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ATTORNEY GENERAL

State of Louisiana
DEPARTMENT OF JUSTICE
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SEP 06 2012
Opinion 12-0085

90 - A - 1 PUBLIC FUNDS & CONTRACTS

Ms. Darlene M. Ourso
Iberville Parish School Board, District O
57030 Ourso Road
White Castle, Louisiana 70788

Dear Ms. Ourso:

When a public official is acting beyond the course and scope of his duties he is not entitled to have public funds used to pay the legal fees for the defense of civil or criminal actions brought against him. The fact that the caption to a lawsuit states that a public official is sued in his individual and official capacity is not proof sufficient that the conduct complained of occurred outside or beyond the course and scope of his public duties. The determination of whether the actions the local public official or employee are being defended against are actions taken in the course of carrying out the official duties of the public office is a factual determination that must be made on a case by case basis.

You have requested an opinion of this office regarding whether the Iberville Parish School Board ("IPSB") may use public funds to pay or reimburse legal fees incurred by the Superintendent and President of the IPSB who hired an attorney to represent them in both their official and individual capacities. Your concern stems from the fact that in the caption of the lawsuit, the Superintendent and the IPSB President are each sued "individually and in his official capacity."

Going back to the 1970's, our office has issued numerous opinions regarding whether public funds may be used to pay for or reimburse legal fees incurred by a local public official when he must hire an attorney to defend himself against civil, criminal, or ethics charges filed against him.¹ We have consistently stated that if a local public official or employee is sued for civil damages or charged with crime and is found not liable or not guilty and the allegations arose out of the performance of his official functions, then the public body that employs that person may, but does not have to, pay or reimburse the attorney's fees and expenses for the defense of the suit, provided the expenses were reasonable and necessary.

¹ The following opinions address the use of public funds by a local entity for reimbursement of legal fees incurred when a public official has to defend himself against criminal, ethics, or civil charges brought against him: 77-1131, 77-1610, 79-349, 79-349A, 80-105A, 80-209, 83-475, 83-611, 85-412, 87-699, 87-744, 90-38, 90-490, 94-276, 94-384, 94-369, 94-369A, 96-152, 96-398, 97-369, 98-474, 99-27, 99-180, 99-356A, 00-157, 01-94, 02-0005, 02-0027, 03-0261, 04-0133, 05-0050, 05-0144, 05-0302, 05-0377, 07-0041, 07-0045, 07-0132, 08-0094, 08-0101, 09-0074, 09-0130, 09-0132, 09-0280, 10-0099, 10-0182, 10-0290, 11-0182, 12-0071, and 12-0080.

These opinions have, more often than not, treated reimbursement of attorney's fees for civil and criminal matters the same insofar as stating that before public funds may be used to reimburse legal expenses, the litigation must be over and the local public official be found either not guilty or not liable for the criminal or civil charges brought against him. We wish to expand our analysis of when public funds may be used to pay for or reimburse legal expenses based on the different nature of criminal and civil charges.

In our view, when a public official is found guilty of criminal or ethics charges, it is because of conduct that occurred outside the course and scope of his public duties. As a result, public funds may only be used to reimburse legal fees incurred by a local public official in the event that he is found not guilty of all charges brought against him, a no true bill returned by a grand jury, charges are dropped, etc. In other words, it is our opinion that when criminal or ethics charges are brought against a local public official, it is only after the public official is found not guilty that the local public entity may choose to reimburse legal expenses incurred by the public official in defending himself. See La. Atty. Gen. Op. Nos. 10-0290, 99-356A, 97-369, 96-152, 95-242.

State criminal and ethics charges can only be brought against a local public official by a handful of people: a district attorney, the attorney general, or the Board of Ethics. On the other hand, anyone can file a civil suit against a local public official. Our office previously noted that public officials are more prone to having frivolous lawsuits filed against them than ordinary citizens and must defend themselves regardless of the merit of the lawsuit. If a public official who successfully defended himself from a civil claim or from criminal charges filed as a result of the performance of his public duties had to pay his fees with personal funds, it would severely limit the number of people who would run for (and remain in) public office. La. Atty. Gen. Op. No. 83-611. Allowing public funds to be used to pay or reimburse legal fees incurred in successfully defending oneself encourages individuals to seek or remain in public office with the assurance that if they are forced to defend their actions while serving in their official capacity, they may be reimbursed for legal fees incurred. See Atty. Gen. Op. Nos. 90-38, 80-105, 79-349A. This, in turn, gives the electorate a greater choice in who to elect to public office. La. Atty. Gen. Op. Nos. 09-0130, 08-0139.

It is our opinion that when a local public official is named in a civil lawsuit because of actions he took in the course and scope of his position, the local public entity may choose to use public funds to fund the litigation. Whether the actions alleged in the civil suit occurred in the course and scope of the public official carrying out his official duties is a factual determination that must be made by the local entity. As a general rule, the La. Attorney General's Office refrains from making factual determinations. If civil charges are filed against a local public official, the local public entity makes a determination that the charges arise from the official's official actions, it is our opinion that public funds may be used to pay for his defense without the necessity of awaiting a final judgment. If at any

point during the litigation it becomes apparent that the conduct of the public official occurred outside or beyond the course and scope of his public duties, then public funding of the defense must stop. We note that the fact that the caption of a civil lawsuit states that a public official is sued in his official and individual capacities does not necessarily mean that there is any merit to the allegations in the suit or that the actions alleged were in the public official's individual capacity.

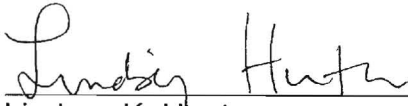
Finally, our past opinions regarding reimbursement of legal expenses have consistently stated that, if a local entity is legally able to reimburse legal fees and makes the choice to do so, that entity must also determine: (i) that the hourly rate charged by the attorney was reasonable; (ii) that the hours spent by the attorney were reasonable and necessary; and (iii) that any costs incurred by the attorney were reasonable and necessary. See La. Atty. Gen. Op. No. 07-0045. It continues to be our opinion that the local public entity must make these factual determinations before paying for or reimbursing any legal expenses. If the local entity determines that the rate charge or hours and expenses incurred were unreasonable and/or unnecessary, public funds should not be used to reimburse those expenses.

Based on the foregoing, it is the opinion of this office that when a public official is acting beyond the course and scope of his duties he is not entitled to have public funds used to pay the legal fees for the defense of civil, criminal, or ethics charges brought against him. The fact that the caption to a lawsuit states that a public official is sued in his individual and official capacity is not sufficient proof that the conduct complained of occurred outside or beyond the course and scope of his public duties. The determination of whether the actions the local public official or employee are being defended against are actions taken in the course of carrying out official duties of the public office is a factual determination that must be made on a case by case basis.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

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Attorney General

By: 
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