

SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

449



FROM: County Counsel & Executive Office

SUBMITTAL DATE:
February 2, 2011

SUBJECT: Report on Repayment of Attorney Fees

RECOMMENDED MOTION: that the Board of Supervisors receives and files the attached report.

BACKGROUND: On January 11, 2011, Supervisor Benoit requested a report on the costs of the lawsuit brought by former District Attorney Rod Pacheco against the Board of Supervisors and whether there are any remedies to compel the repayment of these costs.

As explained in the attached report, the former District Attorney used state asset forfeiture funds to pay the costs of the lawsuit (\$104,683.33). Such funds are distributed at the request of the District Attorney for law enforcement related purposes. The lawsuit concerned the staffing of the District Attorney's Office and was arguably law enforcement related. Even though the former District Attorney did not comply with County contracting policies and procedures, Courts are reluctant to impose personal liability for repayment where the source of the funds is legislatively approved. If, however, a determination is made that the former District Attorney improperly expended state asset forfeiture funds and failed to exercise due care in the expenditure of such funds, the parties responsible for the expenditure and the contractor (Bingham and McCutchen) could be liable for repayment of the funds.

PAMELA J. WALLS, County Counsel

BILL LUNA, Executive Officer

FINANCIAL
DATA

Current F.Y. Total Cost: \$
Current F.Y. Net County Cost: \$
Annual Net County Cost: \$

In Current Year Budget:
Budget Adjustment:
For Fiscal Year:

SOURCE OF FUNDS:

Positions To Be Deleted Per A-30 ☐

Requires 4/5 Vote ☐

C.E.O. RECOMMENDATION:

APPROVE

BY:

Bill Luna

County Executive Office Signature

Consent ☐ Policy ☒

Consent ☐ Policy ☒

Dept's Recomm.:

Per Exec. Ofc.:

Prev. Agn. Ref.:

District:

Agenda Number:

3.47

REPORT REPAYMENT OF ATTORNEYS' FEES

Riverside County Counsel

January 31, 2011

On January 11, 2011, Supervisor Benoit asked County Counsel and the Executive Office to report back on the costs of the lawsuit brought by former District Attorney Rod Pacheco ("Pacheco") against the Board of Supervisors ("Board"). Supervisor Benoit also asked whether there are available remedies to compel the return of these costs.

Pacheco v. Board Lawsuit

Pacheco filed the lawsuit to compel the Board to process the hiring of ten Deputy District Attorney I positions and the demotion of two existing employees. Seven of the Deputy District Attorney I positions were frozen and unfunded, and one of the demotions was to a position unavailable in the District Attorney's budget. After filing the lawsuit, Pacheco submitted a new request to under fill the District Attorney I positions from vacant and funded District Attorney II and III positions in the District Attorney's budget and the demotion request was withdrawn. The County processed the new requests and the lawsuit was dismissed.

Attorneys' Fees

On December 1, 2010, Pacheco retained the law firm of Bingham and McCutchen "to have certain non-elected at-will employees of the District Attorney's office retained as permanent employees." (Bingham & McCutchen Engagement Letter, p. 1.) During the month of December, and until the case was dismissed on December 29, 2010, the firm was paid a total of \$110,000 at a rate of \$750 and \$625 per hour for two partners and \$400.00 per hour for an associate.¹ Under the direction of Assistant District Attorneys Kelly Keenan and William Mitchell, eleven separate payments were made, each in the amount of \$10,000. Approximately \$5,000 was returned to the District Attorney's Office as unearned fees.

State Asset Forfeiture Funds

The attorney fees were paid from state asset forfeiture funds. Such funds are awarded to the District Attorney's Office in connection with their processing of a forfeiture action (Health & Safety Code section 11489(b)(2)(B)²). The funds are deposited into a separate account maintained by the Auditor-Controller in accordance with section 11495(a) and is subject to appropriate accounting controls and annual financial audits of all deposits and expenditures (section 11469(h)). The funds are to be used for law enforcement (section 11469(a)) and shall be distributed to the District Attorney at his request (section 11295(a)).

¹ The County incurred no costs in defending this action. The law firm of Best, Best and Krieger (Cynthia Germano and Howard Gold) along with Ed Zappia, voluntarily and at no cost to the County, represented the Board in Pacheco's lawsuit. Had the County been billed for these services, the County would have incurred approximately \$50,000 in attorney fees (\$27,000 Best Best & Krieger [\$230 partners/\$185 associates per hour]; \$15,000 Ed Zappia [\$200 per hour]; and \$8,000 County Counsel [\$143 per hour]) for the defense of Pacheco's lawsuit.

² All statutory references are to the Health and Safety Code unless otherwise noted.

The Board of Supervisors, however, still retains budgetary authority over the District Attorney, including the authority to supervise the safekeeping, management or disbursement of public funds (section 25303) and can request an audit of state asset forfeiture funds (section 11495(b)). (78 Ops. Cal. Atty. Gen. 92 (1995).)

Contracting Policies and Procedures

Government Code section 23005 provides that the power to contract may be exercised only by the Board and its duly authorized agents and officers. Ordinance No. 459, section 3 prohibits a County officer or employee from engaging independent contractors to perform services for the County and its departments without a specific order of the Board or written authority of the County Purchasing Officer. The County's Purchasing Manual prohibits transactions entered into by a person not authorized to contract on behalf of the County, or who exceeds their delegated authority. Splitting of orders is prohibited. (Purchasing Manual sections 3.2, 3.2.1.)

County Counsel Conflict

In Pacheco's action against the Board, County Counsel represented the Board necessitating the former District Attorney to select independent counsel. The Board has an obligation and duty to pay the attorneys' fees of outside counsel selected by the District Attorney. (80 Ops. Atty. Gen. 127.) However, the Board has plenary authority over the County's budget, including expenses incurred by the District Attorney. The Board must be able to ensure that the District Attorney hires competent counsel at a rate that is appropriate for the type of expertise required. (*Id.*, Government Code sections 25003, 31000.) The Board may determine the appropriate fee structure for the employment of outside counsel selected by the District Attorney. (*Id.*)

Analysis

Pacheco was entitled to select independent counsel to prosecute his lawsuit, and the Board has an obligation to pay the attorneys' fees he incurred in that effort. Pacheco did not, however, follow the County's contracting procedures and policies when he hired Bingham and McCutchen. The Board did not approve the retention agreement with Bingham and McCutchen, nor did the District Attorney have delegated authority to enter into an agreement and incur over \$100,000 in attorneys' fees.

A public official who controls public funds may be held personally liable to repay improperly expended funds if he has failed to exercise due care in permitting the expenditure. (*Stevens v. Geduldig* (1986) 42 Cal.3d 24, 32.) In determining whether a public official failed to exercise "due care" in permitting the expenditure so as to be personally liable to repay such funds, relevant considerations include whether the expenditure's impropriety was obvious or not, whether the official was alerted to the possible invalidity of the expenditure, and whether he relied on legal advice or on the presumed validity of an existing legislative enactment or judicial decision in making the expenditure. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 227.) In addition, if a contractor obtains public money under an illegal contract, a right of action exists to recover

money paid to the contractor and the state is not stopped to deny the validity of such a contract even where it has received the benefit of full performance. (*Geduldig, supra.*, at p. 35.)

Courts, however, have been reluctant to find personal liability on the part of public officials or contractors to repay public monies. Despite the holding in *Geduldig*, the California Supreme Court ultimately determined in that case that neither the public officials nor the contractor were liable because the Governor transferred funds to cover the contracts from a proper source.

Conclusion

In light of this reluctance, and the fact that the attorneys' fees were paid from state asset forfeiture funds for a purpose that was arguably law enforcement related, it is unlikely that Pacheco or Bingham and McCutchen would be held personally liable to repay the attorneys' fees. If, however, a determination were made that Pacheco improperly expended state asset forfeiture funds and failed to exercise due care in the expenditure of such funds, Pacheco could be liable for repayment of the funds.