



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 7, 1997

Mr. Don H. Hazelip, C.P.A.  
Eastland County Auditor  
100 West Main, Room 205  
Eastland, Texas 76448

Letter Opinion No. 97-065

Re: Whether county may pay legal expenses incurred by sheriff in defending himself in a prosecution on criminal charges (ID# 39367)

Dear Mr. Hazelip:

In your capacity as county auditor,<sup>1</sup> you seek advice concerning the authority of the Eastland County Commissioners Court to pay legal expenses incurred by the sheriff in defending himself in a prosecution on criminal charges. We will briefly summarize the events leading up the prosecution, which you describe in your letter.

Some county residents complained to the commissioners court that an individual had moved a fence on his property to encroach on the right-of-way of a public road. Eventually, the commissioners court entertained a motion directed to the sheriff to remove the fence by 5:00 p.m. the next day. Two commissioners voted in favor of the motion, and two commissioners abstained. With the help of one of the commissioners, the sheriff removed part or all of the fence. As a result of this incident, criminal charges were filed against the sheriff. The trial proceeded, but after hearing testimony from the sheriff, the state<sup>2</sup> moved to dismiss all charges and the court granted the motion. The sheriff is now asking the commissioners court to pay his legal expenses of \$10,000, which he incurred in defending himself against the charges.

You first ask whether the State of Texas is obligated to pay the sheriff's legal fees. The recovery of costs in criminal cases depends entirely upon statutory provisions therefor.<sup>3</sup> We find no statute authorizing the defendant to recover the cost of legal representation in a criminal prosecution.<sup>4</sup> The state shall indemnify state officers and employees for attorney's fees incurred in

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<sup>1</sup>The criminal district attorney of Eastland County has declined to issued an opinion on this matter because he testified at the sheriff's trial.

<sup>2</sup>The state was represented by the Office of the Attorney General.

<sup>3</sup>20 AM. JUR. 2d *Costs* § 100 (1965).

<sup>4</sup>See Code Crim. Proc. art. 26.05 (compensation of attorney appointed by court to represent indigent defendant).

defense of a criminal prosecution under certain conditions, subject to a \$10,000 limit,<sup>5</sup> but we find no similar provision applicable to county officers and employees. Accordingly, we find no legal authority for the state's payment of the sheriff's legal fees.

You next inquire whether the commissioners court may pay the sheriff's claim. Numerous opinions of this office have cited the following rule for determining whether a governing body may provide for legal counsel to defend public officers and employees in litigation arising in the course of their public duties:

When a Texas governing body believes in good faith that the public interest is at stake, even though an officer is sued individually, it is permissible for the body to employ attorneys to defend the action. . . . The propriety of such a step is not made dependent upon the outcome of the litigation, but upon the bona fides of the governing body's motive.<sup>6</sup>

This common-law rule is codified in part in section 157.901 of the Local Government Code, which authorizes the county to pay for the defense of a county official or employee under certain circumstances. Section 157.901(a) provides that "[a] county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of public duty is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both." Moreover, "[i]f additional counsel is necessary or proper in the case of an official or employee provided legal counsel under Subsection (a) or if it reasonably appears that the act complained of may form the basis for the filing of a criminal charge against the official or employee, the official or employee is entitled to have the commissioners court of the county employ and pay private counsel."

Thus, the authority of the county to employ attorneys to defend county officers and employees is limited to situations where the legitimate interest of the county, not just the personal interest of the officer or employee, is at stake.<sup>7</sup> This is a question of fact, to be resolved by the commissioners court in the exercise of good faith judgment.<sup>8</sup>

Both the common-law rule and section 157.901 of the Local Government Code permit only the commissioners court to employ an attorney for the county officer and do not authorize the

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<sup>5</sup>Civ. Prac. & Rem. Code § 104.003.

<sup>6</sup>Attorney General Opinions JM-824 (1987) at 2, JM-755 (1987) at 1-2, MW-252 (1980) at 1, H-887 (1976) at 2, H-70 (1973) at 5; *see also* Attorney General Opinion M-726 (1970).

<sup>7</sup>Attorney General Opinion JM-824 (1987) at 2.

<sup>8</sup>You have inquired about the validity of the motion directing the sheriff to remove the fence. Since the relevant inquiry is whether the commissioners court made a good faith determination that the county's interests required it to defend the sheriff, we need not address your questions about the motion.

commissioners court to reimburse the officer for the fees of an attorney employed by the officer in his or her individual capacity. Section 157.901 of the Local Government Code makes it clear that the "the *commissioners court of the county* [will] employ and pay private counsel."<sup>9</sup>

Letter Opinion No. 90-93 considered whether the commissioners court could pay a claim submitted by the county judge for reimbursement of attorneys fees incurred in defending himself against an indictment. It found no common-law authority for the idea "that a political subdivision may reimburse a public official or employee after that person has incurred legal expenses."<sup>10</sup> When the commissioners court employs the attorney, it has some control over the expenditure of public funds for the county officer's legal expenses.<sup>11</sup> Accordingly, we find no basis for the commissioners court to reimburse the sheriff for his legal fees incurred in this prosecution.

### S U M M A R Y

The commissioners court may employ an attorney to defend the sheriff in a criminal prosecution pursuant to common law or section 157.901 of the Local Government Code, if the legitimate interest of the county, not just the personal interest of the sheriff, is at stake. The commissioners court may not reimburse the sheriff for his legal fees in the prosecution after he has incurred them.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Opinion Committee

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<sup>9</sup>Local Gov't Code § 157.901 (emphasis added).

<sup>10</sup>Letter Opinion No. 90-93 (1990) at 2; *see also* Attorney General Opinion DM-107 (1992) at 4.

<sup>11</sup>*Cf.* Attorney General Opinion DM-133 (1992) at 2 (commissioners court may not reimburse private landowners for attorney's fees incurred in right-of-way action against another landowner).