

MAINE STATE LEGISLATURE

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October 16, 1975

H. Sawin Millett, Jr., Commissioner

Educational & Cultural Services

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Attorney General

Liability Insurance

SYLLABUS:

As a general rule, State officers and employees are not personally liable for damages resulting from their official acts, so long as they are acting in good faith, legally, and within the scope of their authority. If, however, such officer or employee is adjudged personally liable for damages, reimbursement by the State would be within the discretion of the Legislature. State funds should not be used to purchase liability or indemnification insurance for state officers and employees unless such expenditure is legislatively approved.

FACTS:

Members of the State Board of Education have been individually named as parties defendant in pending litigation. They have expressed concern about the possibility of being found personally liable for any damages which might be awarded to plaintiffs in these suits.

QUESTIONS, ANSWERS AND DISCUSSION:

(1) "Is it currently the policy of the State that State employees and members of quasi-state boards and commissions are protected by a governmental immunity doctrine which protects them from being held individually liable for damages while they are acting in their official capacity(s)?"

The answer to this question is generally affirmative. The State Board of Education is organized by statute (20 M.R.S.A. § 1) and its members are appointed by the Governor with the advice and consent of the Council (20 M.R.S.A. § 51). Members of the Board are, therefore, State officers. As a general rule of law "Any public officer carrying on a governmental function is protected from civil suit by the immunity of the State, provided always that his actions are consistent with the duty which is placed upon him, and he does not misuse his office." Atty. Gen. Rep. 1951-54, p. 307.

The concept of immunity from liability for State officers was succinctly set forth in Hjorth v. Whittenburg, 241 P.2d 907 (Utah, 1952), quoting from Gresty v. Darby, 68 P.2d 649 (Kan.), as follows:

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"It is the general rule of law that state or municipal officials, performing the duties imposed upon them by statutes . . . and exercising in good faith the judgment and discretion necessary therefor, are not liable personally in damages for injuries to private individuals resulting as a consequence of their official acts." (at 909).

Other decisions have held that there is no personal liability in the absence of "fraud or malice" [Hester v. Miller, 78 A.2d 322 (N.J., 1951)], or unless the act was "outside the scope of authority" or was so negligently performed as to "take the actor outside of the protection of employment" [Sayers v. Bullar, 22 S.E.2d 9 (Va., 1942)]. See also - 81 C.J.S., States, § 84.

One basis for the general rule of law just stated, is that a State official acting within the scope of his authority is acting for the State, and, therefore, a suit challenging such act is really a suit against the State. Atty. Gen. Rep. 1951-54, p. 307. Another basis is one of public policy to avoid a situation where officers would be hesitant to properly perform official acts for fear of incurring personal liability thereby. Hjorth v. Whittenburg, supra. Whatever the basis for the rule, it should be noted that not all acts performed by a State officer would be covered. Acts which are performed outside of the official's scope of authority, which constitute a misuse of office, which are done in bad faith or which are performed with culpable negligence, would expose the official to possible personal liability for resultant damages, despite the fact that they are ostensibly "official" acts. An official acting in this manner would not be acting for the State and would not be performing his duties in a manner which public policy would seek to protect. See generally § 81 C.J.S., States, §§ 84 and 218.

An ancillary matter is the personal liability of State officers and employees who are sued under Federal Civil Rights statutes, specifically 42 U.S.C. § 1983. This section imposes personal liability on "every person" who deprives another of his civil rights under color of "any statute, ordinance, regulation, custom or usage." Despite the all-inclusive language of the statute, it has been held that governmental immunity may remain in certain fact situations. Westberry v. Fisher, 309 F. Supp. 12 (D.C. Me., 1970). In the Westberry case, the Court did not set the limits for the remaining immunity, but did state that in the circumstances of that case, where "The record is utterly devoid of any proof of abuse or discretionary authority, malice or ill-will on the part of any of [the] defendants.", the State officers should not be denied governmental immunity from liability. Supra, at 17.

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(2) "If the answer to question #1 is yes, would your office argue this doctrine in providing legal arguments in defense of the members of the State Board of Education?"

Assuming that the Attorney General appeared for members of the State Board of Education in a civil action where their "official acts and doings" were called in question [5 M.R.S.A. § 191], the general rule of law set forth above could be used in formulating their defense. The decision of this office as to whether it would be used would depend upon the nature and facts of the specific case.

(3) "If judgment were rendered against individual members of the Board, what would be the State's position in terms of the individual's obligation to personally make payment of such damages?"

In the event that a final judgment was rendered by a court against individual members of the Board, which awarded damages to the plaintiff, the members would be personally obligated to pay such damages. If payment was not made, the successful plaintiff could invoke the collection procedures provided by statute to enforce the judgment, just as he could in any case not involving State officials.

However, the essence of the question is whether the State official could expect reimbursement from the State, either prospective or retrospective, for the court judgment he is obliged to satisfy. The answer to the question is that a decision to make such reimbursement would depend upon the will of the Legislature. In light of the answer to question (1) above, a decision that a State officer is personally liable for damages resulting from his action would imply that his act was in some way outside of his scope of authority or was an abuse of that authority. In the absence of a general reimbursement or indemnification statute, it would then be for the Legislature to decide whether the particular circumstances of the case create such public sympathy that reimbursement should be made.

(4) "Would it be a proper expenditure of State (or federal) monies to purchase liability or indemnification insurance to protect the members of the Board from the ultimate possibility of personal payment of damages described in question #3?"

This office has previously stated that State funds should not be used to purchase legal defense insurance because, among other things, such insurance ". . . might result in some state funds being used, directly or indirectly for defense of cases when employees had acted outside their authority." Opinion of the Attorney General dated August 13, 1974. The same rationale applies, with even more force, to

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liability or indemnification insurance since the event being insured against is a judicial decision which implies that the officer has acted outside of the scope of his authority or has abused his authority, as explained in question (3). Therefore, it is our opinion that State funds should not be used to purchase such insurance, unless the Legislature decides to do so. The Legislature, of course, may decide that it is in the State's best interest to purchase such insurance, just as it might decide to indemnify the officer directly with State funds.

We cannot answer the question of whether Federal funds may be used for the stated purpose. The answer might depend upon what these funds were, and the question would be more appropriately answered by the proper Federal authority.

S. KIRK STUDSTRUP
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