



State of West Virginia
Office of the Attorney General

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October 24, 2019

The Honorable Matthew L. Harvey
Jefferson County Prosecuting Attorney
120 South George Street
Charles Town, WV 25414

Dear Matt:

You have asked for an Opinion of the Attorney General regarding reimbursements for the legal fees of Public Service District (“PSD”) board members. This Opinion is being issued pursuant to West Virginia Code Section 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 on the factual assertions in your correspondence with the Office of the Attorney General.

In your letter, you explain that several complaints were filed in 2016 with the West Virginia Ethics Commission against one of the Jefferson County PSD’s board members. The board member hired counsel and successfully defended against these complaints, then asked the Jefferson County Commission (“Commission”) to reimburse his legal expenses. Meanwhile, the Commission voted to dissolve the PSD, and the PSD’s properties and services have been transferred to the City of Charles Town. The board member’s reimbursement request remains pending.

Your letter raises the following legal questions:

First, does a county commission have a duty to reimburse a member of a PSD board for legal fees incurred in the successful defense of an ethics complaint?

Second, does a county commission’s decision to dissolve a PSD affect the commission’s power or obligation to issue such reimbursements?

We conclude that a county commission does not have express statutory duty to reimburse the legal fees for a PSD board member, and that the relationship between a county commission and a PSD is too attenuated to infer an implicit duty, either. Further, this answer does not change when a PSD is dissolved, at least without facts that are not present here relating to the assumption of the dissolved entity’s debts or obligations. Finally, we note that your letter also asks about the propriety of reimbursing the board member where he did not pay the legal fees directly, but rather

had his company pay them on his behalf in the form of a loan. As we conclude that the Commission does not have a duty to issue a reimbursement in this case, this Opinion does not address whether the company's involvement makes the board member ineligible for reimbursement.

Discussion

Question 1: Authority To Reimburse A PSD Board Member's Legal Fees

The West Virginia Supreme Court of Appeals has set forth a three-part test to determine whether a public official is entitled to reimbursement for legal fees:

[1] [T]he 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.

Powers v. Goodwin, 170 W. Va. 151, 157, 291 S.E.2d 466, 472 (1982). In a previous Opinion requested by your office, we explained that the first two factors are heavily fact-specific and thus beyond the scope of an Opinion request, yet would likely be satisfied in circumstances similar to these. W. Va. Op. Att'y Gen., 2017 WL 1377946, at *4 (Apr. 5, 2017). Accordingly, this response focuses on the third question: whether the reimbursing agency—here, the Commission—has authority to issue reimbursements. We conclude that a county commission does not have express or implied power to reimburse the expenses of PSD boards or their members, including legal fees.

No statute expressly authorizes a county commission to reimburse the legal fees of a PSD board member. *Powers*, however, establishes that reimbursement authority can be “express or implied.” 170 W. Va. at 157, 291 S.E.2d at 472. And West Virginia Code Section 7-1-3 provides that county commissions have authority over “the superintendence and administration” of their own “internal police and fiscal affairs,” which the Court has read as “granting implied powers reasonably necessary to carry out [their] express responsibilities.” *Id.* at n.3 (citing *State ex rel. County Court v. Arthur*, 150 W. Va. 293, 145 S.E.2d 34 (1965); *Mohn v. County Court of Cabell County*, 145 W. Va. 377, 115 S.E.2d 806 (1960)). As we explained in our previous letter, these principles indicate that a county commission's “implied powers” include authority to reimburse legal fees for members of some subordinate bodies. *See* 2017 WL 1377946, at *1.

The test to resolve whether a commission's reimbursement power extends to a *specific* county entity—here, the PSD—comes from *State ex rel. Warner v. Jefferson County Commission*, 198 W. Va. 667, 42 S.E.2d 652 (1996). In *Warner*, the Court considered whether the Commission was obligated to reimburse the legal fees of a member of a solid waste authority. *Id.* at 670, 482 S.E.2d at 655. The Court analyzed the third *Powers* factor by asking whether the Commission had a “clear legal duty” to pay legal expenses for members of the authority. *Id.* at 672, 482 S.E.2d at 657. It did: This duty arose from the “symbiosis” between the Commission and the solid waste authority, as evident by the express statutory requirement for the Commission to fund the authority's general operating expenses. *Id.* at 672-73 n.11, 482 S.E.2d at 657-58 n.11 (“The expenses of any county solid waste authority . . . shall be paid by the county commission from the

general funds in the county treasury to the extent that such expenses are not paid by fees, grants and funds received by the authority from other sources.” (quoting W. Va. Code § 22C-4-7(b) (1994)). This obligation to support the authority’s “general administrative expenses” created a “fiscal tether” between the two entities, and this “financial responsibility” in turn included power to pay “reasonable legal fees and expenses.” *Id.* at 672-73, 482 S.E.2d at 657-58 (quoting W. Va. Code § 22C-4-7(b) (1994)).

For comparison, our previous Opinion explained that county commissions may reimburse legal fees for members of county planning commissions. *See* 2017 WL 1377946, at *1. This conclusion tracks *Warner*’s reasoning. As with solid waste authorities, county commissions have a strong and direct financial connection to their planning commissions: “The county commission in the case of a county planning commission . . . *shall provide* the planning commission with . . . [a]ppropriate money to defray the reasonable expenses of the planning commission.” W. Va. Code § 8A-2-10 (emphasis added).

The relationship between county commissions and PSDs is different. Critically, there is no “fiscal tether” between PSDs and county commissions. The obligations of a PSD are “payable solely and only out of revenues derived” by the district itself, and enforceable only by a suit against the district. W. Va. Code §§ 16-13A-7, 17. Although PSD boards must inform commissions of their budget and spending decisions, commissions do not have any control over these decisions. *Id.* §§ 16-13A-3, 7, 10-12. Moreover, PSDs have both express and implicit authority to reimburse their own members under the *Powers* framework: The West Virginia Code authorizes attorney’s fees reimbursements for PSD board members in the context of removal proceedings, W. Va. Code § 16-13A-3a, and allows reimbursements for “all reasonable and necessary expenses actually incurred in the performance of their duties as provided by the rules of the board,” *id.* § 16-13A-4(d). This statutory framework underscores that PSDs and county commissions are financially distinct. Absent the fiscal “symbiosis” that existed in *Warner*, it is unlikely a court would conclude that the Commission has a duty to issue reimbursements to PSD board members.

On the other hand, we recognize that there is a connection between these entities to the extent that county commissions appoint some members of a PSD board, W. Va. Code § 16-13A-3, which was also an element of the Court’s analysis in *Warner*. 192 W. Va. at 673, 482 S.E.2d at 658 (citing W. Va. Code § 22C-4-3 (1994)). But it does not appear from *Warner* that this fact, standing alone, would be dispositive. The Court emphasized that it was “[b]ecause of [its] financial responsibility” that “the County Commission has, at the very least, the implied power to pay [a solid waste authority member’s] reasonable legal fees and expenses.” *Id.* The Court’s focus on the monetary aspect of the entities’ relationship indicates that a financial link is essential to finding a duty to issue reimbursements for legal expenses. And given that *Powers* requires an identifiable source of express or implied power to issue reimbursements, lack of a legal *duty* to act is likely tantamount to lack of legal *authority* as well. *See Warner*, 198 W. Va. at 673, 482 S.E.2d at 658 (equating Commission’s “duty and responsibility” under governing statutes with “implied power” under *Powers*).

Question 2: Consequences Of Dissolving A PSD

Your letter also asks whether the fact that the Commission voted to dissolve the PSD alters its legal duties or powers in this context. We conclude that none of the statutes governing the dissolution of PSDs alter the financial relationship between a PSD and a county commission. Accordingly, dissolution of a PSD does not, without more, change the result under the third *Powers* factor.

The dissolution of a PSD does not vest a county commission with new “financial responsibility,” *Warner*, 192 W. Va. at 673, 482 S.E.2d at 658, for the district. The statutes governing dissolution do not create a duty for county commissions to assume the debts or obligations of a PSD. *See* W. Va. Code § 16-13A-2; W. Va. Code St. R. § 150-7-8. Indeed, the duties of county commissions are addressed in only one provision, and that provision prohibits PSDs from “enter[ing] into any agreement, contract or covenant that infringes upon, impairs, abridges or usurps the duties, rights or powers of the county commission.” W. Va. Code § 16-13A-2(g). The West Virginia Supreme Court of Appeals has also held that the provisions of Section 16-13A-2 governing PSDs may not be construed to create unstated powers by implication. *Berkeley Cty. Pub. Serv. Sewer Dist. v. W. Va. Pub. Serv. Comm’n*, 204 W. Va. 279, 284-86, 512 S.E.2d 201, 206-08 (1998) (rejecting the argument that the power of county commissions to establish “territorial boundaries” of a PSD implicitly grants the power to define the service area as exclusive). As a result, because the Code does not expressly transfer obligations from a dissolved PSD to a county commission, it is unlikely a court would infer this burden.

The limited relationship between county commissions and PSDs thus makes it unclear whether a county commission *could* dissolve a PSD in a way that would transfer responsibility for the PSD’s obligations to the county. Regardless, your request does not refer to any such transfer between the former PSD and Jefferson County. Accordingly, we conclude that the Commission did not automatically assume responsibility to reimburse the legal fees of members of the dissolved PSD’s board.

The fact that the Commission voted to dissolve the PSD does not alter this analysis. We are aware of no statutory authority or legal doctrine mandating a political subdivision to assume the obligations of an entity it acts to dissolve. Nor is it clear why such a doctrine would apply against the Commission, as the Public Service Commission has as much authority as county commissions—if not more—over the dissolution of PSDs. *See* W. Va. Code § 16-13a-2(a) (requiring that “no new public service district shall be . . . dissolved . . . without the written consent and approval of the Public Service Commission”). Such a doctrine would also cut against the general rule that subdivisions are prohibited from incurring debt obligations, with the exception of those funded by special revenue bonds or service fees. *See, e.g., Winkler v. State Sch. Bldg. Auth.*, 189 W. Va. 748, 760, 434 S.E.2d 420, 432 (1993) (holding that obligations funded by special revenue bonds are not “debts” within the general Article X prohibition on public indebtedness); *United States v. City of Charleston*, 149 F. Supp. 866, 872 (S.D. W. Va. 1957) (same, with respect to obligations funded by service fees). Insofar as the now-dissolved PSD had any obligations that could be funded by bond revenue or service fees, the duty to fund them would follow the “public

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service properties under control of the district.” W. Va. Code § 16-13A-13. Your letter indicates that these properties have been transferred to the City of Charles Town, not to Jefferson County.

In sum, the limited relationship between a county commission and a PSD does not change upon dissolution of a PSD, at least without any additional circumstances surrounding the dissolution not specified here. We thus conclude that dissolution of the Jefferson County PSD did not vest the Commission with new power or legal obligation to reimburse PSD board members for legal fees.

Sincerely,



Patrick Morrisey
Attorney General

Lindsay See
Solicitor General

Thomas Lampman
Assistant Solicitor General