



State of West Virginia
Office of the Attorney General

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April 5, 2017

Mr. Matthew Harvey
Prosecuting Attorney
Office of the Prosecuting Attorney of Jefferson County
120 S. George St., 2nd Floor
Charles Town, WV 25414

Dear Prosecutor Harvey:

You have asked for an Opinion of the Attorney General regarding whether the Jefferson County Commission has any express or implied authority to indemnify an official for attorney fees incurred while defending himself or herself against an ethics complaint requesting no specific remedy or sanction. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Attorney General’s Office.

In your letter, you explain that in August 2014 a citizen of Jefferson County filed an ethics complaint with the West Virginia Ethics Commission against the then-President of the Planning Commission of Jefferson County. You note that the ethics complaint did not specify the remedy sought. The ethics complaint alleged that the President improperly used his position on the Jefferson County Planning Commission for financial gain in the following ways: (1) While serving on the Planning Commission, he allegedly appeared before the Jefferson County Board of Zoning Appeals to argue in favor of granting a seasonal use variance to the “All Good” rock concert; (2) While serving as Planning Commission liaison, he allegedly appeared before the Jefferson County Development Authority to influence a vote in favor of the application; (3) As President of the Planning Commission, he allegedly presided over meetings in which a proposed mass gathering ordinance was watered down; and (4) He allegedly refused to disqualify himself from participation in the Planning Commission’s work on the mass gathering ordinance.

The West Virginia Ethics Commission dismissed the case, and the then-President is seeking to have the Jefferson County Commission pay his legal expenses in defending against the complaint. You further explain that your office previously requested an opinion concerning whether or not the county had authority to reimburse the President for attorney fees under the standards set forth in W. Va. Code § 11-8-31a(b). Now you ask whether the County Commission has express or implied authority to reimburse the President under any provision.

Your letter raises the following specific legal question:

Does a county commission have express or implied authority to reimburse the President of the County Planning Commission for legal expenses paid in successfully defending against an ethics complaint seeking no specific remedy or sanction?

We conclude that the West Virginia Supreme Court of Appeals would likely find that the county commission has express or implied authority to reimburse legal expenses paid in successfully defending against an ethics complaint seeking no specific remedy or sanction under the facts presented in your letter. While West Virginia Code § 11-8-31a does not contain that express authority, the Supreme Court of Appeals has held that county commissions have authority to reimburse legal expenses under a more general statute (West Virginia Code § 7-1-3) that governs county administration.

As explained in our prior letter, the West Virginia Supreme Court of Appeals has applied a three-part test for determining whether an official is entitled to reimbursement of attorney fees. In *Powers v. Goodwin*, 170 W. Va. 151, 291 S.E.2d 466 (1982), the Court surveyed the law of other jurisdictions on the authority of a government body to reimburse its officials for attorneys' fees and derived from that case law a three-part test. *Id.* at 157–160, 291 S.E.2d at 472–475. Specifically, the Court held that reimbursement is warranted where: (1) the underlying action “arise[s] from the discharge of an official duty in which the government has an interest”; (2) “the officer . . . 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 157, 291 S.E.2d at 472. While the first two prongs of the test are fact-specific, the Court in *Powers* concluded that the third prong had been satisfied for county commissions by the State Legislature through enactment of West Virginia Code § 7-1-3, which provides that such commissions have authority over “the superintendence and administration of the internal police and fiscal affairs of their counties.” *Id.* at 157 n.3, 291 S.E.2d at 472 n.3 (quoting W. Va. Code § 7-1-3).

Following the *Powers* decision, the State Legislature enacted West Virginia Code § 11-8-31a, which expressly provides that county commissions have authority to indemnify officials for successfully defending against an action that seeks either (a) “[the official’s] removal from office” or (b) “the recovery of moneys alleged to have been wrongfully expended.” W. Va. Code § 11-8-31a. This provision appears to apply only to a particular type of action described in neighboring parts of the statute—namely, a civil or criminal action relating to the misuse of funds collected by the county through levies. W. Va. Code §§ 11-8-29, -30, -31.

Given this narrow legislative authorization, one might have argued that the Legislature was responding to *Powers* by clarifying that it was only authorizing reimbursement of attorney fees for a narrow category of actions.¹ But the Supreme Court of Appeals has not interpreted West Virginia Code § 11-8-31a in this narrow manner. To the contrary, the Court has concluded that county commissions still possess authority to reimburse fees under the more general language in West Virginia Code § 7-1-3 even in those circumstances where § 11-8-31a does not apply on its face—for example, where the commission does not have a quorum sufficient to make a determination under § 11-8-31a. *State ex rel. Smith v. Mingo Cnty. Comm'n*, 228 W. Va. 474, 481–82, 721 S.E.2d 44, 51–52 (2011) (citing Syl. Pt. 3, in part, *Powers*, 170 W. Va. 151, 291 S.E.2d 466). *State ex rel. Smith v. Mingo County Commission* held that in such cases, a court must apply the *Powers* framework to determine whether reimbursement of fees is appropriate, that is, an inquiry into whether the action arises out of an official duty and whether the officer acted in good faith. *Id.* at 482, 721 S.E.2d at 52.²

Further, the same year that the Court decided *Smith*, the Court applied the *Powers* test in the unrelated context of a claim for attorney fees expended in defending against an action challenging an official's eligibility for election. *State ex rel. Hicks v. Bailey*, 227 W. Va. 448, 451, 711 S.E.2d 270, 273 (2011). In *State ex rel. Hicks v. Bailey*, the Court explained that *Powers* recognized that county commissions have the general authority to award attorney fees under West Virginia Code § 7-1-3. *Id.*, 711 S.E.2d at 273 (citing *Powers*, 170 W. Va. at 157 n.3, 291 S.E.2d at 472 n.3). Consistent with *Powers* and *Smith*, the Court in *Bailey* concluded that § 7-1-3 only authorized a county commission to reimburse fees where the person was “discharging an official duty” and acting in good faith. *Id.*, 711 S.E.2d at 273.

On the specific facts in *Hicks*, the Court concluded that a county commission had no authority to reimburse attorney fees for an election contest because the contest did not arise from the discharge of an official duty. *Id.*, 711 S.E.2d at 273. In assessing whether an election contest is an official duty, the lower court had relied in the statement in *Powers* that “the voters have a legitimate interest in protecting their duly elected officials from being hectorred out of office.” *Id.* at 451–52, 711 S.E.2d at 273–74. But the Supreme Court declined to extend such reasoning to cover election contests because the interest at stake is “purely personal.” *Id.* at 452, 711 S.E.2d at 274. And although the public has an interest in ensuring that properly elected candidates hold office, the Court reasoned that the public does not have an interest in a particular person holding that office. *Id.*, 711 S.E.2d at 274.

¹ After *Powers*, the Legislature also enacted the Torts Claims Act, which requires county commissions to indemnify employees in certain civil actions. In *Atkinson v. County Commission of Wood County*, 200 W. Va. 380, 489 S.E.2d 762 (1997), the Court indicated that the Act might suggest a need to revisit its decision in *Powers*, but the Court has since declined to revisit its decision in *Powers*. *Atkinson*, 200 W. Va. at 386 & n.14, 489 S.E.2d 762, 768 & n.14.

² Indeed, the Court in *Smith* held that these two factors from *Powers* should govern the exercise of a county commission's discretion even in those instances when § 11-8-31a applies directly. *Smith*, 228 W. Va. at 482, 721 S.E.2d at 52.

Based on the reasoning in *Powers*, *Smith*, and *Hicks*, we think that the Supreme Court of Appeals would conclude that the Jefferson County Commission has authority under West Virginia Code § 7-1-3 to reimburse a county official for attorney fees where the action involved the discharge of an official duty and the official acted in good faith.

There are a few points worth noting in applying that general principle to the specific facts raised in your letter. *First*, we are not aware of a case in which the Court has applied the *Powers* framework in connection with an administrative proceeding as opposed to litigation. But the rationale of *Powers* seems broad enough to permit reimbursement for defense of a complaint brought before the state ethics board. The majority rule that the Court articulated when developing the *Powers* test permitted reimbursement for expenses incurred in the “discharge” of official duties, 170 W. Va. at 157, 291 S.E.2d at 472, which would seem to apply regardless of the forum in which the official was defending his or her conduct. Moreover, an adverse ruling from the ethics board could serve as the predicate for an action to remove the official from office. W. Va. Code §§ 6B-2-4(s)(2)-(3).

Second, and related, we are not aware of a case in which the Court applied *Powers* where the underlying action did not seek the official’s removal from office or any other particular sanction. But unlike the specific text of West Virginia Code § 11-8-31a, which makes explicit reference to requests for removal from office, there appears to be no similar requirement when applying the *Powers* framework under West Virginia Code § 7-1-3. To the contrary, as the Court explained in *Powers* and reiterated in *Smith* and *Hicks*, the policy underlying reimbursement of fees applies broadly whenever “the voters have a legitimate interest in protecting their duly elected officials from being hectorred out of office through the constant charge of bankrupting attorneys’ fees on their own resources.” *Powers*, 170 W. Va. at 161, 291 S.E.2d at 476; *Smith*, 228 W. Va. at 481, 721 S.E.2d at 51; *Hicks*, 227 W. Va. at 451, 711 S.E.2d at 273. Therefore, we conclude that the Court would likely determine that where the *Powers* test is met, county commissions may reimburse their officials for fees even if the underlying action does not expressly seek the official’s removal from office or some other specific sanction.

Third, while the actual application of *Powers* to these specific facts is beyond the scope of this opinion, it appears that the county commission would have strong bases to conclude that, unlike in *Hicks*, at least some of the claims in the ethics complaint arose from the discharge of an official duty. The complaint alleges, for example, that the president violated the West Virginia Ethics Act in presiding over multiple meetings of the Planning Commission in which he allegedly guided the watering down of a proposal that would benefit his client. The Court is likely to conclude that the complaint arose from the president’s exercise of his official duty to preside over meetings of the Jefferson County Commission. See Bylaws of the Jefferson County Planning Commission, § 3.2, available at <http://www.jeffersoncountywv.org/home/showdocument?id=259>. And further, the Court is likely to determine that the government has an interest in the orderly conduct of Planning Commission meetings and the President’s conduct when presiding over those meetings.

Mr. Matthew Harvey

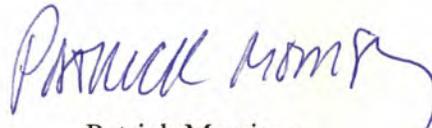
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Of course, as noted above, prior to awarding fees, the county commission must also assure itself that the officer acted in good faith. Here, the fact that the complaint against the officer was dismissed appears to be some indication that the President acted in good faith, but that determination must be made by the county commission in the first instance.

Finally, although we are not aware of a case that presents these specific facts, the Supreme Court has previously suggested that the county commission's decision whether or not to award fees, while discretionary, could be challenged in an appropriate petition for mandamus to that Court. *Powers*, 170 W. Va. at 160, 291 S.E.2d at 475. In any such challenge, the Court would likely evaluate whether the county commission abused its discretion by engaging in an analysis of the *Powers* factors. *Smith*, 228 W. Va. at 482, 721 S.E.2d at 52.

Sincerely,

A handwritten signature in blue ink, appearing to read "Patrick Morrissey", with a stylized flourish at the end.

Patrick Morrissey
Attorney General

Thomas M. Johnson, Jr.
Deputy Solicitor General

Erica N. Peterson
Assistant Attorney General