

VOLUME NO. 37

OPINION NO. 57

COUNTIES - Charges; COUNTIES - Official misconduct of an officer; COUNTY OFFICERS AND EMPLOYEES - Compensation for legal fees; COUNTY OFFICERS AND EMPLOYEES - Official misconduct; MISFEASANCE AND MALFEASANCE - Costs of defense; PUBLIC OFFICERS - Compensation for legal fees; PUBLIC OFFICERS - Official misconduct; REVISED CODES OF MONTANA, 1947 - Sections 16-3802 and 94-7-401.

HELD: A county is not obligated to pay the costs of defending a non-indigent county officer charged with official misconduct under section 94-7-401, R.C.M., 1947.

23 August 1977

Arthur W. Ayers, Jr., Esq.
Carbon County Attorney
Carbon County Courthouse
Red Lodge, Montana 59068

Dear Mr. Ayers:

You requested my opinion on this question:

Is a county obligated to pay the costs of defending a non-indigent county officer charged with official misconduct under section 94-7-401, R.C.M. 1947?

My opinion is that a county is not so obligated.

Section 94-7-401 provides criminal sanctions against a public servant who, in his or her official capacity, intentionally acts in a manner he or she knows to be contrary to regulation or statute. Section 16-3802, which enumerates county charges, does not include specifically the costs of defending a county officer, but does have a general provision including among county charges "[t]he contingent expenses necessarily incurred for the use and benefit of the county." Section 16-3802(i), R.C.M. 1947. The Montana Supreme Court has interpreted that provision narrowly: "What is not by the law imposed as expenses upon a county is not a charge against it." Wade v. Lewis and Clark County, 24 Mont. 335, 340, 61 P. 879, 880 (1900); Brannin v. Sweet Grass County, 88 Mont. 412, 416, 293 P. 970, 972 (1930).

Nothing in the law of Montana imposes on counties the expense of defending a public officer charged with official misconduct. Other states, however, have long recognized that:

[i]t is not the duty of the public to defend or aid in the defense of one charged with official misconduct. The history of morals or jurisprudence recognizes no such obligation. When a citizen accepts a public office, he assumes the risk of defending himself against unfounded accusations at his own expense.

Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901).

Furthermore, public policy should not allow the use of public funds to aid in the defense of one charged with official misconduct.

Personal liability of public officers for misconduct in office tends to protect the public and to secure honest and faithful service by such servants [T]o permit such use of public funds is but to encourage a disregard of duty and to put a premium upon neglect or refusal of public official to perform the duties imposed upon them by the law.

Roofner's Appeal, 81 Pa. Super. Ct. 482, 485 (Super. Ct. 1923).

Section 94-7-401(4) provides that a public servant charged with official misconduct be suspended without pay pending final judgment. Upon acquittal, he or she is to be reinstated with back pay. Counsel fees incurred by the officer may not be recovered under this provision. Leo v. Barnett, 48 App.Div.2d 463, 369 N.Y.S.2d 789, 792 (App. Div. 1975). See also Tracy v. Fresno County, 125 Cal.App.2d 52, 270 P.2d 57, 63 (Ct. App. 1954); Township of Manalapan v. Loeb, 126 N.J. Super. 277, 314 A.2d 81 (Super. Ct. Ch. Div. 1974), aff'd per curiam, 131 N.J. Super. 469, 330 A.2d 593 (Super. Ct. App. Div. 1974).

THEREFORE, IT IS MY OPINION:

A county is not obligated to pay the costs of defending a non-indigent county officer charged with official misconduct under section 94-7-401, R.C.M., 1947.

Very truly yours,

MIKE GREELY
Attorney General