Answer by letter-Craft

September 29, 1969

OPINION LETTER NO. 349

Honorable Melvin Vogelsmeier
State Representative, District 109
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Vogelsmeier:

This letter is in response to your request which reads as follows:

> "1. Whether or not a mayor may charge his legal expenses to the city in defending an impeachment action brought by the city counsel against such a mayor of a fourth class city?
>
> "2. Whether or not the counselmen, collectively or individually, may be held liable for slandering the mayor by making false accusations in an impeachment charged if the mayor be exonerated?"

Question No. 1.

Section 79.230, RSMo 1959, provides as follows:

> ". . . if deemed for the best interest of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, . . ."

On August 15, 1969, by letter, this statute was called to your attention and we asked whether the terms of this statute would be followed by the mayor in retaining his attorney. Since we have not heard from you, we assume that the legal expenses incurred by the mayor would not be incurred pursuant to a properly passed ordinance.

In Dearmont v. Mound City, 278 S.W.2d 802 (K.C.Mo.App. 1925) the court held that the employment of an attorney was not proper unless an ordinance was passed as provided by law authorizing the employment. See also Dougherty v. City of Excelsior Springs, 85 S.W. 112 (K.C.Mo.App. 1904). Therefore, it is our conclusion that the mayor could not in any event charge his legal expense to the city in the absence of an ordinance providing for employment of special counsel.

Question No. 2

Section 79.240, RSMo 1959, provides in part:

> "Any elective officer, including the mayor, may in like manner, for cause shown, be removed from office by a two-thirds vote of all members elected to the board of aldermen, independently of the mayor's approval or recommendation. . . ."

Where a person participates in a judicial or quasi-judicial proceeding he is absolutely privileged to make libelous charges Pulliam v. Bond, 406 S.W.2d 635 (Mo. 1966). The court in this case denied the privilege because the court concluded that the facts did not bring that case within the "'. . . narrow limits . . . in which the public service or the administration of justice requires complete immunity from being called to account for language used.' . . ." l. c. 640.

The court further stated:

> ". . . The classic examples of the application of an absolute privilege are the proceedings of legislative bodies, judicial proceedings, and communications by military and naval officers. . . ."

Since removal of a mayor by a two-thirds vote of all the members of the board of aldermen is provided for by law (Section 79.240, supra), it is our conclusion that in such a proceeding statements made by an alderman are privileged.

In the Pulliam case, the court quoted with approval the granting of an absolute privilege in two cases which appeared to involve ". . . persons acting directly in quasi judicial capacities under legislative authority." l. c. 640.

This question is exhaustively discussed in Laun v. Union Electric Company of Missouri, 166 S.W.2d 1065 (Mo. 1942). The court characterized the defense of absolute privilege in this area as follows:

> "'. . . the necessity, in the public interest, of a free and full disclosure of facts in the conduct of the legislative, executive and judicial departments of the government.'" l.c. 1071

In Callahan v. Ingram, 26 S.W. 1020 (Mo. 1894) a member of a city council, while the council was in session, described the plaintiff as a "downright thief." In determining whether the councilman was privileged, the court stated:

> ". . . There can be no doubt, on proper occasion, members of the city council would be protected from 'responsibility for whatever is said by them, which is pertinent to any inquiry pending or proposed before them,' but no further. They would become 'accountable when they wander from the subject in hand to assail others.' . . ." l. c. 1022

The court went on to say:

> ". . . when the objectionable words were spoken there was no inquiry pending or proposed before that house of the council, which would make the occasion one of privilege, beyond that which is accorded to every citizen. . . . Whether the occasion is such as to make the communication one of privilege is always a question of law for the court, where there is no dispute as to the circumstances under which it was made, . . ." l.c. 1022

See also 53 C.J.S., Libel and Slander, Section 103.

A removal proceeding conducted pursuant to Section 79.240, RSMo 1959, is an inquiry pending before the council and statements made pertinent thereto would in our opinion, be a proper occasion to grant the privilege.

Although a removal proceeding by a city board of aldermen is not a judicial proceeding in the usual sense nor a legislative proceeding since the council is not acting as a legislative body, it is our opinion that a removal proceeding deserves the protection afforded governmental bodies in attempting to obtain a frank disclosure of facts with regard to the public welfare.

Therefore, it is our conclusion that the councilmen are absolutely privileged in making accusations against a mayor at a removal

proceeding and this privilege does not depend upon the ultimate outcome of the removal proceeding.

Yours very truly,

JOHN C. DANFORTH
Attorney General