

OPINION 65-205**Syllabus:**

1. A village may expend funds to retain counsel to represent public officers if the litigation is the result of a good faith attempt by the officer to discharge his official duties thereby giving the village an official interest in the adjudication of the charges.

2. The decision to retain counsel to represent a public officer is in the discretion of the legislative authority of a village.

3. The time of filing the suit has no bearing on the authority to retain legal counsel or to the authority to expend money in payment of such counsel.

To: Robert H. Huffer, Pickaway County Pros. Atty., Circleville, Ohio
By: William B. Saxbe, Attorney General, November 23, 1965

I have before me your request for my opinion which

reads as follows:

"May a village spend money from the general fund for the payment of attorney fees for a former Mayor and/or a former Chief of Police in the defense of an action for malicious prosecution which event occurred while both officers were employed by said village?"

"Would the fact that the officers were holding their respective offices at the time suit was filed have any bearing on the village's authority to expend money on their behalf?"

In Opinion No. 2835, Opinions of the Attorney General for 1928, page 2541, one of my predecessors in office stated the following in the syllabus:

"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 basis of that opinion was the fact that there was no specific prohibition against hiring legal counsel for a public officer and because of the Home Rule Provisions, Sections 3 and 7, Article XVIII, Ohio Constitution, which extend municipal powers. Accordingly, my predecessor in office found that a municipality could provide by its charter for situations such as you describe if the officer was attempting in good faith to discharge the duties of his office.

Opinion No. 2835, *supra*, is supported in part by the holding in Opinion No. 65-66, Opinions of the Attorney General for 1965 which states in the syllabus:

"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)

It is my opinion, therefore, that if the officer is attempting in good faith to discharge the duties of his office and a law suit is brought against him for such an attempt, then the village has an official interest in the adjudication because the main issue becomes the enforcement and legality of the village's laws.

The Revised Code also provides for the employment of legal counsel by the village when such counsel is necessary. Section 733.48, Revised Code, provides in part:

"When it deems it necessary, the legislative authority of a village may provide legal counsel for the village, or for any department, or official thereof* * *and provide compensation for such counsel."

(Emphasis added)

Therefore, the decision of whether or not the village has an official interest in the adjudication of the charges rests in the discretion of the legislative officials. For example, Section 733.30, Revised Code, requires in part that a "Mayor shall perform all the duties prescribed by the bylaws and ordinances of the municipal corporation". If the mayor is attempting to enforce an ordinance, bylaw or resolution of the village, the village would seem to have an official interest in the adjudication of the charges. Accordingly, the legislative officials must then determine whether or not legal counsel should be retained and paid by the village and their decision can only be challenged on the basis of abuse of discretion.

Therefore, it is my opinion that retaining legal counsel for village officers is limited to situations where the suit is brought because of the official's good faith attempt to discharge his official duties resulting in an official interest on behalf of the village in the outcome of the litigation.

In response to your second question, it is my opinion that the time of filing the suit would have no bearing on the village's authority to expend money on behalf of a public officer or ex-public officer if the act sued upon was a good faith attempt by the officer to discharge his official duties. The village would still, in the case of an ex-public officer, have an interest in the outcome of the litigation as to future courses of action to be carried out by the village officials.

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

1. A village may expend funds to retain counsel to represent public officers if the litigation is the result of a good faith attempt by the officer to discharge his official duties thereby giving the village an official interest in the adjudication of the charges.

2. The decision to retain counsel to represent a public officer is in the discretion of the legislative authority of a village.

3. The time of filing the suit has no bearing on the authority to retain legal counsel or to the authority to expend money in payment of such counsel.