ingraham v. Medina Township Bd. of Trustees*, C.A. No. 1853, 1990 Ohio App. LEXIS 2927 (Medina County July 11, 1990) *jurisdictional motion overruled*, 55 Ohio St. 3d 713, 563 N.E.2d 722 (1990), the court permitted a board of township trustees to ratify the hiring of outside counsel as a moral obligation, when such counsel had been improperly hired by the zoning inspector. *See also State ex rel. Delph v. City of Greenfield*, 71 Ohio App. 3d 251, 593 N.E.2d 369 (Highland County 1991) (holding that it would be a proper function for a city council to consider police chief's claim for reimbursement of legal fees incurred in defense of a *quo warranto* action, even though it might only constitute a moral obligation).

upon its journal, in which the compensation to be paid for such legal services shall be fixed," as required by R.C. 309.09(B).

It is, therefore, my opinion, and you are hereby advised that pursuant to R.C. 309.09(B), a board of township trustees has discretionary authority to reimburse a township trustee for legal fees incurred in defending a removal action under R.C. 3.07-.10, provided that the board of township trustees first makes a determination that the charges in the removal action arose from actions of the trustee that occurred or were prompted as part of a good faith, well-intended attempt to perform official duties and responsibilities, and provided further that a decision to provide reimbursement is made by order of the board, duly entered on its journal, in which the compensation to be paid for the legal services is fixed.