

## Opinion 2000 - 1

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**This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.**

CLAIMS -- Payment (of police officers' legal fees as moral obligation)

LOCAL LAWS -- Compensation (authority to pay police officers' legal fees) -- Municipal Funds (authority to pay police officers' legal fees)

MUNICIPAL FUNDS -- Appropriations and Expenditures (authority to pay police officers' legal fees)

POLICE AND POLICE PROTECTION -- Compensation (authority to pay legal fees)

PUBLIC OFFICERS AND EMPLOYEES -- Compensation (authority to pay police officers' legal fees) -- Legal Expenses (authority to pay police officers' legal fees)

VILLAGES -- Powers and Duties (authority to pay police officers' legal fees)

GENERAL MUNICIPAL LAW, §50-j; MUNICIPAL HOME RULE LAW, §10; STATE CONSTITUTION, ARTICLE VIII, §1; PUBLIC OFFICERS LAW, §18; VILLAGE LAW, §§4-412(3)(3), 5-524(7): As a rule, in the absence of pre-existing authority pursuant to a State statute, local law or collective bargaining agreement provision, a village may not pay legal expenses incurred by village police officers in connection with criminal proceedings. A village may not pay as a moral or equitable obligation legal expenses of village police officers arising out of allegations of misconduct.

This is in reply to your request for our opinion concerning the payment by a village of certain legal fees incurred by village police officers. You state that three members of the village's police force testified before a grand jury under a waiver of immunity because of their involvement in the fatal shooting of a civilian. The grand jury determined that the shooting was justified and no criminal charges were instituted against the police officers. You also state that during the District Attorney's investigation and the proceedings before the grand jury, the police officers were represented by attorneys whom they retained on their own. The police officers did not ask the village to provide them with legal representation and the village board of trustees did not authorize the attorneys to provide the representation. You have also advised us that the village has adopted the provisions of section 18 of the Public Officers Law.

Under these circumstances, you ask whether the village is legally obligated by statute to pay the police officers' legal fees. If not, you also ask whether the village may pay the legal fees as a "moral" or "equitable" obligation.

As a rule, a municipality may not provide legal counsel for a municipal officer or employee who is charged with a criminal offense arising out of the performance of his or her official duties in the absence of pre-existing authority pursuant to a State statute, local law or collective bargaining agreement provision (see Zimmer v Town of Brookhaven, 247 AD2d 109, 678 NYS2d 377; 1990 Opns St Comp No. 90-47, p 104; see also, e.g., Corning v Village of Laurel Hollow, 48 NY2d 348, 422 NYS2d 932; Cahn v Town of Huntington, 29 NY2d 451, 328 NYS2d 672; Matter of Chapman v City of New York, 168 NY 80; Security v County of Albany, 96 AD2d 976, 466 NYS2d 841, affirmed 61 NY2d 965, 475 NYS2d 280; Schieffelin v Henry, 123 Misc 792, 206 NYS 172, affirmed 211 App Div 850, 207 NYS 914; 1985 Opns St Comp No. 85-22, p 29).<sup>(1)</sup> Providing a defense at municipal expense pursuant to such pre-existing authority does not constitute a gift in violation of article VIII, §1 of the State Constitution because the defense is considered additional remuneration for services rendered (see Corning, supra; Security, supra; Schieffelin, supra; cf. Matter of Chapman supra).

There does not appear to be a State statute pursuant to which the village is authorized or required to pay the legal fees at issue. Section 18 of the Public Officers Law is the principal defense and indemnification statute for municipal officers and employees. Insofar as here relevant, section 18 generally requires a village which has adopted the provisions of that section to provide for the defense of its officers and

employees in any "civil action or proceeding" arising out of any alleged act or omission which occurred or allegedly occurred while the officer or employee was acting within the scope of his or her public employment or duties (Public Officers Law, §18[2][a]).<sup>(2)</sup> The provisions of section 18, however, do not authorize a municipality to provide a defense in a criminal proceeding (see Zimmer, supra; 1986 Atty Gen [Inf] 6; cf. Wassef v State, 98 Misc 2d 505, 414 NYS2d 262 [analogous provisions of Public Officers Law, §17 do not require State to provide defense in a criminal matters]; compare Public Officers Law, §19, relative to defense and indemnification of State officers and employees in criminal proceedings). To the extent that an investigation by a district attorney into the potential commission of a crime may be considered either an "action" or a "proceeding" (compare General Construction Law, §§11-a, 16-a, 18-a; CPLR, 105[b], [d]; Criminal Procedure Law, §1.20[16], [18]; People v Van Der Beek, 18 AD2d 205, 238 NYS2d 676), it must usually be considered criminal in nature (see Criminal Procedure Law, §1.20[18], defining "criminal proceeding" in part as "any proceeding which occurs in a criminal court and involves a criminal investigation"). Similarly, a grand jury proceeding is generally regarded as a criminal proceeding (see People v Van Der Beek, supra; People ex rel Nuccio v Eighth Dist. Prison Warden of City of New York, 182 Misc 654, 45 NYS 2d 230; but see Hunt v Hamilton County, 235 AD2d 758, 652 NYS2d 402 [grand jury proceeding held to be civil action or proceeding within meaning of Public Officers Law, §18 when district attorney admitted no intention of pursuing criminal charges]). Accordingly, it is our opinion that the village in this instance may not pay the police officers' legal expenses pursuant to the provisions of section 18 of the Public Officers Law.

Section 50-j of the General Municipal Law provides in relevant part that every village shall be liable for, and shall assume the liability to the extent that it shall save harmless, any duly appointed police officer of the village "for any negligent act or tort" committed while the police officer was acting in the performance of his or her duties and the scope of his or her employment. Section 50-j, however, also applies only with respect to civil actions and proceedings (see 1988 Atty Gen [Inf.] 6, supra). Therefore, since the legal expenses in this instance were incurred in a criminal context, we do not believe that section 50-j is applicable.

We further note that section 5-524(7) of the Village Law provides for the payment by a village of the "actual and necessary expenses" of village officers and employees incurred in the performance of their official duties. In 1983 Opns St Comp No. 83-196, p 251, we construed similar language in section 116(1) of the Town Law and concluded that a town board may authorize payment of actual and necessary expenses, including legal fees, when town employees are subpoenaed to testify before a grand jury solely because of their positions as town employees and their knowledge of town affairs. In Opn No. 83-196, supra, however, we also concluded, citing Chapman, supra, that the employee's legal fees cannot be considered "actual and necessary expenses" if the employee is the target of a grand jury investigation.<sup>(3)</sup> Here, since the actions of the police officers appear to have been the primary focus of the District Attorney's investigation and the grand jury proceedings, we do not believe that police officers' legal expenses may be paid pursuant to section 5-524(7).<sup>(4)</sup>

While there does not appear to be a State statute authorizing payment of the police officer's legal fees, the village's home rule authority must also be considered. In this regard, we note that section 10 of the Municipal Home Rule Law authorizes local governments, including villages (Municipal Home Rule Law, §2[8]), to adopt and amend local laws not inconsistent with the Constitution or any general law relating to their "property, affairs or government" and, to the extent not restricted by the State Legislature, certain enumerated subjects including the compensation of their officers and employees (Municipal Home Rule Law, §10[1][i], [ii][a][1]). Pursuant to this authority, a village may adopt a local law prospectively authorizing the village to provide legal counsel to a village officer or employee who is charged with a criminal offense arising out of the performance of his or her official duties (see Zimmer, supra; Opn No. 90-47, supra; see also, e.g., Corning, supra; Security, supra). If the village adopted such a local law prior to the incurrence of the costs by the police officers, that local law may authorize or require the village to pay the police officers' legal expenses. Since the cost of the police officers' representation has already been incurred, however, we believe that adoption of a local law, at this point in time, authorizing the village to pay the cost would result in a gift in violation of article VIII, §1 of the Constitution (see Corning, supra; Security, supra; Schieffelin, supra; Matter of Chapman, supra).

With respect to "moral" or "equitable" claims, we note that section 4-412(3)(3) of the Village Law expressly authorizes the board of trustees of a village to pay or compromise claims which are equitably,

but not legally, payable by the village "in those cases in which there has been a payment to the village through error or mistake and to which funds the village is not entitled". Since the case at hand does not involve an erroneous or mistaken payment to the village, we do not believe that section 4-412(3)(3) is applicable.

Assuming for purposes of this discussion that a village has authority to pay moral or equitable claims in addition to those it is authorized to pay pursuant to section 4-412(3)(3) of the Village Law (see Municipal Home Rule Law, §10[1][ii][a][5], [e][3]; 1986 Opns St Comp No. 86-42, p 69), we note that it is well established that legal expenses incurred by a municipal officer or employee in defense of allegations of misconduct do not give rise to a moral or equitable obligation on the part of the municipality to pay the expenses because the municipality derives no pecuniary or proprietary benefit from the defense (see Corning, supra; Matter of Chapman, supra). Accordingly, it is our opinion that the village in this instance may not pay the police officers' legal fees as a moral or equitable obligation.

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1. The letter of inquiry also asks whether, under the provisions of the current collective bargaining agreement between the village and the police officers' collective bargaining representative, the village is required to pay the police officers' legal fees. Since it is our policy, in rendering opinions to local governments, to interpret State statutes of general applicability, we generally do not construe the provisions of local contracts, such as collective bargaining agreements. Rather, we believe that the meaning and intent of such provisions should be addressed by the parties to the contract or by any dispute resolution procedures applicable to the agreement. Accordingly, we express no opinion as to whether the collective bargaining agreement provides for payment by the village of the legal fees at issue.
2. We note that compliance with the notice provisions of subdivision 5 of section 18 has been held not to be a condition precedent for requiring a municipality to provide a defense pursuant to section 18 (see, e.g., Hunt, supra; Matter of Polak v City of Schenectady, 181 AD2d 233, 585 NYS2d 844).
3. Opn No. 83-196, supra, was partially superseded by Opn No. 85-22, supra, with respect to the power of a municipality to provide, prospectively, as additional compensation, a criminal defense for its officers and employees in relation to acts arising out of the performance of their official duties.
4. Similarly, we do not believe that the village's implied authority to retain counsel in furtherance of village purposes authorizes payment of the police officers' legal fees. To the extent that the case of Gaylord v Village of North Collins, 57 Misc 2d 803, 293 NYS2d 365, suggests otherwise, we believe it is against the weight of authority (see Zimmer, supra; Opn No. 90-47, supra; see also, e.g., Corning, supra; Security, supra).