



State of West Virginia
Office of the Attorney General

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The Honorable Ralph A. Lorenzetti, Jr.
Prosecuting Attorney
Office of the Prosecuting Attorney of Jefferson County
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Dear Prosecutor Lorenzetti:

You have asked for an Opinion of the Attorney General regarding whether the Jefferson County Commission may, or is required to, reimburse the legal expenses incurred by the president of the Jefferson County Planning Commission in defending against an ethics complaint. 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 address the possible reimbursement of the president of the Jefferson County Planning Commission under West Virginia Code § 11-8-31a for legal expenses incurred in responding to an ethics complaint. You explain that in August 2014, a citizen of Jefferson County filed an ethics complaint with the West Virginia Ethics Commission against the president of the Planning Commission for Jefferson County. The West Virginia Ethics Commission dismissed the case. Now, your letter states, the president of the Planning Commission is seeking to have the Jefferson County Commission reimburse legal expenses he incurred successfully defending against the ethics complaint. You note that West Virginia Code § 11-8-31a permits a “governing body” to reimburse the attorney’s fees expended by an “official” in successfully defending against certain types of actions. In full, that statutory provision states:

The governing body of the governmental entity of which a person is an official is hereby authorized to reimburse such person for the reasonable amount of such person’s attorney fees in any case:

(a) Wherein such person has successfully defended against an action seeking his or her removal from office, or

(b) Wherein such person has successfully defended against an action seeking the recovery of moneys alleged to have been wrongfully expended.

In either case such governing body shall have authority to determine if such reimbursement is warranted and the reasonableness of the amount sought to be recovered.

W. Va. Code § 11-8-31a.

Your letter raises the following specific legal questions, which we address in turn below:

*(1) Is the president of the Jefferson County Planning Commission an official of a governmental entity under West Virginia Code § 11-8-31a? (2) Does West Virginia Code § 11-8-31a require a governing body to reimburse an official for attorney's fees when he or she has successfully defended against an action seeking the recovery of moneys alleged to have been wrongfully expended? (3) Is an ethics complaint filed with the West Virginia Ethics Commission "an action seeking the recovery of moneys alleged to have been wrongfully expended" under West Virginia Code § 11-8-31a?**

Question One: Is the President of the Jefferson County Planning Commission an Official of a Governmental Entity Under West Virginia Code § 11-8-31a?

We conclude first that the Jefferson County Planning Commission is a "governmental entity" within the meaning of West Virginia Code § 11-8-31a. The Jefferson County Planning Commission—like other planning commissions—has "regulatory powers over land planning" and serves "in an advisory capacity" to other governmental bodies. W. Va. Code § 8A-2-1 ("A governing body of a municipality may, by ordinance, create a planning commission . . . [to] serve in an advisory capacity to the governing body or governing bodies that created it and have certain regulatory powers over land planning."). Indeed, the members of the Jefferson County Planning Commission are appointed (to three-year terms) by the Jefferson County Commission. Bylaws of the Jefferson County Planning Commission, §§ 2.1, 2.2, *available at* <http://www.jeffersoncountywv.org/home/showdocument?id=259>.

We also conclude that the president of the Jefferson County Planning Commission is an "official" of that governmental entity. The plain meaning of "official" is "a person who as a position of authority in a company, organization, or government" or "a person who holds an office." Merriam Webster Online, *Official*, <http://www.merriam-webster.com/dictionary/official> (last visited Mar. 17, 2016). Under the bylaws of the Jefferson County Planning Commission, the president readily satisfies that definition. The "president" is an "office" established by the bylaws, filled annually by an election of the members of the Planning Commission. *Id.* §§ 3.1–3.6. Moreover, the "president" is a "position of authority," as the president "preside[s] at all

* Your letter also cites *Baldau v. Jonkers*, 229 W. Va. 1, 725 S.E.2d 170 (2011), which we do not address because it concerned a court order directing individual defendants to pay attorney fees rather than the reimbursement of attorney fees by a governing body under West Virginia Code § 11-8-31a.

public hearings and meetings,” “may call special meetings,” and “is empowered to certify by signature or otherwise any official and valid action of the Planning Commission.” *Id.* § 3.2.

Question Two: Does West Virginia Code § 11-8-31a Require a Governing Body To Reimburse an Official for Attorney Fees When He or She Has Successfully Defended Against an Action Seeking the Recovery of Moneys Alleged To Have Been Wrongfully Expended?

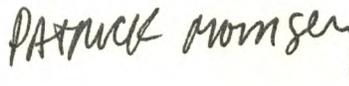
We believe that the West Virginia Supreme Court of Appeals would conclude that a governing body is required to apply to any reimbursement decision under West Virginia Code § 11-8-31a the three-part test the Court adopted in *State ex rel. Smith v. Mingo Cnty. Comm'n*, 228 W. Va. 474, 721 S.E.2d 44 (2011). On its face, the statute does little more than grant governing bodies the “authority to determine if such reimbursement is warranted.” W. Va. Code § 11-8-31a. In *Smith*, the Court noted that the statute “provides no criteria on which to base such a determination,” and expressly “h[e]ld” that the applicable criteria is found in *Powers v. Goodwin*, 170 W. Va. 151, 291 S.E.2d 466 (1982), a case that pre-dates the statute. *Smith*, 228 W. Va. at 482, 721 S.E.2d at 52. In the sixth syllabus point in *Smith*, the Court held that “[i]n determining whether reimbursement for attorney’s fees is warranted under West Virginia Code § 11-8-31a (2008), a governing body should apply the three-part test established in syllabus point three of *Powers v. Goodwin*, 170 W. Va. 151, 291 S.E.2d 466 (1982).” Syl. Pt. 6, *Smith*, 228 W. Va. 474, 721 S.E.2d 44. The *Powers* three-part test provides 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.” *Smith*, 228 W. Va. at 482, 721 S.E.2d at 52. Though the Legislature passed West Virginia Code § 11-8-31a just three years after *Powers*, the Court concluded that “§ 11-8-31a appears to build on the framework established in *Powers*.” *Smith*, 228 W. Va. at 481, 721 S.E.2d at 51.

While the facts of *Smith* are different from the question you pose, the Court’s holding in the sixth syllabus point of that case unmistakably applies. *Smith* concerned a mandamus action seeking reimbursement of legal fees, and the Court’s primary holding was that a mandamus action was permissible because the governing body was “unable to consider the issue” due to a conflict of interest that prevented a quorum. 228 W. Va. at 480, 721 S.E.2d at 50. The Court further concluded that *any court* faced with such a mandamus petition should apply the *Powers* three-part test to determine whether the petitioner has “established a clear legal right to the relief sought.” *Id.* at 482, 721 S.E.2d at 52. Separately, however, the Court also specifically held that *any governing body* considering a request for reimbursement under West Virginia Code § 11-8-31a must similarly apply the *Powers* three-part test. Syl. Pt. 6, *Smith*, 228 W. Va. 474, 721 S.E.2d 44. Though that holding was not necessary to the question in *Smith* or the outcome of that case, we cannot ignore the Court’s deliberate decision to include the holding as a syllabus point. See *State v. McKinley*, 234 W. Va. 143, 153, 764 S.E.2d 303, 313 (2014) (“[T]he Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court.”). We do note that the Court in *Smith* did not address whether an official seeking reimbursement from a governing body could bring a mandamus action if the governing body failed to apply or improperly applied the *Powers* three-part test.

Question Three: Is an Ethics Complaint Filed with the West Virginia Ethics Commission “an Action Seeking the Recovery of Moneys Alleged To Have Been Wrongfully Expended” Under West Virginia Code § 11-8-31a?

Finally, we do not believe that an ethics complaint filed with the West Virginia Ethics Commission constitutes “an action seeking the recovery of moneys alleged to have been wrongfully expended” under West Virginia Code § 11-8-31a(b). That clause appears to be in reference to the actions authorized by several immediately preceding provisions of the West Virginia Code. *See, e.g.*, W. Va. Code § 11-8-28 (“Whenever a fiscal body expends money or incurs obligations in violation of sections twenty-five and/or twenty-six of this article, suit shall be instituted by the prosecuting attorney of the county or the attorney general of the State, in a court of competent jurisdiction to recover the money expended or to cancel the obligation, or both.”); *id.* § 11-8-30 (“A person who in his official capacity negligently participates in an illegal expenditure may be proceeded against for the recovery of the amount illegally expended. The political subdivision concerned, a taxpayer of the subdivision, the state tax commissioner or a person prejudiced may bring the proceeding.”). To be sure, an ethics complaint could be brought alleging that an individual violated the Ethics Act by wrongfully expending certain funds. But such a complaint would not be “an action seeking the *recovery* of [the] moneys alleged to have been wrongfully expended,” but rather an action seeking a sanction of the individual under the State’s ethics laws. W. Va. Code § 11-8-31a(b) (emphasis added).

Sincerely,



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