

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

FILED IN OFFICE
2014 DEC 10 PM 4:21

JOHN T. DARR, in his official
capacity as Sheriff of Muscogee County,

Plaintiff,

v.

COLUMBUS, GEORGIA, a city, a public
and body politic and a political subdivision
of the State of Georgia; TERESA P.
TOMLINSON, in her official capacity as
Mayor of Columbus, ISAAH HUGLEY,
in his official capacity as the City Manager
of Columbus, PAM HODGE, in her
official capacity as Finance Director of
Columbus, JERRY "POPS" BARNES, in
his official capacity as District 1
Councilor, GLENN DAVIS, in his official
capacity as District 2 Councilor, BRUCE
HUFF, in his official capacity as District
3 Councilor, EVELYN TURNER PUGH,
in her official capacity as District 4
Councilor, MIKE BAKER, in his official
capacity as District 5 Councilor, GARY
ALLEN, in his official capacity as District
6 Councilor, EVELYN "MIMI"
WOODSON, in her official capacity as
District 7 Councilor, JUDY THOMAS,
in her official capacity as District 9
Councilor, and BERRY "SKIP"
HENDERSON, in his official
capacity as District 10 at Large Councilor,

Defendants.

CIVIL ACTION

FILE NO. SU-14-CV-3437-94

M. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

**DEFENDANTS' RESPONSE TO PLAINTIFF DARR'S PETITION FOR
APPOINTMENT OF COUNSEL AND PAYMENT OF ATTORNEY'S FEES**

COME NOW Defendants in the above-styled action and files this Response to Plaintiff's Petition for Appointment of Counsel and for payment of Attorney's Fees, respectfully requesting the Court DENY said petition as set forth below, and in support thereof state as follows:

I. PRELIMINARY STATEMENT

Plaintiff Sheriff Darr has submitted a Petition for the Appointment of Counsel and for Attorney's Fees, requesting relief which is, in part, outside the scope of the jurisdiction of this Court. In response to Plaintiff Darr's request, it is important to note that the Defendants: 1) have previously agreed in writing to the Sheriff's desire for independent legal counsel in the face of the Sheriff's asserted conflict of interest with the City Attorney; and, 2) have further agreed in writing that the taxpayers will fund the Sheriff's prosecution of this litigation at the same rate at which it pays its own lawyers to defend it, or \$250 per hour. That should have ended any fee issue. However, in this Petition, Plaintiff Darr presses those moot points and, further, seeks to have this Court direct the specific account or fund from which the Sheriff's legal fees are to be paid. This would usurp the statutorily prescribed function of the "governing authority," here CCG, and has no basis under Georgia law. While the statutory law Plaintiff Darr cites provides that CCG must pay the Sheriff's legal fees, nowhere does that provision specify a particular fund or budget from which the payment should be made. Indeed, as is set forth below, Georgia law requires the subject attorney fees be paid from the Sheriff's budget, and from nowhere else, absent a legislative amendment, which the judiciary may not direct.

Accordingly, the Plaintiff's petition for fees is due to be **DENIED** as **MOOT** in that the only relief Plaintiff is entitled to under the law has been agreed to by Defendant CCG. A proposed **ORDER** is attached to the Defendant's response.

II. RESPONSE TO NUMBERED PARAGRAPHS

The Plaintiff's Petition for fees is not a pleading warranting paragraph-by-paragraph responses or counter-assertions of law or fact. Defendants object to the paragraphs 1-35 of Plaintiff's Petition for fees as they contain: 1) purported statements of law, incorrect recitations of law, legal argument or generalizations of law; 2) references to documents which speak for themselves; and/or 3) incorrect, non-specific, conclusory, or generalized statements of purported fact. Subject to those objections, Defendants refer the Court to their Verified Answer and Responses, which is being filed pursuant to the Georgia Civil Practice Act and Order of this Court, as well as each of the affirmative defenses and responsive paragraphs contained therein. To the extent not expressly addressed or referenced above, all allegations of the Plaintiff are hereby denied.

III. STATEMENT OF FACTS

On Monday, November 10, 2014, the Sheriff of Muscogee County, Georgia filed an action for extraordinary relief, asking the Court to "undo" CCG's \$263 million budget for Fiscal Year ("FY") 2015 budget enacted on June 17, 2014 and effective as of July 1, 2014, *ab initio*. The Sheriff further seeks to enjoin the Defendants to follow the law during the FY2016 budget process, which is only just underway and about which there has been no allegation of any violation of law.

The Sheriff's Mandamus Petition admits on its face a deliberative legislative budget process in which: the Sheriff submitted his requested \$26,853,716 budget to the Council (*See* Petition, ¶¶ 114, 127), and the Council considered that budget request in a series of budget meetings wherein the Sheriff was heard (*See* Petition, ¶¶ 134 and 135). The Council approved an annual operating budget for the Sheriff in the amount of \$27,653,956, some \$400,000 more

than the Sheriff's FY2014 annual operating budget. The Sheriff's allocated FY2015 budget comprises more than 10% of CCG's entire \$263 million budget, which funds some 50 departments, divisions, boards and offices.

The Sheriff's Mandamus Petition acknowledges that the CCG Council invited the Sheriff back at mid-Fiscal Year 2015 should he wish to request funds in addition to the \$27,653,956 approved for his annual budget. *See* Charter ¶ 7-404 ("The Council may make appropriations in addition to those contained in the current operating budget or capital budget, at any regular or special meeting called for such purpose"); *See also* **Exhibit A**, Ord. No. 14-25, § 2 ("[a]t mid-year FY2015, the Columbus Council may review the Muscogee County Sheriff's Operating Budget or such other operating budget as deemed appropriate.") Despite this clear and complete legislative remedy, the Sheriff continued with this litigation, to include the instant Petition for Fees.

On July 18, 2014, Sheriff Darr wrote to the CCG City Attorney Clifton Fay stating only: "I have a dispute with the Columbus Consolidated Government regarding their actions taken on the fiscal year 2015 budget." *See* **Exhibit B**, Darr Correspondence, July 17, 2014. On July 23, 2014, the City Attorney responded that the letter did not create a basis of a conflict. *See* **Exhibit C**, Fay Correspondence, July 23, 2014("the fact that you assert that you 'have a dispute' with this appropriation does not, in my view, create a conflict of interest entitling you to individual legal counsel pursuant to O.C.G.A. §45-9-21(e).").

On July 29, 2014, Plaintiff's Counsel sent correspondence directly to individuals known by them to be represented by legal counsel stating, "[p]ursuant to O.C.G.A. §45-9-21(e), this letter shall constitute Sheriff Darr's legal notice and request to the local governing authority to voluntarily agree to provide separate legal counsel to the Sheriff to represent him in this dispute."

See **Exhibit D**, Walker, Hulbert Correspondence, July 29, 2014. Though the threatened legal claim was defective in many particulars, counsel's correspondence goes on to describe their alleged basis for a conflict of interest between the Sheriff and the City Attorney. Id.

On July 30, 2014, City Attorney Clifton Fay responded: 1) requesting a meeting or informal mediation; 2) accepting Walker, Hulbert as independent counsel for Plaintiff; and 3) agreeing to pay Plaintiff's said counsel \$250 per hour "for the purpose of attending such meeting or informal mediation and for the purpose of reviewing public documents requested by you in order to analyze any claim of the Sheriff." See **Exhibit E**, Fay Correspondence, July 30, 2014.

On August 19, 2014, having heard nothing from Darr's independent legal counsel, Defendants again notified Sheriff Darr's counsel that they had the authority to be counsel for Sheriff Darr under O.C.G.A. §45-9-21(e):

On July 30, 2014, City Attorney Clifton Fay responded to your correspondence offering to meet and discuss the issues you raised. In his letter, the City Attorney included authorization for payment for your fees to review documents and to meet in order to informally mediate the Sheriff's purported budget issues. This offer was made to you in order to avoid the unnecessary expense of litigation to the taxpayers of Columbus, as well as to demonstrate to you and the Sheriff the weakness of his claims of inadequate funding. No response has been made to this offer, and you have requested no further documents or investigation.

Because you have taken the position that the Sheriff's desire for a higher budget has placed the City Attorney in conflict with his representation of the Sheriff, the City grants the Sheriff the authority to retain you as counsel in order to avoid litigation on that issue. Therefore, in accordance with the pay structure and limitations of payments regularly made by the City Attorney's office, the Sheriff may retain you at a rate not to exceed \$250.00 per hour on any litigation he chooses to initiate over his budget, subject to any limitations allowed by law.

See **Exhibit F**, Hatcher Stubbs Correspondence, August 19, 2014 (emphases added).

On August 21, 2014, Plaintiff's Counsel responded, stating: "[W]e will not file the Petition for Appointment of Legal Counsel if you will confirm that the rate of \$250.00 per hour is the rate you are being paid as outside counsel for the City in this matter, as well." See **Exhibit**

G, Walker, Hulbert Correspondence, August 21, 2014 (emphasis added). The \$250 hourly rate for all counsel was confirmed with Plaintiff's counsel via telephone.

On September 9, 2014, Plaintiff's legal counsel, consisting of two law firms – Walker, Hulbert and W. Kerry Howell, LLC – submitted legal bills direct to Defendants' legal counsel for payment. In response, Defendants' Counsel wrote to each law firm:

We are in receipt of your bill submission. Please note that you and your firm are a vendor of the Sheriff's Office and not the city. Only the Sheriff can review and approve your bills. Obviously, as adverse Counsel and an adverse party (your client having so declared), we cannot review the validity or appropriateness of your fees. I am returning your invoices to you and you should submit your invoices to Sheriff Darr for his review and approval. He may enter them for processing into the Columbus Finance Department payment system.

See **Exhibit H**, Hatcher Stubbs Correspondence, September 9, 2014.¹ To ensure that Plaintiff's Counsel understood the generally accepted bookkeeping and accounting practices required of a municipal invoice review and payment process, Defendants' Counsel responded more particularly:

We are in receipt of your letter from last week regarding the payment of your Firm's invoice, which was submitted directly to me. We wanted to make sure that you knew that my initial response was made pursuant to the established systems of the City which ensure general accounting principles are followed in the recording of revenues, accounts payable, payroll, capital assets and others, including attorneys' fees. These policies apply to all Columbus Consolidated Government elected officials departments, divisions and agencies. You may not have previously known the process, but the City takes these procedures seriously, as it has received the Certificate of Achievement for Excellence in Financial Reporting from the Government Finance Officers Association for the last twenty-two years. Aside from its internal reviews and audits, the City is also required to keep its systems and rules in place for the external auditors, who are also governed by similar auditing principles. In asking you to submit to this invoice payment process, we are trying to ensure all governmental accounting standards and generally accepted accounting principles are followed. The City procedures

¹ Plaintiff's Petition for fees contains an "Exhibit H", which curiously redacts the letter's final paragraph regarding the Sheriff's unorthodox behavior. While it is not the Defendants' object to send this Court down a non-pertinent path, Defendants do attach as **Exhibit J** an unredacted version of Walker, Hulbert's September 10, 2014 correspondence.

require that your Firm submit an invoice for approval to the official contracting the services, in this case the Sheriff, for his approval. Once that invoice is approved, the Sheriff may place the invoice into the system for payment.

See **Exhibit I**, Hatcher Stubbs correspondence, September 16, 2014 (emphasis added); See also O.C.G.A. §36-81-3, and discussion *infra*.

Essentially, the Defendants have accepted the Sheriff's request for independent legal counsel and accepted the rate at which it pays its own counsel. Accordingly, O.C.G.A. §45-9-21(e)(2) does not apply to the instant motion, to-wit: "This subsection shall not apply unless the governing authority of the county has first denied a written request by the county officer for counsel."

Defendants, including the "governing authority" of CCG, stand ready and willing to pay the Sheriff's legal bills/invoices related to this action, upon approval by the Sheriff and entry by the Sheriff into the Columbus, Georgia Finance Department payment system. Plaintiff has chosen to litigate this moot point to improperly direct and, thereby, control the accounts and budgeted funds of Defendant CCG in a manner not allowed by Georgia law.

IV. ARGUMENT AND CITATION OF AUTHORITIES

The Sheriff is a constitutional officer and is not a subdivision or agent of the county. See Bd. of Comm'rs of Dougherty County v. Saba, 278 Ga. 176, 177 (2004)(citing 1983 Ga. Const., Art. IX, § I, Par. III(a)); and Bd. Comm'rs of Randolph County v. Wilson, 260 Ga. 482 (1990). The Sheriff's duties and powers are set by state law and cannot be impeded by the county government. See Wilson, *supra*, 260 Ga. at 482; See also O.C.G.A. § 15-16-10(a)(listing statutory duties of sheriff).

Nonetheless, as a county officer, the sheriff's budget and accounts are subject to the authority of the county commission, which can amend or change estimates of required expenditures presented by the county officer.

Saba, *supra*, 278 Ga. at 177; *See also id.* (citing Chaffin v. Calhoun, 262 Ga. 202 (1992)(affirming county commissioners' 47% reduction in the sheriff's budget and holding that commissioners do not have to approve the budget that a sheriff proposes)); *See also* Wilson, *supra*, 260 Ga. at 483 ("sheriff's budget and accounts are subject to the authority of the commission")(citing O.C.G.A. § 36-5-22.1 (governing authority oversees and settles county funds assigned to officers for its use and benefit)).

Once appropriated, the Sheriff may expend his budget to fulfill his enumerated constitutional duties as defined by State law. *See* Saba, *supra*, 260 Ga. at 178; *but see* Jennings v. McIntosh County Bd. of Comm'rs, 276 Ga. 842, 845 (2003)("this Court made plain that even though the elected official has the discretion to expend money designated in the budget, the expenditure must be 'within the sphere of [the officer's] legally delegated powers.'")(brackets in original).

Non-constitutional elected officials must pay out of their personal pockets for "private counsel" fees incurred in litigation against the county until such time as they are successful in the pursuit of that litigation. *See* Gwinnet County v. Yates, 265 Ga. 504, 508 (1995)(county official pays for "private counsel" under judicially-created method of fee assessment, unless and until official is successful in litigation and a court orders county to pay fees), and Boswell v. Bramlett, 274 Ga. 50, 52-53 (2001)(same).

However, state statutory law provides that the Sheriff, as a constitutional officer, has a right to independent legal counsel at county taxpayer expense in instances where his official legal interests are in conflict with that of the county, regardless of his success on the merits. *See*