

Advisory Opinion 2021-01

Issued on January 7, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County School Superintendent** asks whether the Board of Education may use public funds to pay his attorney fees, either directly or through the procurement of liability insurance, for the defense of pending Ethics Commission complaints if the complaints arise out of the performance of his duties as Superintendent.

Facts Relied Upon by the Commission

A County School Superintendent's contract with the County Board of Education provides that the Board of Education "shall defend, hold harmless, and indemnify the Superintendent from any and all demands, claims, suits, actions and legal proceedings brought against the Superintendent in his official capacity as [an] agent or employee" of the school system "or with regard to any and all demands, claims, suits, actions and legal proceedings brought against him in his individual capacity, which arise out of the performance of any of his duties as Superintendent, to the full extent as permitted by the laws of the State of West Virginia."

The employment contract has a separate clause governing criminal proceedings. This clause provides that the Board of Education "may reimburse the Superintendent for actual legal fees incurred in defense of a criminal charge or charges in the event such charge or charges are dismissed or in the event the Superintendent is acquitted, upon a determination that the Superintendent was acting within the scope of his employment and was acting in good faith, to the extent permitted by laws of the state of West Virginia."

The Superintendent's contract is up for renewal, and he wants to know whether it complies with the Ethics Act for the same or similar terms to be included in his new contract. He states that the terms are intended to require the Board of Education to defend him, i.e., pay his legal fees, in the event that an Ethics Commission complaint is filed against him for a matter arising from the performance of his duties as Superintendent. In the alternative, the Superintendent asks whether the Board of Education may procure liability insurance which provides him a defense for an ethics complaint arising from the performance of his duties.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) states, in relevant part:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection.

Advisory Opinion

I. Payment of legal defense costs for a pending ethics complaint

The Ethics Act permits the expenditure of public funds when there is a legitimate government purpose for the expenditure.¹ The Ethics Commission has held that an “expenditure . . . may constitute the unlawful use of [public] office for private gain if the overriding benefit is to the public official or employee as opposed to the agency or public.” Advisory Opinion 2018-03. In determining whether the expenditure of public funds for a specified purpose is permissible, the Commission relies “upon the common law, [the] West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor’s Office to determine whether there is express or implied authority for the expenditure.” Advisory Opinion 2012-50.

The Commission therefore must determine whether and/or under what circumstances using public funds to provide a defense to a public official in a pending ethics complaint constitutes use of public office for private gain. For purposes of this analysis, the Ethics Commission finds that the analysis and conclusion are the same regardless of whether a Board of Education authorizes the payment of legal fees in a pending ethics complaint directly or in accordance with the terms of an employment contract. The procurement of liability insurance will be discussed separately in section II.

Neither the Ethics Act nor any other provision in the West Virginia Code directly answers the question posed.² Absent express legal authority or clear guidance from the Legislature on this issue, it is necessary to determine under what conditions there is implied authority for the use of public funds to pay the legal fees of a public official in a pending ethics complaint. The Ethics Commission thus relies upon common law for guidance.

¹ See Advisory Opinions 2020-04 (defining when the Governor’s use of the state aircraft for trips to and from his hometown comply with the Ethics Act), 2018-07 (holding that a county commission may allow the sheriff to live rent-free in a house located in the county park because the sheriff’s presence would enhance security at the park and he would repair and maintain the house), and 2012-20 (finding that a university may use a reasonable amount of public funds for wellness-related incentives so long as there is a rational basis for such expenditure).

² The Act does, however, provide that the Ethics Commission may order a person to reimburse a respondent his or her reasonable attorney fees if the Ethics Commission determines by clear and convincing evidence that the person knowingly filed a bad faith complaint. W. Va. Code § 6B-2-4(v)(2)(B).

In *Powers v. Goodwin*, 291 S.E.2d 466 (W. Va.1982), the Supreme Court of Appeals of West Virginia considered a situation where two Boone County Commissioners authorized the use of County funds to reimburse a fellow Commissioner for the legal fees he incurred in successfully defending against a removal petition and a related criminal grand jury proceeding: both matters arose from allegations that the Commissioner had unlawfully used his County telephone credit card for personal calls. *Id.* at 469. The petitioners in *Powers* asserted that the two County Commissioners who had authorized the reimbursement of the legal fees should be removed because the reimbursement constituted the unlawful expenditure of county funds. *Id.* The Circuit Court found that removal was not warranted, but that the County Commissioners had unlawfully authorized the payment of their fellow Commissioner's legal fees. *Id.* The lower Court went on to hold that, because it was an unlawful expenditure of public funds, the two County Commissioners must reimburse the County for the legal fees if the County Commissioner who had incurred them did not. *Id.*

The County Commissioners appealed the Circuit Court's ruling holding them secondarily liable for the reimbursement of the legal fees to the County. The Supreme Court of Appeals of West Virginia analyzed whether the County Commissioners had authority to use County funds to pay the legal fees. The Supreme Court held that: "The rules governing whether a public official is entitled to indemnification for attorneys' fees are the same in both the civil and criminal context." The Court then established a three-part test for when it is permissible to indemnify a public official for his or her legal fees in a civil or criminal context:

- 1) the underlying action must arise from the discharge of an official duty in which the government has an interest;
- 2) the officer must have acted in good faith, and
- 3) the agency seeking to indemnify the officer must have either the express or implied power to do so.

Id. at Syl. pt. 3. The Supreme Court then remanded the matter to the Circuit Court for it to apply the three-part test to decide whether the County Commissioners erred in authorizing the payment of the attorney fees. *Id.* at 477. The Supreme Court further directed the lower Court to determine whether their actions in authorizing the payment warranted removal and to make a separate finding regarding whether the County Commissioners were secondarily responsible for repayment of the legal fees to the County.³ *Id.*

³ In its ruling, the Supreme Court noted: "It would appear to this Court that on the facts presented to the court below in the joint motions for summary judgment that the reimbursement of Mr. Goodwin for his attorneys' fees was probably an unauthorized expenditure since the foundation of both the criminal prosecution and petition to remove him from office was personal malfeasance entirely unrelated to the discharge of his official duties. *Id.* at 477.

The West Virginia Office of the Attorney General considered the application of *Powers* when it opined whether a county commission may reimburse a county planning commission member for his attorney fees for his *successful* defense of an Ethics Commission complaint. County Commission’s Authority to Reimburse a County Official’s Legal Expenses, W. Va. Op. Atty. Gen. (April 5, 2017) (emphasis added). The West Virginia Office of the Attorney General opined that *Powers* “seems broad enough to permit reimbursement for defense of a complaint brought before the state ethics board” for successfully defending against an ethics complaint if the county commission or circuit court determined that the *Powers* factors had been met.⁴ *Id.* at p. 4.

Neither *Powers* nor any subsequent Supreme Court opinion addresses the application of the *Powers* test to the defense of a public official in a pending Ethics Commission complaint proceeding. In *Powers* the Supreme Court did not, however, expressly state that the indemnification of a public official for his or her attorney fees is only permissible in those circumstances where the civil or criminal action has been successfully concluded in the public official’s favor, and the Court recognized the complexity of the indemnification issue by stating: “The problem, of course, is how to apply these criteria in any particular case.” *Powers*, 291 S.E.2d at 472.

The *Powers*’ opinion addresses, in passing, the permissibility of “advance indemnification,” i.e., providing a defense to public officials or employees with public funds, by citing *McQuillin, Municipal Corporations*, 3d Ed., § 12.137, for the proposition that, “[a] city may assume the expense of a suit against its agent or its servant in which the interests of the municipality are directly involved.” *Id.* at 472. The Court further reasoned that “we can envisage situations where a criminal prosecution does, indeed, arise directly from the good faith discharge of official duties....” *Id.* at 473. Due to the challenges of determining whether payment or reimbursement of attorney fees by a public entity is permissible, the Supreme Court stated that a public entity may “get an advance determination of the legality of indemnification through an Attorney General’s opinion or a mandamus proceeding...” *Id.* at 475.

The Ethics Commission is unable to envision every circumstance whereby a superintendent may request that a board of education provide him or her a defense in an Ethics Commission complaint proceeding. The Ethics Commission recognizes, nevertheless, that there may be circumstances where a board of education determines it is in the best interest of the board of education to hire an attorney to defend a

⁴ The Attorney General Opinion noted that it had reached this conclusion, albeit it was “not aware of a case in which the Court has applied the *Powers* framework in connection with an administrative proceeding.” *Id.* at p. 4. The Attorney General Opinion also notes that the Supreme Court has indicated that after the passage of the Tort Claims Act it “might suggest a need to revisit its decision in *Powers*, but the Court has since declined” to do so. *Id.* FN 1.

superintendent in an Ethics Commission complaint proceeding. For example, a plaintiff in a civil action alleging wrongful discharge against a board of education and/or a superintendent may file an ethics complaint containing similar allegations, e.g., that he or she was fired so that the superintendent could hire a friend based upon unlawful favoritism. A board of education may find it is in the best interest of the board of education to protect its interests by providing a defense to the superintendent in the related ethics complaint.

The Ethics Commission holds that the Ethics Act does not prohibit the Board of Education from using public funds to provide a defense to the County Superintendent if the Board finds that paying the attorney fees and other defense costs is in the best interest of the Board of Education and that the *Powers* test has been satisfied. The Board of Education may seek a determination of the legality of advance indemnification for attorney fees in a pending Ethics Complaint through an Attorney General opinion or mandamus proceeding.

II. Insurance coverage provision

The County Superintendent next asks whether he may, as a term of his employment contract, require the Board of Education to procure insurance for him that provides a defense to him for an ethics complaint arising out of the performance of his duties.

The West Virginia Legislature has outlined the types of liability insurance coverage to which a County Superintendent is entitled; hence there is express authority for county boards of education to procure insurance in accordance with statute. The relevant provisions state:

Liability insurance for county boards of education, their employees and members, the county superintendent of schools, public charter schools electing to obtain coverage, and for employees and officers of the state Division of Corrections and Rehabilitation; written notice of coverage to insureds.

(a) In accordance with the provisions of this article, the State Board of Risk and Insurance Management shall provide appropriate professional or other liability insurance for all county boards of education, teachers, supervisory and administrative staff members, service personnel, county superintendents of schools, and school board members....

(b) Insurance provided by the Board of Risk and Insurance Management pursuant to the provisions of subsection (a) of this section shall cover claims, demands, actions, suits, or judgments by reason of alleged negligence or other acts resulting in bodily injury or property damage to any person within or without any school building or correctional institution if, at the time of the alleged injury, the teacher, supervisor, administrator,

service personnel employee, county superintendent, school board member, or employee or officer of the Division of Corrections and Rehabilitation was acting in the discharge of his or her duties, within the scope of his or her office, position or employment, under the direction of the county board of education, or Commissioner of Corrections, or in an official capacity as a county superintendent or as a school board member or as Commissioner of Corrections.

...

(d) The insurance policy provided by the Board of Risk and Insurance Management pursuant to subsection (a) of this section shall include comprehensive coverage, personal injury coverage, malpractice coverage, corporal punishment coverage, legal liability coverage, as well as a provision for the payment of the cost of attorney's fees in connection with any claim, demand, action, suit, or judgment arising from such alleged negligence or other act resulting in bodily injury under the conditions specified in this section.

(e) The county superintendent and other school personnel shall be defended by the county board or an insurer in the case of suit, unless the act or omission shall not have been within the course or scope of employment or official responsibility or was motivated by malicious or criminal intent.

...

W. Va. Code § 29-12-5a.

The Legislature has directed by statute the type of insurance which the State Board of Risk and Insurance Management ("BRIM") may or must provide to boards of education and county superintendents. The Ethics Commission has no authority to determine 1) whether the insurance provided by BRIM to county school systems covers the attorney fees and costs for a superintendent's defense of an ethics complaint or 2) whether a county school system is authorized to purchase additional coverage beyond that provided by BRIM to cover administrative claims arising from the performance of the superintendent's duties. While the Ethics Commission has authority to opine "on whether an action or proposed action violates the provisions" of the Ethics Act,⁵ the Ethics Commission finds that it may constitute an unwarranted exercise of its discretion

⁵ W. Va. Code § 6B-2-3(a).

to rule on whether a board of education is authorized to procure insurance to provide a legal defense to a superintendent in an administrative proceeding.⁶

The Ethics Commission finds that it does not violate the Ethics Act for the Board of Education to procure liability insurance which may provide a defense to the Superintendent or other school officials and personnel if the Board of Education determines it has legal authority to do so and that it serves a public purpose.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11 and does not purport to interpret other laws or rules, including whether there is express or implied authority for the expenditure.

In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

⁶ See *West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp.*, 472 S.E.2d 411 (W. Va. 1996) (discussing authority of administrative agencies and when deference is given to the actions of agencies).