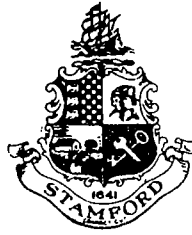


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**To:** William S. Callion, Jr., Chairman of the Board of Finance

**From:** Andrew J. McDonald, Director of Legal Affairs *AJM*

**Date:** May 3, 2000

**Re: Legal Representation of City Officers**

By memorandum dated April 17, 2000, Mr. Tarzia and Mr. Rubino have requested a legal opinion from the Office of Legal Affairs relating to the City's obligation to provide legal counsel to municipally elected officers.<sup>1</sup>

The question presented for consideration relates to the origin, nature and extent of the City's responsibility to indemnify and defend municipally elected officials when those elected officials have been named in their individual capacity as defendants in a lawsuit alleging misconduct by them in their official capacities.<sup>2</sup>

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<sup>1</sup> Presumably this request was made pursuant to Charter § C5-20-5. In accordance with the terms of that Charter section, however, the Board of Finance as an entity is required to vote in favor of asking for a legal opinion from this office. Individual members of the Board of Finance are not among those authorized under that section of the Charter to request legal opinions. Additionally, § C5-20-5 of the Charter requires that the legal opinion must arise in connection with the official powers and duties of the board which makes the request. Given the fact that a news article in *The Advocate* dated April 14, 2000, if correct, indicated that the entire Board of Finance wished to have this written legal opinion prepared, we will assume that the request has been properly authorized by the entire Board of Finance and will overlook the apparent incompleteness of the request submitted by Mr. Tarzia and Mr. Rubino. We ask that, in the future, requests for legal opinions by the Board of Finance come from the Chairperson and reflect that the entire board has requested the opinion.

<sup>2</sup> The request also asked whether the opinion regarding the City's responsibilities to protect and defend an elected official would depend on the nature of the office held by that official. No legal authority of which we are aware would permit a distinction to be drawn between and among elected officers of a municipality. Consequently, this opinion is applicable to all municipal officers elected by eligible voters in the City of Stamford and as enumerated in § C1-80-1.

*AJM*  
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As I indicated at the Board of Finance's April 13, 2000 meeting, the City is required by state law to provide legal representation to municipal officers within the parameters of C.G.S. § 7-101a. Please permit me to expand on that legal conclusion with the following analysis.

### Municipally Elected Officers

As an initial matter, it should be noted that only those individuals enumerated in the Charter qualify as "elected officers." As set forth in Charter § C1-80-1, the municipal officers of Stamford include the Mayor, the members of the Board of Representatives, the members of the Board of Finance, the members of the Board of Education, a Town and City Clerk, seven (7) constables and two (2) Registrars of Voters.

Additionally, and perhaps more importantly, state statutes also denominate those individuals that comprise a city's "municipal officers." Elected constables are among their number. *See*, C.G.S. §§ 9-185. The voters of Stamford elect their municipal constables at biannual municipal elections pursuant to C.G.S. § 9-200.

Furthermore, the fact that constables are "municipal officers" is confirmed by a joint opinion issued from then-Attorney General Lieberman and then-Chief State's Attorney Austin McGuigan issued to the Commissioner of Public Safety which specifically found that under various state statutes, constables are "municipal officers." Opinion of the Attorney General, 1984 Conn. Op. Atty. Gen. 146, dated April 5, 1984 at p.1; *See also*, C.G.S. §§ 7-88, 7-92, 7-97, 9-185.

Since the office of Constable is specifically included in the Charter and is specified as a municipal officer in state statutes, there can be no question but that a Constable, as elected by the qualified voters of Stamford, is a "Municipal Officer" of the City.

### State Law

For approximately thirty years Connecticut law has required municipalities to defend and indemnify their municipal officers from any lawsuit against such officers which alleges negligence or infringement of another's civil rights while that officer is discharging his duties. Specifically, C.G.S. § 7-101a(a) provides, in pertinent part, that:

**"each municipality shall protect and save harmless any municipal officer, whether elected or appointed,...of such municipality from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such officer or such employee while acting in the discharge of his duties."**

Additionally, every municipality in Connecticut is required to protect and save harmless any municipal officer from financial loss and expense, including legal fees and costs, which arise from any lawsuit that alleges malicious, wanton or willful misconduct on the part of the officer while discharging his duties. *See*, C.G.S. § 7-101a(b). If a plaintiff alleges that a municipal officer acted maliciously, wantonly or willfully in the discharge of his duties, the municipality is still required to provide a defense to that municipal officer. Indeed, that requirement continues until such time as a judgment has been rendered in the case, either by a judge or a jury. *See*, C.G.S. § 7-101a(b); *see also*, *Orticelli v. Powers*, 197 Conn. 9, 12-13 (1985).

There is an important limitation on a municipality's obligation to defend and indemnify its officers, however, in instances where an officer is **ultimately proven** (as opposed to merely being alleged) to have acted maliciously, wantonly or willfully in the discharge of his duties. Pursuant to C.G.S. § 7-101a(b):

**“in the event such officer or employee has a judgment entered against him for a malicious, wanton or willful act in a court of law, such municipality shall be reimbursed by such officer or employee for expenses it incurred in providing such defense and shall not be held liable to such officer and employee for any financial loss or expense resulting from such act.”**

Put simply, state statutes require municipalities to defend elected officials when those officers are alleged to have acted inappropriately in the conduct of their office. That duty to defend takes two forms. First, if the official has acted negligently or has infringed on a person's civil rights, the City must defend that official and pay any judgment rendered against that official for actions taken in the discharge of his duties. Second, if the official is alleged to have acted maliciously, wantonly or willfully in the discharge of his duties, the municipality still must defend that official until a judgment has been rendered in court. If, after all evidence has been presented, a final judgment enters in the case finding that the official did, in fact, act maliciously, wantonly or willfully, then the municipality has a right to be reimbursed by the officer for its legal expenses and the municipality will not be required to indemnify the official for that misconduct.

### Federal Law in Civil Rights Cases

Consideration must be given to a situation where the City is sued in the same action as the elected officials. This scenario is quite common in cases where a plaintiff alleges that both the municipality and one of its municipal officers or employees have violated the plaintiff's civil rights pursuant to 42 U.S.C. § 1983. As you know, the Office of Legal Affairs acts as the legal advisor to both the City and its various component parts, including elected officers. Charter § C5-20-3. When approaching cases where the municipality is named as a defendant in addition to one or more of its officers, the diligent attorney must address the possibility that a conflict of interest might arise in the defense of that action.

Indeed, just such a conflict of interest arose in the case of *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984).<sup>3</sup> In *Dunton*, a copy of which is enclosed for your review, the court held that the interests of a municipality and the interests of its municipal officers and employees in a civil rights action are in conflict. *Dunton*, 729 F.2d at 907. In order to demonstrate the conflict of interest, Judge Meskill wrote in *Dunton* that:

“A municipality may avoid liability by showing that the (officer or employee) was not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy. The (officer or employee), by contrast, may partially or completely avoid liability by showing that he was acting within the scope of his official duties. If he can show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality. If he is successful in asserting a good faith immunity defense, the municipality may be wholly liable because it cannot assert the good faith immunity of its employees as a defense to a (civil rights) action.” *Id.*

The *Dunton* Court characterized this common scenario as an “imminent threat of a serious conflict” which would warrant immediate disqualification of an attorney from representing both the municipality and the municipal officer. *Id.* According to the unanimous decision of this federal appellate tribunal, this “high potential for conflicting loyalties” would preclude an attorney from adequately or ethically defending the interests of both the municipality and its officer.

In the *Dunton* case, the County Attorney tried to represent both Suffolk County and the municipal officer involved in that civil rights action. The Court found the County Attorney’s actions to be “inconsistent” with his ethical obligations which call for exercising independent judgment on behalf of a client. *Dunton*, 729 F.2d at 908. The Court in *Dunton* chastised the County Attorney for even attempting to represent both the municipality and the municipal officer. “The County Attorney had to know of the serious conflict his multiple representation created, and knew or should have known that he could not fulfill his ethical obligations to the county without seriously undercutting (the officer’s) legal position.” *Dunton*, 729 F.2d at 909.

Finally, the *Dunton* Court determined that the trial of that case was so inherently unfair as to violate the civil rights of the officer involved and “would work an injustice” if left in tact. Consequently, the entire judgment was overturned and vacated and a new trial was ordered.

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<sup>3</sup> For those on the Board of Finance who are not familiar with legal precedents, this decision was rendered by the United States Court of Appeals for the Second Circuit (which includes Connecticut) in 1984. The decision, written by Judge Meskill (who is a former Republican Governor of the State of Connecticut) is binding legal authority in Connecticut. No attorney can disregard the holding in *Dunton v. County of Suffolk* without risking sanctions by the Court.

In applying the lessons taught by *Dunton*, the United States District Court for the District of Connecticut has held that the potential conflict is almost impossible to overcome. In *Manganella v. Keyes*, 613 F.Supp. 795 (D.Conn. 1985), United States District Judge Ellen Bree Burns confirmed "that an inherent conflict of interest arises in a (civil rights) action when codefendants in a suit are a local government and (municipal officers or employees) in their individual capacity as differing theories of liability and differing defenses are applicable to each defendant." *Manganella*, 613 F.Supp. at 797. Again illustrating this conflict, the Judge Burns noted that, in order to avoid liability, the municipality would have to show that the officer acted outside the scope of his authority. By contrast, the officer, in order to avoid liability, would have to show that his actions were reasonably within the scope of his official duties. *Id.*

In reconciling the lessons taught by the Second Circuit in *Dunton* with C.G.S. § 7-101a, Judge Burns found two substantial "difficulties."

"First, the municipality is only liable for actions of the officer 'in the discharge of his duties.' Second, if the officer is found to have acted in a malicious, wanton, or willful manor, the municipality may seek reimbursement from the officer and will not be liable to him for any losses. In other words, by arguing that the officer's actions were malicious, wanton, or willful, the municipality may escape financial liability under the statute. Therefore, in order to prevent the potential conflict of interest it is necessary that the municipality waive whatever rights to reimbursement it may have under § 7-101a and agree to pay any judgment entered against the officer."

*Manganella*, 613 F.Supp. at 798.

In *Manganella*, a copy of which is enclosed, Judge Burns held that, pursuant to C.G.S. § 7-101a, a municipality cannot easily escape its obligation to defend a municipal officer if the municipality is also a codefendant. In considering this conflict, Judge Burns noted that a municipality may resolve its conflicting obligations by hiring separate lawyers for itself and its officers. The Court also noted, however, that in some cases it may be more economical to have the same attorney represent both clients.

In order to have a municipal attorney represent both the municipality and the municipal officer in a civil rights lawsuit, substantial rights of the municipality must be given away. The *Manganella* Court ruled that "(i)f the municipality chooses to reduce its legal costs by providing joint representation, it is necessary that the municipality take steps to reduce or eliminate the potential conflict of interest. Because Conn. Gen. Stat. § 7-101a already imposes a duty upon the municipality to hold its officers and employees harmless, the conflict of interest can be eliminated by the municipality waiving the defenses to liability that are permitted under § 7-101a." *Manganella*, 613 F.Supp. at 798.

In order to accomplish that waiver so the municipality can forego the cost of hiring separate counsel, Judge Burns ruled that the municipality is required to waive any and all rights it has under the law for reimbursement of legal expenses or the cost of judgment damages. "The municipality must also agree to pay any judgment entered against the officer whether or not his actions are found to be willful, wanton, malicious or *ultra vires*." *Manganella*, 613 F.Supp at 799.

Additionally, it should be noted that before a municipality may attempt to represent both defendants in a civil rights action, the municipal officers involved also must consent to any such waiver. As Judge Burns noted, those "officers must also be informed of their right, under Conn. Gen. Stat. § 7-101a, to have the municipality pay for their defense if they choose to employ separate attorneys." *Manganella*, 613 F.Supp. at 799.

### Other Considerations/Matters

Of course, there are serious potential consequences to the City if it does not fulfill its obligation to provide a defense for municipal officers in an appropriate case pursuant to C.G.S. § 7-101a. For instance, in *Knapp v. City of Derby*, a Republican Registrar of Voters sued the City of Derby because the Corporation Counsel of Derby refused to fully defend the Registrar in a civil rights action brought against her by a third party. The Registrar, in turn, went out and hired a lawyer to defend her interests in the underlying lawsuit. After the Registrar was successful in defeating the federal civil rights lawsuit, she sued the city in state court for not defending her interests pursuant to C.G.S. § 7-101a. The Court entered summary judgment in favor of the Registrar and against the City of Derby for all of her legal fees and costs and found that the Corporation Counsel and the City of Derby violated the Registrar's rights of defense and indemnification pursuant to C.G.S. § 7-101a. See, *Knapp v. City of Derby*, 1998 WL 23102 (Conn. Super. Ct., Bruce Thompson, J.).

On a related matter, members of the Board of Finance have inquired about the law firm retained to represent Constable Ralph Serafino and Constable Jon Gallup in the federal civil rights case of *Katsouros v. Serafino, et al.* As outlined above, since the City was named as a defendant in that suit as well, we were bound by *Dunton* and *Manganella* to either hire separate counsel for these constables or waive our rights of reimbursement and consent to paying any judgment rendered against these individuals. The City has chosen to preserve its rights to seek reimbursement if, after trial, it is found by a judge or jury that these constables acted willfully, wantonly or maliciously.

In conformity with binding legal precedent, then, the City has retained the firm of Sherwood and Garlick, P.C. from Westport to represent Messrs. Serafino and Gallup. In particular, the City has retained the services of Charles W. Fleischmann, a principal in the firm, to represent these constables as municipal officers. The City has selected Attorney Fleischmann, with the consent of the individual constables involved, based upon his twenty-three years of experience practicing in Federal Court, including the last six in the service of the United States District Court as a Special Master, and his eighteen years of

service as an Attorney Trial Referee for the Connecticut Superior Court. Mr. Fleischmann has a broad range of experience in federal civil rights claims, and has represented other municipalities in the defense of civil rights lawsuits, including the Town of Fairfield. He has also written extensively on federal practice and procedure matters for professional publications.

I trust that this memorandum answers the questions posed in the April 17, 2000 correspondence from Mssrs. Tarzia and Rubino, but if you need any additional information, please do not hesitate to call upon me.

Cc: Dannel P. Malloy, Mayor  
Board of Representatives

AJM:djp