

JIM MURPHY
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HOUSE OF REPRESENTATIVES
District 133 • Harris County



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Ways & Means
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April 21, 2015

The Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

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OPINION COMMITTEE

FILE # ML-47725-15
I.D. # 47725
RQ-0022-KP

Re: Request for Attorney General Opinion

Dear General Paxton,

On behalf of Houston Community College System ("HCCS," "College"), I am submitting this request as an authorized requestor¹, concerning the following question:

Whether an institute of higher education may expend public funds to reimburse or pay the personal attorney's fees incurred by a board member defending a quo warranto action or removal proceeding, challenging the board member's election as trustee.

The HCCS Chancellor has been presented with such a request for reimbursement. However, before the Chancellor proceeds to make a determination whether the factual circumstances suggest that a reimbursement of the attorney's fees is in the public interest, the Chancellor seeks to confirm that the Attorney General Opinions holding that reimbursement of a trustee in the context of an election contest is not permissible, will not preclude the Attorney General's consideration of this issue raised to the Chancellor.

All matters concerning the underlying quo warranto removal proceeding have been disposed of and the judgment in the case has become final.² The action was initially brought by the County Attorney of Harris County, Texas in the name of the State of Texas, as an election contest against David Wilson, Trustee of District II for Houston Community College. Trustee Wilson retained private counsel to represent him in the contest. HCCS was not initially a party to the action; however, HCCS was later added as a party by the State of Texas, because HCCS is operated by its Board of Trustees. The County Attorney argued that the quo warranto action would have legal effect on the operation of the

¹ Tex. Gov. Code § 402.042

² *State of Texas v. David B. Wilson*, Cause No. 213-75695; 151st District Court, Harris County, Texas. Pursuant to the Texas Election Code, David Wilson assumed the election post of Trustee upon the canvass of the election, notwithstanding a temporary restraining order filed on December 30, 2013 by the County Attorney ordering Wilson to not take the oath of office and the election contest.

institution. HCCS retained outside counsel to represent its interests in the suit. Legal counsel for the College did not represent or otherwise advise Trustee Wilson in the case.

Background Information on the Suit

On or about Tuesday November 5, 2013, an election was conducted in Harris County, Texas to elect a trustee to Houston Community College System, District II. Wilson ran in the election and prevailed in the general election for the position of Trustee to HCCS, District II, a single member district. A candidate for Trustee District II must be a resident for that Trustee District and must be elected by residents of that District.³ If a Trustee changes his residency to a location outside of the district from which the trustee was elected, the trustee vacates the office.⁴ On December 19, 2013 a quo warranto action was filed complaining of Wilson. The State of Texas attempted to show Wilson was not at the time of the election in November 2013, a resident of HCCS District II and was ineligible to serve in that office; therefore, the court had grounds under the quo warranto action to remove Wilson from office. Notwithstanding a temporary restraining order issued by the County Attorney and the quo warranto petition, Wilson took the oath of office on January 1, 2014 in front of a notary public and filed with the Texas Secretary of State on January 2, 2014. In August 2014, Wilson prevailed in the suit and is currently serving as HCCS Trustee for District II.

Trustee Wilson has requested that the College reimburse his legal expenses paid from his personal funds, related to advice and representation associated with the election contest.

While the College is generally aware the Attorney General has held that it is inappropriate to reimburse a school trustees for a successful defense in an election contest, it is the College's further understanding that the general rule of law in reimbursing public officials in suits is that a district may expend funds for a defense in a private suit if a majority of disinterested members of the school board make a good faith determination that a defense of the action or reimbursement relating to the action is in the public interest. While the College is prepared to evaluate whether reimbursement of attorney's fees for a trustee's defense in an election contest is in the public interest, the purpose and intent in making this request for an Attorney General Opinion, is to confirm that the College is not precluded from considering Trustee Wilson's requests simply because it arises in the context of an election contest, which the College argues is a private suit involving only the trustee's personal interest in seeking office.

The matter is of importance to the College in that instruction from the Attorney General will provide guidance to institutes of higher education concerning the treatment of reimbursement questions in litigation involving election contests and quo warranto suits where a member is sued in their individual capacity. The College is also concerned about balancing the use of appropriated funds with the interests of protecting the College from legal claims that affect the overall operation of the college, even with such claims brought in the form of suits against individual trustees.

³ Tex. Educ. Code §130.0822(f)

⁴ Id.

Where the Attorney General has held that it is inappropriate to reimburse a school trustee for successful defense of an election contest, the general rule of law in reimbursing public officials in suits is that a district may expend funds for such a defense in a private suit "if a majority of the disinterested members of the school board make a good faith determination that a defense of the action is in the public interest. A school district may not expend public funds to represent the purely private interest of the individual trustee."⁵ The College wants to insure that where the issue is brought to the board, if a majority of the disinterested trustees for the College make a good faith determination that reimbursement of the action is in the public interest, such reimbursement is not otherwise precluded as a matter of law because the action arose in the context of an election contest.

HCCS' Understanding of Reimbursement Principles

The College argues it is restricted from reimbursing legal expenses incurred in a private suit per the prohibition defined in the Texas Constitution. Article 3, Section 52, prohibits the expenditure of public funds for the benefit of any individual, including a trustee:

- (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid or, or to any individual..."⁶

Thus, the College's ability to indemnify a trustee or other employee for loss or damage to them resulting from their service to the college is substantially limited. Indemnification of public servants generally arises when civil and criminal lawsuits are brought against public servants about the exercise of their public office.

To the extent that the legislature has provided a limited waiver of the substantial immunity afforded to persons elected to serve on a board for public office (immunity from suits arising from their actions within the scope and course of their employment), public servants may be entitled to indemnification for certain losses and reimbursement for legal expenses. As an example, Chapter 102 of the Texas Civil Practice and Remedies Code provides indemnification and reimbursement for legal expenses incurred by public servants from claims arising from alleged acts, omissions, or negligence of officials from actions within the course and scope of their office. Notwithstanding, public servants may be entitled to have their legal expenses paid for in certain suits brought against them personally for actions arising from carrying out the duties of their office, *if* a majority of the disinterested members of the board of trustees of the district make a good faith determination that a defense or reimbursement of the action is in the public interest.

The Texas Legislature has addressed the issue of indemnification for public officials in a number of different statutes⁷ authorizing payments for the defense of employees and public servants acting within

⁵ See Tex. Att'y Gen. Op. No. JM-968 (1988), at 3.

⁶ Tex. Const. Art III, §52

⁷ See Tex. Civ. Prac. Rem. Code §102.002 (authorizing local governments to pay actual damages awarded against an employee, including an officer of the political subdivision, resulting from an act or omission of the employee in

their scope of service. Additionally, the purchase of insurance to provide for coverage in these types of circumstances is common. However, on suits brought against a public officer in their individual capacity, the Attorney General has held that a political subdivision's authority to employ attorneys to defend that official, is limited to those situations where the legitimate interests of the district, and not merely the personal interests of the officer, require the assertion of a vigorous legal defense on behalf of the public interest. Further, the Attorney General has generally found no public interest in reimbursing an elected public official for defense of an election contest. For example, Attorney General Opinion JM-685 (1987) holds that while a school district can expend public funds to defend its interests in an election contest where officials of the district are named in their official capacities, the school district has no authority to pay the legal expenses of an individual trustee in defending an election contest involving the vote count in his election as trustee. Similarly, the Attorney General has concluded that a county is prohibited by the Texas Constitution from reimbursing an incumbent Sheriff for attorney's fees incurred in defending an election contest suit.⁸

While on their face, AG Ops JM-685 and GA-0104⁹ appear to prohibit the reimbursement of a candidate for successful defense of an election contest, it seems appropriate for the board to determine whether the legitimate interests of the College, and not merely the personal interests of the officer, are a matter of public interest warranting the reimbursement of expense. Here, the election contest involved the eligibility of Wilson to be seated as a trustee where his residency was at issue. The College's interest in the quo warranto action was limited to being a named party to the action; HCCS had no interest in the outcome of this suit and had no interest in the success of Wilson in the underlying election. Moreover, the College has no interest in the success of any candidate running for office, whether their seat is challenged or not. Thus the issue before the Chancellor is whether the seating of a candidate for election is in the public interest's to expend public funds to reimburse the trustee in a successful defense.

Because of the existing opinions holding it improper to reimburse a candidate in a successful defense of an election contest, the College believed it would be prudent to ask the Attorney General for a ruling based on the circumstances described herein before recommending a decision on reimbursement of the requested expenses.

the course and scope of his employment and the related court costs and attorney's fees awarded against the employee.); Tex. Civ. Prac. Rem. Code §102.004 (authorizing political subdivisions to provide defense counsel for public servants).

⁸ See Att'y Gen. Op. No. DM-431

⁹ See Att'y Gen. Op. No. GA-0104, at 4, holding that a school district may reimburse an officer or employee for the expense in defending a lawsuit only if it determines that 1) the expenditure was for the district's interest and not merely the officer's or employee's personal interest, and 2) the lawsuit arose out of actions by the officer or employee that were undertaken in good faith within the scope of their official duty.

The College seeks to balance its obligations for the appropriate use of public funds with its authority and discretion to consider reimbursement of individual trustees on their appropriate defense of the issues affecting college polices. Please do not hesitate to contact me concerning any question you may have about the request or should you wish to examine a set of pleadings in the suit or invoices giving rise to the request.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Murphy". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Representative Jim Murphy