

Office of the Attorney General
State of North Dakota

Opinion No. 82-76

Date Issued: November 18, 1982

Requested by: John J. Fox
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--QUESTION PRESENTED--

Whether a county is obligated to pay attorney's fees in an action brought by the sheriff against the county judge to obtain an alternative writ of prohibition to stay contempt proceedings brought against the sheriff by the county judge in the county court of increased jurisdiction.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a county is not obligated to pay attorney's fees in an action brought by the sheriff against the county judge to obtain an alternative writ of prohibition to stay contempt proceedings brought against the sheriff by the county judge in the county court of increase jurisdiction.

--ANALYSIS--

The obligation of political subdivisions to furnish legal counsel to defend law enforcement officers is found at Section 44-08-11 of the North Dakota Century Code:

The state or any political subdivision of the state must furnish legal counsel to defend any law enforcement officer in any action brought against such officer to recover damages arising out of any act of such officer in good faith and in the performance of his official duties. (Emphasis Supplied)

As can be seen, this section applies to situations where an action is being brought against a law enforcement officer to recover damages. That is not the case in this instance as the sheriff brought the action against the county judge.

The general rule of law is that public officials who pursue or defend personal suits must bear their own legal expenses. *City of Berkley v. Holmes*, 191 N.W.2d 561 (Mich. 1971).

Further, it does not appear that the legislative intent was to permit public officials, on their own initiative, to hire private attorneys and make the costs thereof, without any

limitation, a public charge. Such a construction is repugnant to the sound principles of public policy.

The question presented emanates from a case which was decided by the North Dakota Supreme Court entitled *Schneider v. Ewing*, 310 N.W.2d 581 (N.D. 1981), where the Supreme Court issued a writ of prohibition to prevent the county judge from continuing with contempt proceedings against the sheriff of Stark County. The court found that the county court with increased jurisdiction lacked subject matter and personal jurisdiction to enter orders concerning overcrowded conditions in the county jail and to commence proceedings to hold the sheriff in contempt for failing to obey said orders where actions underlying said orders were initiated sua sponte by the court and were not commenced by proper public prosecutors.

The Supreme Court stated that Judge Ewing had several options that he could have exercised when he realized that conditions in the Stark County Jail were in need of improvement. One of the courses of action that the Supreme Court enunciated was for the judge to seek the advice of the state's attorney to explore the possibility of an appropriate action brought by the state's attorney against the sheriff as chief administrator of the jail or against the board of county commissioners as the jail's governing body. If the state's attorney were to refuse to perform or was unable to do so, the judge could then resort to the district court by way of Section 11-16-06, N.D.C.C., to seek intervention by the Attorney General or an appointed attorney. See *Schneider v. Ewing*, 310 N.W.2d 581, 585 (N.D. 1981).

Therefore, since the sheriff instituted his own action against the judge of the county court of increased jurisdiction, he is not entitled to legal counsel under Section 44-08-11, N.D.C.C. In addition, the county would not be required to pay the sheriff's attorney's fees under Section 44-08-11, N.D.C.C., if the county through its public prosecutor brought an action against the sheriff. However, legal counsel would be provided in any action brought against the sheriff to recover damages arising out of the performance of his official duties.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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