

OPINION 65-220

Syllabus:

1. A city may provide for the payment of legal counsel for a councilman if the litigation is the result of the councilman's good faith attempt to discharge the duties imposed upon him by law thereby giving the city an official interest in the adjudication of the charges.

2. A director of law cannot prosecute and defend the accused councilman in the same suit.

To: Richard J. Wessel, Butler County Pros. Atty., Hamilton, Ohio
By: William B. Saxbe, Attorney General, December 14, 1965

I have before me your request for my opinion involving legal assistance for councilmen and the authority or powers of a director of law. Your questions read as follows:

"1. Can a city legally provide and pay for an attorney for a councilman who is charged with the violation of a provision of the city charter?"

"2. Can the Director of Law, who is charged by the city and by the Revised Code of Ohio to prosecute cases in the Municipal Court represent a councilman who is charged with violation of a provision of the city charter?"

The answer to your first question is in part dependent on the charter provisions and ordinances of the City. The Revised Code is silent in respect to your request and so under the powers of local self-government, Section 3, Article XVIII, Ohio Constitution, the city could provide in the affirmative as to your first question.

However, such a provision in a city charter or ordinance is subject to two limitations or qualifications which are set forth in Opinion No. 2835, Opinions of the Attorney General for 1928, page 2541, and Opinion No. 65-66, Opinions of the Attorney General for 1965. The syllabus of Opinion No. 2835, supra, reads as follows:

"A village council may legally expend public funds to pay legal counsel for defending a police officer of the village in a civil action, for assault and battery arising out of the arrest of a person within the confines of a village for a breach of the peace, where it finds that the officer was in good faith attempting to discharge the duties imposed upon him by law as such police officer."

(Emphasis added)

The syllabus of Opinion No. 65-66, supra, reads as follows:

"A school board of a city school district may not expend public funds to pay legal fees of the city solicitor and private attorneys for their professional services rendered in the successful defense of a member of the school board charged with nonfeasance, malfeasance, and misfeasance where the board of education has no official interest in the adjudication of the charges."

(Emphasis added)

Therefore, before such counsel can be retained by the city, it must be determined that the officer was in good faith attempting to discharge the duties imposed upon him by law and the city must have an official interest in the adjudication of the charges. It is my opinion that a city acquires an official interest in the adjudication of the charges against a public officer only if said officer is attempting in good faith to discharge the duties imposed upon him by law.

The Revised Code contains three sections which are pertinent to the second question of your request and they read as follows:

Section 705.11, Revised Code:

"The solicitor shall act as legal adviser to and attorney for the municipal corporations, and for all officers of the municipal corporation in matters relating to their official duties. * * * He or his assistants shall be the prosecutor in any police or municipal court, and shall perform such other duties * * * as are required or provided."

Section 733.51, Revised Code:

"The city solicitor * * * shall serve the several directors and officers provided in title VII of the Revised Code as legal counsel and attorney.

"Such solicitor shall be prosecuting attorney of the police or mayor's court."

Section 733.53, Revised Code:

"The city solicitor, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of such city, all complaints, suits and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute. He shall not be required to prosecute any action before the mayor of such city for the violation of an ordinance without first advising such action."

Section 733.53, supra, states, "The solicitor, * * * shall prosecute or defend * * *", but it does not provide for both prosecuting and defending the accused in the same suit. Furthermore, it is my opinion that no such authority can be implied from the statute. The lack of implied authority is supported in part by Opinion No. 584, Opinions of the Attorney General for 1923, page 466, and Canon 6 of the Canons of Professional Ethics. Paragraph one of the syllabus in Opinion No. 584, supra, reads as follows:

"1. A prosecuting attorney may not, after taking office, continue to represent a client in a case in which the interests of such client and of the county are adverse."

Therefore, it is my opinion that a director of law cannot prosecute and defend the accused councilman in the same suit.

Accordingly, it is my opinion and you are hereby advised:

1. A city may provide for the payment of legal counsel for a councilman if the litigation is the result of the councilman's good faith attempt to discharge the duties imposed upon him by law thereby giving the city an official interest in the adjudication of the charges.

2. A director of law cannot prosecute and defend the accused councilman in the same suit.