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April 7, 2010

ADVISORY OPINION NO. 2010-04

The Honorable James A. Stephens
Member
Bessemer City Council
1800 Third Avenue North
Bessemer, Alabama 35020-4999

Reimbursement For Attorneys' Fees/Public Official Prosecuted For Violating The Alabama Ethics Law Seeking Reimbursement For Attorneys' Fees

A member of the Bessemer City Council, who was indicted and prosecuted in her official capacity for violating the Alabama Ethics Law, but who was acquitted of the charges, may not seek reimbursement for payment of her attorneys' fees, expert fees and other fees by the City of Bessemer, as there is no proper corporate interest involved on the part of the City of Bessemer.

Dear Mr. Stephens:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTION PRESENTED

May the City of Bessemer pay the legal fees incurred in the defense of a City Council member's prosecution for having violated the Alabama Ethics Law?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

On February 6, 2008, the Alabama Ethics Commission referred, on a finding of probable cause the case of Louise Alexander, a member of the Bessemer City Council, to the Attorney General's Office for prosecution.

After investigation and hearing, the Commission unanimously determined that probable cause did exist to believe that Ms. Alexander had used her public position as a member of the Bessemer City Council for her personal benefit. Ms. Alexander was indicted and the case was prosecuted by the Attorney General's Office in the Jefferson County Circuit Court in February of 2010.

Ms. Alexander was acquitted by the jury.

James A. Stephens, a member of the City Council of the City of Bessemer, Alabama, asks the following question:

"May a public official, who has been charged with a felony violation of the Alabama Ethics Law, tried in a court of law but who is cleared of wrongdoing by jury trial, seek reimbursement from the City of Bessemer for the attorney fees, expenses, and costs, including expert fees, in connection with the trial defense?"

Mr. Stephens states that in 2007, Louise Alexander, a Bessemer City Councilor, and as such, a public official, was charged with felony violations of the Alabama Ethics Law. After a complete and thorough investigation by the Alabama Ethics Commission, the matter was unanimously referred to the Alabama Attorney General for criminal prosecution. In January (sic) of 2010, a jury trial was held and defendant was acquitted of all charges.

Mr. Stephens states that Ms. Alexander has made a request to the City for reimbursement of all legal fees incurred during her defense of these charges. This has been a controversial matter in the City of Bessemer, and based upon information and belief, the bill submitted appears to be close to $400,000.00.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24) defines a public official as:

> "(24) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2."

Section 36-25-5(a) states:

> "(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-5(c) states:

> "(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy."

It should be noted that this opinion follows closely and quotes extensively from Advisory Opinion No. 97-15, rendered on March 5, 1997, which held that:

> "A public official, who is accused of having violated the Alabama Ethics Law, but who is later cleared of wrongdoing, may not seek reimbursement from the State of Alabama for expenses relating to that charge, including but not limited to attorney fees, expert fees, and other fees, as there is no proper corporate interest involved."

The Alabama Ethics Law is a criminal statute designed to prevent the use of one's public office for one's personal benefit. The penalties for violation of the Alabama Ethics Law range from a Class A misdemeanor for violation of filing and disclosure requirements, to a Class B felony for an intentional violation of the chapter.

An individual accused of a criminal act under the Ethics Law is presumed to be acting ultra vires, which means that the actions are "beyond the scope of, outside of or in excess of powers and authority granted to an individual or entity." Blacks Law Dictionary, Fifth Edition.

The key case in an analysis of whether or not a governmental entity may pay attorneys' fees under these type situations is City of Montgomery et al. v. James Collins et al., *355 So.2d 1111*. In that case City of Montgomery taxpayers brought a class action to enjoin the City of Montgomery from expending municipal funds to defend city police officers who had been indicted for perjury. In the Collins case, the court held that there was a proper corporate interest in defending the police officers due to the fact that a civil action against the City was forthcoming and directly related to the perjury charges.

In Collins, the court held that there were four issues to be looked at in determining whether or not public funds could be expended in this situation. Those factors are as follows:

1) It must be in the proper corporate interest of the "public entity" to expend its funds for the purpose;

2) That this proper corporate interest depends upon the existence of a risk of future civil litigation against the (public entity) itself arising out of the same or similar circumstances;

3) The acts allegedly committed must be done by the (public entity) officials in the discharge of their corporate duties; and

4) The officers performing these duties must have acted honestly and in good faith.

The Attorney General, in Opinion No. 82-00492 stated:

"Public money cannot be expended by a governing body to shield themselves from their own unlawful and corrupt acts."

"The Supreme Court of Alabama has never carried the concept of 'proper corporate interests' so far as to permit a municipality to indemnify its official or employee from actual liability for damages to third parties arising out of a tort, much less resulting from intention or wantonness conduct. There is a marked difference between providing the cost of defense and paying a punitive judgment . . ." Carr v. City of Florence, *729 F. Supp. 783, (N.D. Ala.) 1990*.

> "This Court made an exception to the general rule in *City of Montgomery v. Collins, 355 So.2d. 1111, Alabama 1978*. In Collins the expenditure of public funds of the city of Montgomery was allowed in the defense of Montgomery Police Officers who had been charged with the offense of perjury in the testimony they gave the Grand Jury. The court said that it was in the 'proper corporate interest' of the City of Montgomery to defend against these prosecutions since they created a risk of litigation against the City itself, should the perjury prosecutions have proved unsuccessful."

In the situation before the Commission, the complaint against Louise Alexander was filed by an individual associated with the City of Bessemer. Also, during the course of the trial, several individuals, including at least one Council member, the Mayor and employees of the City's finance department testified for the State of Alabama and against Louise Alexander. Clearly, the City of Bessemer has no corporate interest in paying Ms. Alexander's attorneys' fees.

In addition, none of the requirements in determining whether a proper corporate interest exists under *Collins v. Montgomery* have been met or are applicable to this scenario.

Based on the facts as provided and the above law, the City of Bessemer may not pay attorneys' fees, expert fees and other fees associated with her criminal prosecution, as there is no proper corporate interest involved.

CONCLUSION

A member of the Bessemer City Council, who was indicted and prosecuted in her official capacity for violating the Alabama Ethics Law, but who was acquitted of the charges, may not seek reimbursement for payment of her attorneys' fees, expert fees and other fees by the City of Bessemer, as there is no proper corporate interest involved on the part of the City of Bessemer.

AUTHORITY

By 3-0-1 vote of the Alabama Ethics Commission on April 7, 2010.

Braxton L. Kittrell, Jr., Esq.
Acting Chair
Alabama Ethics Commission