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State of California

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OPINION	:	No. 79-624
	:	
of	:	<u>October 18, 1979</u>
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SUBJECT: REQUIREMENT TO EXPEND PUBLIC FUNDS FOR PRIVATE COUNSEL—California is not required to expend public funds for private counsel retained by a member of the California Supreme Court to represent the member in connection with a proceeding conducted by the Commission on Judicial Performance, but the State is authorized to expend such funds in accordance with the terms of an agreement between the state and such private counsel to provide such representation.

The Honorable Paul Priolo, Assemblyman, Thirty-Eighth District, has requested an opinion on the following question:

Is the State of California authorized or required to expend public funds for private counsel retained to represent members of the California Supreme Court in connection with a proceeding conducted by the Commission on Judicial Performance, to which each member is a party, pertaining to their conduct in office?

CONCLUSION

The State of California is not required to expend public funds for private counsel retained by a member of the California Supreme Court to represent the member in

connection with a proceeding conducted by the Commission on Judicial Performance, to which such member is a party, pertaining to the member's conduct in office, but is authorized to expend such funds in accordance with the terms of an agreement between the state and such private counsel to provide such representation.

ANALYSIS

The present inquiry is whether the State of California is authorized or required to expend public funds for private counsel retained to represent members of the California Supreme Court in connection with a proceeding¹ conducted by the Commission on Judicial Performance, to which each member is a party, pertaining to their conduct in office.

The subject proceeding of the commission is conducted pursuant to the authority provided by article VI, sections 8 and 18 of the California Constitution and sections 68701 through 68755 of the Government Code.² Such proceedings are conducted in accordance with rules 901 through 922 of the Judicial Council, adopted under article VI, section 6 of the California Constitution and section 68072. (Cal. Const., art. VI, § 18, subd. (f).) In any such proceeding, a judge has the right to be represented by counsel. (Rule 910, subd. (a); *cf.* § 68111.)

We begin with a recitation of pertinent provisions. Section 995³ provides as follows:

“Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.

“For the purposes of this part, a cross-action, counterclaim or cross complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.”

¹ The proceeding, styled “In the Matter of Commission Proceedings Concerning the Seven Justices of the Supreme Court of California,” C.J.P. No. 3012, is in its initial investigative phase, the purpose of which is to determine whether any charge should be formulated against any justice.

² Hereinafter, all section references are to the Government Code unless otherwise indicated.

³ Sections 995 through 996.6 were enacted in their present form by Statutes of 1963, chapter 1683, section 16. The term “employee” in said statutes includes “officer.” (§ 810.2.) Justices of the Supreme Court are state officers. (Cal. Const., art. VI, § 16; § 1060(g).)

Section 995.2 provides:

“A public entity may refuse to provide for the defense of an action or proceeding brought against an employee or former employee if the public entity determines that:

“(a) The act or omission was not within the scope of his employment;
or

“(b) He acted or failed to act because of actual fraud, corruption or actual malice; or

“(c) The defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee.”

Section 995.2 is an exception to section 995 pertaining to *a civil action. or proceeding*. These sections are derived from former sections 2000 (Stats. 1943, ch. 134, §2000, p. 974), 2001 (Stats. 1943, ch. 134, § 2001, p. 975, amended by Stats. 1951, ch. 1087, § 1, p. 2821), and 2002 (Stats. 1943, ch. 134, § 2002, p. 975), pertaining to *actions for damages*.

The following provisions, which have no counterpart in the 1943 enactments, are clearly not limited to actions for damages. Section 995.4 provides:

“A public entity may, but is not required to, provide for the defense of:

“(a) An action or proceeding brought by the public entity to remove, suspend or otherwise penalize its own employee or former employee, or an appeal to a court from an administrative proceeding by the public entity to remove, suspend or otherwise penalize its own employee or former employee.

“(b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity, or an appeal therefrom.”

Section 995.6 provides:

“A public entity is not required to provide for the defense of an administrative proceeding brought against an employee or former employee,

but a public entity may provide for the defense of an administrative proceeding brought against an employee or former employee if:

“(a) The administrative proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and

“(b) The public entity determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.”

Under section 995.6, a public entity may not provide for the defense of an administrative proceeding against an employee unless the conditions prescribed are satisfied.

Although a proceeding of the Commission on Judicial Performance may be an administrative proceeding within the meaning of section 995.6, section 995.4 deals specifically with an action or proceeding brought by a public entity to remove, suspend, or otherwise penalize its own employee. The term “public entity” includes the State of California. (§ 811.2.) A proceeding by the commission may culminate in a recommendation to censure, remove, or retire a member of the Supreme Court. (Cal. Const., art. VI, § 18, subd. (e); rule 921 of the Judicial Council; *McComb v. Superior Court* (1977) 68 Cal. App. 3d 89, 94.) Consequently, section 995.4 is in our view the dispositive provision. Unlike section 995.6, the election by a public entity to provide for a defense under 995.4 is not subject to any conditions precedent. Nor is an election not to provide such defense subject to limitation. (*Cf. County of Sacramento v. Superior Court* (1971) 20 Cal. App. 3d 469, 472–473; *Cf. § 996.4.*)

The question remains, however, whether a public entity may expend public funds for the expense of counsel retained by the employee rather than by the public entity.

Section 996 provides:

“A public entity may provide for a defense pursuant to this part *by its own attorney or by employing other counsel* for this purpose or by purchasing insurance which requires that the insurer provide the defense. All of the expenses of providing a defense pursuant to this part are proper charges against a public entity. A public entity has no right to recover such expenses from the employee or former employee defended.” (Emphasis added.)⁴

⁴ In the case of a state officer, the duty of providing any such defense rests with the Attorney

Thus, it is clear from the express terms of section 996 that the authority of a public entity to “provide for the defense” of an employee requires an agreement between the public entity and the other counsel as to the terms of employment. While the statute does not preclude participation by the employee in the selection of private counsel, a public entity is not authorized under the statute to expend public funds for the expense of such counsel except in accordance with the terms of such agreement. (*Cf. Tracy v. County of Fresno* (1954) 125 Cal. App. 2d 52, 56.)

Nevertheless, section 996.6 provides:

“The rights of an employee or former employee under this part are in addition to and not in lieu of any rights he may have under any contract or under any other enactment providing for his defense.”

Section 68111 provides with regard to judges specifically that whenever any judge of any court of this state is a witness in his official capacity as judge in any action or proceeding, such judge shall be entitled to be represented at such action or proceeding *by counsel of his choice*. This section, which is limited to participation by a judge in a proceeding as a witness, does not provide by its terms for the expenditure of public funds for the expense of counsel retained by the judge. Even assuming that a judge has a right in the first instance to be represented as a witness by the public entity, it may not be reasonably inferred that public funds may be expended for the expenses of counsel of his choice. This interpretation is further indicated by section 27648 which prescribes the specifically limited circumstances in which such expenses may be incurred by the public entity:

“If, because of a declared conflict of interest, any judge, who is otherwise entitled to representation pursuant to Section 825, 995, or 27647, is required to retain his own counsel, such judge is entitled to recover from the appropriate public entity such reasonable attorney’s fees, costs, and expenses as were necessarily incurred thereby.”

While section 27648 pertains to the government of counties (§ 23000 *et seq.*), it necessarily reflects the legislative perception that section 68111 does not by its own terms constitute authority for the expenditure of funds for private counsel. There appears no basis for determining that section 68111 was intended to confer any greater benefits upon the justices of the Supreme Court than upon the judges of the local bench. No such distinction is evident.

General. (§ 12512.)

It is concluded that the State of California is not required to expend public funds for private counsel retained by a member of the California Supreme Court to represent the member in connection with a proceeding conducted by the Commission on Judicial Performance, to which such member is a party, pertaining to the member's conduct in office, but is authorized to expend such funds in accordance with the terms of an agreement between the state and such private counsel to provide such representation.
