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OPINION	:	No. 84-1106
of	:	MARCH 1, 1985
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THE HONORABLE GROVER C. TRASK II, DISTRICT ATTORNEY OF THE COUNTY OF RIVERSIDE, has requested an opinion on the following question:

Is a city council's action to provide for the defense of the chief of police and the deputy chief on criminal conspiracy charges for directing deletions in a police report under the facts presented authorized by Government Code section 995.8 or prohibited as an unconstitutional gift of public funds?

CONCLUSION

A city council's action to provide for the defense of its chief of police and the deputy chief on criminal conspiracy charges for directing deletions in a police report under the facts presented is authorized by Government Code section 995.8 and is not prohibited as an unconstitutional gift of public funds.

ANALYSIS

The facts giving rise to this opinion may be summarized as follows. One vehicle collided with another at an intersection in a California city and caused a death. The investigating police officer prepared a report of the incident which indicated that the view of a stop sign at the intersection in question by drivers of oncoming vehicles was obstructed. It is alleged that the chief of police and deputy chief of police directed the officer to delete the reference to the obstruction in the report and this was done. On the basis of the report the district attorney charged one of the drivers with vehicular manslaughter. The defendant pleaded guilty. When the district attorney learned of the deletion in the report he presented the matter to the grand jury. There was evidence that both the chief and deputy chief denied directing the deletion in the report but there was other evidence that the chief had made statements that the report had to be changed to protect the city. Evidence also showed that had the district attorney known of the obstruction he would not have charged the defendant as he did and that if defense counsel had known of the obstruction she would not have allowed the defendant to plead guilty. The grand jury indicted the police chief and deputy chief for conspiracy to obstruct justice. The city council authorized the employment of defense counsel for the chief and deputy chief at city expense. The district attorney asks whether the council's action was authorized by Government Code section 995.8 or was prohibited as a gift of public funds by article XVI, section 6, of the California Constitution.

Division 3.6 of title 1 of the Government Code (div. 3.6) is entitled, "Claims and Actions Against Public Entities and Public Employees." Section 995[1] provides that a public entity shall provide for the defense of an employee in any civil action based on the employee's conduct in the scope of his employment with the public entity. With respect to the defense of criminal actions section 995.8 provides:

> "A public entity is not required to provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Section 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee, but a public entity may provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee if:
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> "(a) The criminal action or proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and

[1] All section references are to the Government Code unless otherwise indicated.

> "(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."

The words "public entity" include cities and counties (§ 811.2). The word "employee" includes an officer (§ 810.2) and "employment" includes office (§ 810.4). Thus the chief of police and a deputy police chief of a California city would be employees of a public entity within the meaning of section 995.8.

Research has revealed only one appellate court decision interpreting section 995.8. In *County of Sacramento* v. *Superior Court* (1971) 20 Cal.App.3d 469, 473 the court held that under section 995.8 a board of supervisors could refuse to provide for the defense of a county officer to an action to remove him from office under Government Code section 3060, even arbitrarily. No cases have been found which consider the requirements set forth in subdivisions (a) and (b) of section 995.8. We therefore resort to the rules of construction utilized by the courts in interpreting statutes. The applicable rules were summarized in *Moyer* v. *Workman's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, as follows:

> "We begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent the court turns first to the words themselves for the answer. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose; a construction making some words surplusage is to be avoided. When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (Citations and quotations omitted.)

Section 995.8 imposes two conditions upon a public entity's authority to provide for the defense of a criminal action against its employee at public expense which are expressed in its two subdivisions. Subdivision (a) requires that the criminal action be brought on account of an act or omission of the public employee while acting in the scope of his or her public employment. Subdivision (b) requires the public entity to make certain determinations. We shall examine each of these conditions or requirements in turn.

The words "scope of employment" found in subdivision (a) of section 99518 are also found in other provisions of division 3.6 (e.g., §§ 815.2 & 821.6). In *Alma W.* v. *Oakland Unified School District* (1981) 123 Cal.App.3d 133, 138-139 the court observed:

> "The general rule of respondeat superior at common law for nongovernmental employers is the same as that set forth in the Government Code for public employers: An employer is vicariously liable for the torts of employees committed within the course or scope of their employment. [Citations.] Accordingly we look to the interpretation given the phrase 'scope of employment' at common law to guide us in resolving the issue of whether the actions of a public employee fall within the scope of his employment."

The courts have articulated a number of tests to provide some definition of the phrase "scope of employment." In *Sanborn* v. *Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 411 the court stated:

> ". . . a public employee is acting in the course and scope of the employment 'when he is engaged in work he was employed to perform or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or conveniences.' [Citations.] The phrase 'scope of employment' has been equated with the express or implied power of the public employee to act in a particular instance, and in evaluating his conduct to determine whether it is within the ambit of his authority we are to look not to the nature of the act itself, but to the purpose or result intended. [Citations, fn. omitted.] If the object or end to be accomplished is within the employee's express or implied authority his act is deemed to be within the scope of his employment irrespective of its wrongful nature."

A city employs a police chief and deputy police chief to manage and supervise its police department. (See § 38630.) The review and correction of police reports are among the duties inherent in such supervision. Thus reviewing, supervising and correcting police reports is work a police chief and his deputy are employed to perform. The alleged act of directing a change in the police report was incidental to the duty of the chief and his deputy to review the report. Evidence before the grand jury indicated that the change was made to protect the city. There is no suggestion that such change served any purpose personal to the chief or deputy chief. Thus the change would be deemed to be within the scope of their employment irrespective of its wrongful nature.

In assessing whether an employee's wrongful act was required by or incidental to his duties the law defines occupational duties broadly. The fact that an

employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer. (*Alma W.* v. *Oakland Unified School District*, *supra*, 123 Cal.App.3d at 139.) The employer is liable to third persons for wrongful acts committed by his agent in and as a part of the transactions of the business of the agency. This is true even though the acts be willful and malicious. The test is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal and while the agent was still occupying himself with the principal's business within the scope of his employment. (*Deevy* v. *Tassi* (1942) 21 Cal.2d 109, 125.) The test for determining whether or not a particular act was done in the course of the servant's employment is whether the act was done in the prosecution of the business in which the servant was employed to assist. The act of the servant must be connected directly or indirectly with the business of the employer and be in furtherance of the object for which the servant was employed. In other words, if the act is for the benefit of the employer, either directly or incidentally, the act is within the general scope of the servant's employment, but if the act performed is not in any way connected with the service for which he is employed, but for his own particular and peculiar purpose, then the act is not within the scope of employment. (*Kish* v. *California State Automobile Association* (1922) 190 Cal. 246, 249.)

Thus to determine the scope of employment of a police chief and his assistant the law defines their duties broadly to include supervision of the police force as well as engaging in law enforcement actions directly. Reviewing and correcting police reports are part of the transactions of the business of a police department. The chief and his assistant were occupying themselves with the business of the city's police department when they directed the change in the police report if they did direct such a change. The act of directing a change in the report (if it occurred) was connected directly with the business of the city's police department and was for the benefit of the city. Thus under the tests in the cases cited the chief and his deputy in directing changes in the report (if they did) were acting within the scope of their employment with the city.

The second requirement for the city to provide for the defense of the police chief and deputy chief required by subdivision (b) of section 995.8 is that the city make certain determinations. Those determinations are:

1. That such defense would be in the best interests of the city and

2. That the chief and his assistant acted in good faith without actual malice and in the apparent interests of the city.

While section 995.8 contemplates that certain determinations are to be made by the public entity the section is silent on who is to make such determinations for the

public entity. Section 23005 provides that "[a] county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board or authority conferred by law" but we have found no similar statute applicable to cities. Section 905 requires the presentation of a claim against local public entities as a prerequisite to legal action. (See § 945.4.) Section 912.6 requires the "board" to act upon such claims in certain ways. Section 900.2 defines "board" to mean, in the case of local public entities, the governing body of the local entity. We believe that the Legislature contemplated that it would be the governing body of the local entity who was to make the determinations required by section 995.8. In the case of a general law city the governing body is the city council. (See §§ 36501 & 36801 et seq.)

We are not advised what information was presented to persuade the city council to provide for the defense of the chief and deputy chief at city expense. There was evidence presented to the grand jury that the chief and deputy chief denied directing the deletions in the report. Such denials presented to the city council would have supported the determinations required by section 995.8(b). Similarly an explanation for the deletion (e.g., that the view of the sign was not substantially obstructed) might also have supported such determination. However, such denials and explanations are pure speculation since the only information supplied concerning the city council was that the council acted to provide for the defense. The presumption of official duty regularly performed applies to the city council's action. (Evid. Code, § 664; *Sinclair* v. *Arnebergh* (1964) 224 Cal.App.2d 595, 597-598.) Thus, in the absence of contrary evidence, we must conclude, in accordance with the presumption that the city council made the determinations required by section 995.8(b) on sufficient evidence.

Article XVI, section 6, of the California Constitution provides in part:

> ". . . nor shall it [the Legislature] have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual . . . ."

Does section 995.8 violate this prohibition? The constitutional prohibition against the gift of public funds is subject to the well recognized "public purpose" exception. The California Supreme Court in *California Housing Finance Agency* v. *Elliott* (1976) 17 Cal.3d 575 at 583 explained the exception as follows:

> "Under the public purpose doctrine, public credit may be extended and public funds disbursed if a direct and substantial public purpose is served and nonstate entities are benefitted only as an incident to the public purpose. [Citations.] The benefit to the state from an expenditure for a public purpose

is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefitted therefrom. [Citation.]"

In *Sinclair* v. *Arnebergh*, *supra*, 224 Cal.App.3d 595 a city taxpayer sued the city attorney claiming his representation of city policemen in civil tort actions brought against them in their individual capacities was not authorized. The court held that section 995 provided the authority for such defense. The court stated (at p. 599):

"As a matter of general law, municipal corporations have always possessed the discretionary power to indemnify their police officers against liability for acts done within the scope of their employment, to defend them and to appropriate funds for the expense of such defense. [Citation.] The reason for the rule is: 'The duties of policemen are performed for the benefit of the public, and the public is directly concerned in preserving and protecting these officers from the hazard of death or bodily injuries to which the performance of their official duties expose them. Aside from any considerations purely personal to the officer, it is for the public good that these officers, as instruments through which the city performs its functions, shall be shielded from the personal hazards which attend the discharge of their official duties.' [Citation.] With such protection afforded, the public can expect that its laws will be zealously enforced without any hesitation occasioned by considerations of possible personal involvement in defending resulting litigation."

This statement of the public purpose served by statutes authorizing the defense of public officers to litigation arising out of acts performed within the scope of their public employment explains why such defense falls within the public purpose exception to the constitutional prohibition against the gift of public funds. We conclude that section 995.8 does not violate article XVI, section 6, of the California Constitution.

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