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OPINION
OF
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Op. No. 88-18

By: Michael J. Vargon
Assistant Attorney General

To: Harroll H. Adams
State Auditor
PERA Building - Room 302
Santa Fe, New Mexico 87503

QUESTION:

1. A candidate for a position on the Board of Directors for the Middle Rio Grande Conservancy District filed suit against the Board challenging the Board's policy of not permitting write-in ballots. One existing member of the Board agreed with the candidate's position and joined the suit as a plaintiff. The candidate prevailed and was seated as a member of the Board. The Court of Appeals affirmed the trial court but refused to award costs. May the Board authorize payment for a release of liability from the two plaintiffs even though the Court of Appeals stated that no costs are awarded?

2. Is there any problem with the voucher indicating that the payment is for legal fees, if the release indicates that payment is for settlement of a claim?

3. Does the fact that one of the plaintiffs was not a candidate have any effect on the power of the Board to authorize payment for a release of liability or attorney fees with that plaintiff?

4. The Board voted 4-3 to pay the two plaintiffs. Two of the four votes were those of the plaintiffs themselves. Does the fact that the plaintiffs voted to pay themselves $5,000 each affect the validity of the Board action?

ANSWERS:

1. The Court of Appeals order on costs does not have any effect on the Board's power to settle potential claims. The Board has the power to make good faith settlement of genuine claims. The Board does not have the power to pay attorney fees in a quo warranto proceeding.

2. Yes.

3. Yes.

4. Yes.

ANALYSIS:

These questions arise from a contest for a seat on the Board of Directors ("Board") of the Middle Rio Grande Conservancy District ("District"). In 1984, the Board held an election for one position. Mr. Wenk and Mr. Gonzales were candidates.

The Board had refused to count certain write-in ballots for Mr. Gonzales and declared Mr. Wenk the winner. Mr. Gonzales brought suit challenging the Board's rule prohibiting write-in candidates. One member of the Board, Mr. Benavidez, agreed with Mr. Gonzales and joined in the suit as a plaintiff, although he was not a candidate in the 1984 election.

Mr. Gonzales and Mr. Benavidez prevailed in their lawsuit and, in September of 1984, Mr. Gonzales was seated as a director in place of Mr. Wenk. Mr. Wenk appealed, and on October 1, 1987, the Court of Appeals affirmed the trial court's decision. The Court of Appeals stated that no costs were awarded.

At a Board meeting held on November 10, 1987, one of the directors, Mr. Padilla, made a motion that the District make a settlement with Mr. Gonzales and Mr. Benavidez in the amount of $5,000 each to reflect attorney expenses in their recently concluded lawsuit against the District. The attorney for the District declared that he believed the motion to be correct and that, if it passed, the Board also should require Mr. Gonzales and Mr. Benavidez to execute releases of liability. The motion was not amended and passed by a 4 to 3 vote. Mr. Gonzales and Mr. Benavidez voted in favor of the motion. On November 12, 1987, Mr. Gonzales and Mr. Benavidez each signed a general release of liability stating that, for $10,000 consideration ($5,000 each), they released the District from all liability over the contest of write-in votes in District elections.

(1) The District is a political subdivision of the State with all the powers of a public or municipal corporation. See Att'y. Gen. Op. 65-231; 1937-1938 Att'y Gen. Op. 1784; 1931-1932 Att'y

Gen. Op. 483. Municipal corporations have the power to sue and be sued. Roswell Drainage Dist. v. Parker, 53 F.2d 793 (10th Cir. 1932). The Board has the inherent power to make a good faith settlement of genuine claims. Mahoney Grease Serv. v. City of Joliet, 85 Ill. App. 3d 578, 406 N.E.2d 911 (Ct. App. 1980); Northgate Construction Corp. v. City of Fall River, 12 Mass. App. 859, 421 N.E.2d 94 (Ct. App. 1981); Snyder v. City of St. Paul, 197 Minn. 308, 267 N.W. 249 (1936); Abrams v. City of Seattle, 173 Wash. 495, 23 P.2d 869 (1933). The Board's power to make good faith settlements of genuine claims is not affected by the Court of Appeals' decision that no costs should be awarded. Costs are defined as a "statutory allowance to a party for his expenses incurred in an action." Mills v. Southwest Builders, Inc., 70 N.M. 407, 418, 374 P.2d 289, 296 (1962) (citing Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936)). Settlement of potential future claims is not part of the expenses that the parties incur in the quo warranto proceedings.

The Board's power to settle claims against itself does not, however, authorize it to pay attorney fees that private persons incur in a quo warranto proceeding. A quo warranto proceeding is an action to determine or test an officer's right to hold and exercise his office. Albright v. Territory, 13 N.M. 64, 77, 79 P. 719, 722-723 (1905). In Att'y. Gen. Op. 65-233, the Attorney General determined that a school board could not expend public funds to hire an attorney to defend one of its members whose board position had been challenged in a quo warranto proceeding. The opinion noted that quo warranto proceedings have been held to be purely personal, citing State ex rel. Holloman v. Leib, 17 N.M. 270, 125 P. 601 (1912). The opinion further noted that cases from other jurisdictions have held that public and municipal corporations do not have the authority to pay attorneys fees in quo warranto proceedings in the absence of authorizing legislation. Although there are no New Mexico cases precisely on point, we note that State ex rel. Holloman v. Leib has never been overruled and that more recent cases in other jurisdictions have reached the same conclusion as the authorities Opinion No. 65-233 cited. See, e.g., Matthews v. Atlantic City, 196 N.J. Super. 145, 481 A.2d 842 (1984).

The motion that the Board passed was to "make a settlement with Mr. Hector Gonzales and Mr. Frank Benavidez in the amount of $5,000.00 each to reflect the attorneys (sic) expenses in the recent lawsuit against the District." (Transcript of Board meeting of November 10, 1987). It is apparent that the purpose of the payment was reimbursement of attorney fees. The Board did not amend the motion to require that a release of liability be obtained. This appears to be an afterthought. The action of the

Board in authorizing a payment of attorney fees incurred in a quo warranto proceeding is invalid.

(2) As previously noted, the Board apparently paid the entire amount for attorney fees. The District maintains an account for payment of legal claims and debited this account. The voucher states that the payment was for attorney fees. This account may not be debited because the Board may not pay attorney fees in a quo warranto proceeding.

(3) Although a public or municipal corporation has the power to settle or compromise a claim, it does not have the power to make a gift of public money or assets under the guise of compromising an entirely unfounded claim. Carlin v. City of Newark, 36 N.J. Super. 74, 92, 114 A.2d 761, 770 (1955). See also Love v. City of Des Moines, 90 Iowa 210, 230 N.W. 373 (1930); Clough v. Verrette, 79 N.H. 356, 109 A. 78, 79 (1920); State v. De Mattos, 88 Wash. 35, 152 P. 721 (1915). It does not appear that the Board's failure to count write-in ballots for Mr. Gonzales had any effect on Mr. Benavidez' position. Unless there are other facts of which we have not been made aware, there is no basis for Mr. Benavidez' claim, other than simply for attorney fees. We already have noted that the Board may not pay attorney fees in a quo warranto proceeding. Therefore, the Board could not pay $5,000 to Mr. Benavidez.

(4) No statute clearly defines the duties of a member of a board of directors of a conservancy district when a conflict of interest arises. The Conflict of Interest Act, Sections 10-16-1 to 10-16-15 NMSA 1978, applies only to state officers and employees, not to employees or officers of political subdivisions of the state. Att'y Gen. Op. No. 69-19. The District is a political subdivision of the state. See Att'y. Gen. Op. 65-231; 1937-1938 Att'y Gen. Op. 1784; 1931-1932 Att'y Gen. Op. 483. The legislature has enacted conflict of interest laws for counties, Section 4-44-22 NMSA 1978, and municipalities, Section 3-10-5 NMSA 1978, but it has not enacted similar laws for other political subdivisions. Although Sections 73-14-23, 73-14-59 and 73-14-77 NMSA 1978 provide that members of a conservancy district board of directors may be suspended or removed from office for the same reasons and in the same manner as county officers, these provisions do not address the validity of board action when a member votes on a matter in which he has a direct personal, financial interest.

New Mexico has adopted the common law, Section 38-1-3 NMSA 1978, and it prevails when no special statutory provision applies. Walker v. New Mexico & S.P.R.R., 7 N.M. 282, 34 P. 43 (1893), aff'd, 165 U.S. 593 (1897). At common law, a member of a governing board is disqualified from voting on a matter in which he has

a direct personal, financial interest, and a court will invalidate any board action in violation of this rule. See Friedhof v. City of Biloxi, 232 Miss. 20, 97 So. 2d 742 (1957); Preston v. Gillam, 104 N.H. 279, 184 A.2d 462 (1962); McNamara v. Borough of Saddle River, 64 N.J. Super. 426, 166 A.2d 391 (1960); Genkinger v. City of New Castle, 368 Pa. 547, 84 A.2d 303 (1951); Lake De Smet Reservoir Co. v. Kaufmann, 75 Wyo. 87, 292 P.2d 482 (1956); Robert's Rules of Order §44 (Rev. ed. 1970); 4 McQuillin, The Law of Municipal Corporations §13.35 (3rd rev. ed.), Antieau, Municipal Corporations Law §22.67 (1987). Because the Board's vote was 4 to 3 and therefore the motion would not have passed without the affirmative votes of Mr. Gonzales and Mr. Benavidez, we conclude that the Board's action was invalid.

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