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# STATE OF MAINE

Inter-Departmental Memorandum Date August 13, 1974

To William R. Adams, Commissioner

Dept. Environmental Protection

From Jon A. Lund, Attorney General

Dept. Attorney General

Subject Reimbursement for Legal Fees Expended Defending Employees from Civil Suits

Your memorandum of June 10, 1974, posed the following question: May Department of Environmental Protection funds be used to reimburse the legal expenses of Department employees defending civil actions arising out of the performance of their duties in cases where:

1. The Attorney General has been given the opportunity to represent the employee in the civil action and has chosen not to do so, and
2. The employee is ultimately successful in defending the civil action.

Alternatively, you ask if Department funds could be used to purchase insurance for employees who may be subject to such civil actions.

Answer. Department of Environmental Protection funds may be used to reimburse actual legal expenses of Department employees who are ultimately successful defending civil suits meeting the above-mentioned criteria. Department of Environmental Protection funds may not be used to purchase legal defense insurance.

Discussion. Any discussion of the appropriateness of use of state funds for payment of particular expenses must begin with two premises:

1. "The right of a public official, employee, or private citizen, to reimbursement for expenses incurred in the performance of an official duty must be found in a constitutional or statutory provision conferring such right directly or by necessary implication," State v. Sims, 115 S.E. 2d 140 (W. Va., 1960); 81 C.J.S., States, § 128, and
2. "Statutes relating to the fees and compensation of public officers must be strictly construed in favor of the government," State v. Ferguson, 80 N.E. 2d 118 (Ohio, 1948).

Despite these limitations, however, a long line of cases in Maine and elsewhere have held that where a public employee is performing a legitimate public function, and he is properly authorized to do so, he may be indemnified when he incurs liability for legal defense or other matters resulting from bona fide discharge of his duties, Wagh v. Prince, 121 Me. 67 (1921); Bancroft v. The Inhabitants of Lynnfield, 18 Pick. 566 (Mass., 1836); Hotchkiss v. Plunkett, 22 A. 535 (Conn., 1891); Martland v. Town of Thompson, 27 A. 2d 160 (Conn., 1942); Cobb v. City of Cape May, 274 A. 2d 622 (N.J., 1971); State v. Council of Hammonton, 30 N.J.L. 430 (1876); Cullen v. Town of Carthage, 103 Ind. 196 (1885). The last two cases cited both include detailed discussions of the common law indemnity grounds upon which such payments

are allowed. In Waugh and Hotchkiss the Court disallowed payment in the specific case while recognizing the general principal. Two of the above cases, Cullen and Bancroft indicated that indemnity payments might be made for legal defense even if "the result may show that the officers have exceeded their legal authority," Cullen, supra, 198.

The above cases are not "all fours" precedent for the proposed actions as they involve payments by municipalities which were approved by the municipal legislative body. In none of the above cases was there a specific statutory authorization for the particular expense. Nevertheless, all determined that justification for the payment derived from the general statutory duties assigned the particular person being indemnified.

A similar construction has been placed on a state statute authorizing county officials to perform their duties. In O'Donnell v. Board of Chosen Freehold of Morris Co., 158 A. 2d 1 (1960) the court held that:

"In the absence of an express prohibition or limitation, the enabling statutes from which a governing body derives its general powers authorizes the payment of proper expenses incurred by its officials."

Municipalities, counties and state agencies are much alike in that they can only perform such functions as are authorized by state constitution or statute. Thus, if municipalities possess derivative powers to pay legal defense or other legitimate expenses of their employees, state agencies, deriving power from the same source, must possess similar derivative powers. This is particularly so when one recognizes that delegation of authority to a state agency includes those powers and duties necessary and incident to fulfilling that authority, City of Rockland v. Camden and Rockland Water Co., 134 Me. 95 (1935).

A New York Court has implied that a state may be not only empowered to grant indemnity for legal expenses, but liable if it does not. Acting under a claims against the state statute, the New York Court of Claims, rejecting a state police officer's claim for legal expenses for private counsel chosen despite the Attorney General's offer of assistance, noted that:

"This case differs somewhat from the case where the Attorney General refuses an application to furnish counsel free from expense to the claimant." Spellicy v. State, 29 N.Y.S. 2d 824 (1941), motion den., 29 N.Y.S. 2d 813, app. dismissed, 55 N.Y.S.2d 392.

The implication of such a statement is that under different circumstances the officer would have been entitled to indemnification.

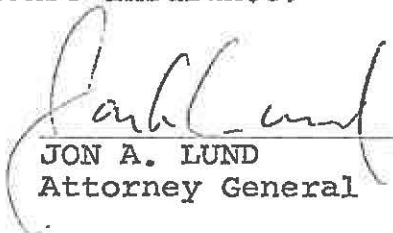
The responsibilities of the Department of Environmental Protection include administration and enforcement of numerous regulatory laws included in Title 12, Title 30 and Title 38 of the Maine Revised Statutes. Department employees, in enforcing these statutes, may face a situation where they could be subject to civil suits for damages as indicated in Item 3 of the proposed Policy Statement attached to your letter to Maurice F. Williams. The prospect of such suits destroying law enforcement programs has been fully recognized in the past.

"If it should be understood that the marshall of the town is left without support from the governing body to defend himself against all manner of suits that might be instituted against him, the vicious and violent might, by a succession of annoying suits against him greatly cripple the enforcement of the ordinances." Cullen v. Town of Carthage, 103 Ind. 196, 200 (1885); see also Cobb v. City of Cape May, 274 A. 2d 622, 625 (N.J., 1971).

Thus, the availability of legal defense, or reimbursement for legal expenses is an essential element of any enforcement program, and inferentially authorized by a statute directing employees to enforce specific laws.

It is, therefore, the informal opinion of the Department of Attorney General that payment of such expenses to actually reimburse employees for legal expenses reasonably incurred in the successful defense of civil suits arising out of the employee's official conduct is permissible. Such indemnification may be made by the Department when requested by employees where (1) the employee has given the Attorney General the opportunity to defend the suit, (2) the Attorney General has declined to do so, and (3) the employee is successful in defense of the suit. The request for defense and the response of the Attorney General should be made in writing to avoid any later disagreements as to the nature of the request or the Attorney General's response.

Insurance raises a different problem, however. With insurance available, state employees might not request the Attorney General to defend suits. Also insurance might result in some state funds being used, directly or indirectly, for defense of cases when employees had acted outside their authority. Therefore, state funds should not be used to purchase legal defense insurance.

  
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JON A. LUND  
Attorney General