

Harmony Board re Ethical and Effective Representation of Government Officers

Board of Supervisors:

We received several inquiries relating to the analysis we provided at the meeting re above.

In order to answer all questions as thoroughly as possible, please find attached a *Memorandum of Law* concerning the Ethical and Effective Representation of Government Officers.

As always, please do not hesitate to let us know of any questions, comments, concerns, etc.

Thank you,

Timothy R. Qualls, *Esq.*

Young Qualls, PA

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MEMORANDUM

To: Harmony Community Development District Board of Supervisors
From: Young Qualls, P.A.
Date: June 18, 2020
Re: Representation of CDD Officers and Employees

QUESTION PRESENTED

May a Community Development District (“CDD”) provide legal representation to a member of the Board of Supervisors sued in her or his individual capacity?

ANSWER

Yes. Section 111.07 of the Florida Statutes, provides expressly that a CDD, "is authorized to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers... civil action includes... any civil rights lawsuit seeking relief personally against the officer." Moreover, the Florida Supreme Court makes clear that a public officer, such as a CDD Supervisor, is entitled to representation at the public expense in a lawsuit arising from (1) performance of official duties (2) while serving a public purpose. Florida courts have opined that denying a public official representation for acts purportedly arising from the performance of official duties would have a chilling effect upon the proper performance of official duties and the diligent representation of the public interest. Finally, it has been said that government entities have not only the legal authority, but the moral obligation to provide counsel to public officers, as doing so ensures accountability by the government entity for government action and allows public officers to act for the public good without substantial fear of personal liability.¹

¹ Craig E. Leen, *The Ethical and Effective Representation of Government Employees by Government Attorneys*, 45 Stetson L.R. 397, 400-402 (2016) (discussing the moral responsibility of the government to provide counsel to government officers)

DISCUSSION

Legal Considerations

The legal framework for Section 111.07 of the Florida Statutes, in relevant part, states:

Any agency of the state, or any county, municipality, or political subdivision of the state, is authorized to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Defense of such civil action includes, but is not limited to, any civil rights lawsuit seeking relief personally against the officer, employee, or agent for an act or omission under color of state law, custom, or usage, wherein it is alleged that such officer, employee, or agent has deprived another person of rights secured under the Federal Constitution or laws.

The Section provides further that if the CDD fails to provide legal representation, then the CDD shall reimburse the public officer who prevails in the action for court costs and reasonable attorney fees. However, any attorney fees paid from public funds for any officer, employee, or agent who is found to be personally liable by virtue of acting outside the scope of his or her employment, or acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, may be recovered by the CDD.

In *Nuzum v. Valdes*, the court determined that Section 111.07, F.S., recognizes the common law principle that a public officer should be allowed representation at the public's expense when the lawsuit arises out of an employee or officer's performance of official duties. 407 So.2d 277, 278 (Fla. 3d DCA 1981). The court further elaborated that to deny a public official representation for official acts would "have a chilling effect" on the proper performance of duties. *Id.* The government can even provide counsel when the acts were allegedly committed with bad faith or malice *Id.* at 279. The government does not have to accept the veracity of the allegations and may still represent the employee if the government by its own review believes the officer's action were proper, or even negligent. Had *Nuzum* been decided the other way, the government could rarely provide counsel. This is because by definition any time a government employee is sued in a personal capacity, the employee must either be alleged to have acted in a bad faith or extreme manner under Section 768.28(9), Fla. Stat.

These principles were solidified by the Florida Supreme Court in *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990). The opinion noted that the right for public officials to have legal representation from their government employer has been long recognized in Florida. *Id.* at 916-17. The Court held that for public officials to be entitled to representation from the government, the litigation must (1) arise from or in connection to performance of official duties and (2) serve a public purpose. *Id.* at 917.

The mere allegation that a public officer willfully violated the civil rights of others or otherwise acted with malice is not sufficient to disqualify the government from providing or paying for legal representation of its officer. Rather, there must be an actual finding, from a court of competent jurisdiction or the government entity itself, that the officer willfully violated the civil rights of others or otherwise acted with malice to create such a disqualification from representation. Otherwise the allegations of a complaint alone would determine whether a public officer was entitled to representation at the public's expense.

Finally, there is a moral obligation to represent a public officer except in cases where the government entity determines that the officer has acted with malice or in bad faith.² A public officer must sometimes make controversial choices or take steps that will put the officer at risk of liability in fulfilling public duties. Indeed, there are circumstances where any action that is made on a specifically tough decision could result in a lawsuit by an aggrieved party challenging the government action, which places public officers or employees between a rock and a hard place if the officer is obligated to carry the costs of defending such official action. Therefore, the government should provide a defense for a sued officer, unless the government entity is convinced that that individual betrayed the public trust and did not act in good faith.

Ethical Considerations

When a CDD officer is sued and the CDD has determined to represent the officer, the attorney must determine whether she or he can provide the representation in house or if separate conflict counsel must be hired.³ “The question is a simple one when the interests of the employee

² Fla. Stat. § 768.28(9)(a). State law is clear that the government entity should be named in the lawsuit to the exclusion of the employee. Thus, this places a moral responsibility on the government entity to provide a defense to the employee who has been improperly named in lieu of the government entity (as the government entity is the proper party unless bad faith or malice is present). Leen, *supra* note 21, at 402.

³ Florida Bar Rule 4-1.7 prohibits attorneys in Florida from representing a client whose interests are directly adverse to another client unless the attorney has a reasonable belief that the representation will not adversely affect the relationship with and responsibilities to the other client, and each client consents after disclosure.

and the government are aligned . . .”⁴ Generally speaking, if the CDD has made a *Nuzum* determination then the CDD’s counsel may represent the officer and raise official immunity on the officer’s behalf with little chance of irreconcilable conflict.⁵

CONCLUSION

In sum, a CDD has the legal authority and moral commitment to provide legal representation for its officers and employees in the event of a lawsuit arising from actions taken on behalf of the CDD. Providing representation to public employees and officers is broadly supported by Florida law. Florida courts have established that the CDD may provide counsel to its employees even where the employee allegedly acted with bad faith or malice, as long as the CDD determines that the provision of representation is warranted based on its own review. Public employees depend on the government’s moral commitment to represent them if they are sued while conducting the public’s business. The purpose of this commitment is to safeguard public employees from the fear of liability so that they may perform their public duties without harassment or distraction. Thus, the CDD may provide legal representation to CDD officers and employees for actions taken within the course and scope of their employment, unless there is a finding by the CDD that the officer willfully violated the civil rights of other or otherwise acted with malice.

⁴ Craig E. Leen, *The Ethical and Effective Representation of Government Employees by Government Attorneys*, 45 Stetson L.R. 412 (2016)

⁵ As set forth in the law review article entitled, *The Ethical and Effective Representation of Government Employees by Government Attorneys*:

My experience has been that in most instances where a government employee is sued, as long as the government entity has made a *Nuzum* determination that the employee did not act with malice or in bad faith, the government entity’s counsel can represent the employee and raise official immunity on the employee’s behalf with little chance of an irreconcilable conflict. Both the government entity and its government employee significantly benefit from this arrangement.

Id.