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CORRESPONDENCE MEMORANDUM

DATE: December 15, 2006

TO: Members of the Employee Trust Funds, Group Insurance, Teachers Retirement, Wisconsin Retirement and Deferred Compensation Boards

FROM: Robert Weber, DETF Chief Counsel

SUBJECT: Attorney General opinion (OAG-2-06) on Board member liability

On October 30, the Attorney General issued an opinion requested by Eric Stanchfield and David Mills on behalf of the Investment Board, Employee Trust Funds Board and the boards attached to the Department of Employee Trust Funds. In her opinion, a copy of which is attached, Attorney General Lautenschlager states that Board members are state officers and public employees for purposes of Wis. STAT. §§ 893.82 and 895.46, and therefore are entitled to:

- **Time limit for asserting claims against them.** Any claim against a Board member must be asserted by written notice to the Attorney General within 120 days of the event causing the damage, or the claim is barred. This notice requirement and time limit, however, would not apply in a federal civil action.
- **Legal representation.** The state will defend a Board member sued for acts committed while carrying out Board duties. Generally, this representation will be provided by the Attorney General. If the Board member refuses the state's offer of legal counsel and hires outside counsel of his or her own choice, then the Board member is **not** entitled to reimbursement for the expenses and costs of that representation.
- **Limitation on damage awards.** The maximum amount that can be recovered by any person is \$250,000. No punitive damages are recoverable. This damage limit, however, would not apply in a federal civil action.
- **Indemnification for damages.** The state will pay any "excess damages" awarded in proceedings against a Board member who is sued in his or her official capacity or for acts committed while carrying out Board duties and the court or jury finds that the Board member was acting within the scope of employment. Excess damages are those that exceed any applicable insurance coverage of the Board member.

Reviewed 6/1/18 by the Office of
Legal Services

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The Attorney General also responded to several questions about circumstances under which a Board member might not be entitled to have the state pay the damage award.

Jury or court finding that Board member was not acting within scope of employment?

In theory, if there was a finding that the Board member acted outside the scope of employment, then the Attorney General could seek reimbursement for fees and costs expended in representing the Board member. In practice, the Attorney General said this situation is unlikely to arise, because the Attorney General makes a determination as to scope early in the defense and would have to demonstrate a significant change in circumstances to justify a suit for reimbursement.

Board member found to have breached fiduciary duty?

Indemnification also applies to at least some breach of fiduciary duty cases, because there is no express statutory exception prohibiting indemnification for breach of fiduciary duty specifically and because not every breach of fiduciary duty is outside the scope of employment. However, the Attorney General notes the possibility that the circumstances of a particular breach might place a Board member outside the scope of his or her employment, and therefore not entitled to indemnification.

Federal lawsuits and criminal prosecutions?

Indemnification also applies to settlements or judgments in civil enforcement actions brought by the federal government. However, it may not apply in state or federal criminal actions. The Legislature has expressly extended the indemnification provision to certain state and federal criminal prosecutions, but only those under specified statutes brought against state employees and officials because of acts committed in the storage, transportation, treatment or disposal of hazardous substances. No other crimes are listed.

2006 WL 4737913 (Wis.A.G.)

Office of the Attorney General

State of Wisconsin
OAG 2-06, 1
October 30, 2006

OAG 2-06, 7

CAPTION:

*1 Individual members of the State of Wisconsin Investment Board and of the Employee Benefits Boards are entitled to damage limitations, notice of claim, indemnity, and legal representation for actions taken within the scope of their board duties because they are state officers.

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David C. Mills
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Dear Secretary Stanchfield and Director Mills:

OAG 2-06, 1

You have asked for my opinion as to whether members of the State of Wisconsin Investment Board (SWIB) and of the Employee Trust Fund Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board and the Deferred Compensation Board (collectively the “Employee Benefits Boards”) are (a) subject to the limitations on damages set forth in [Wis. Stat. § 893.82](#) and (b) entitled to the state’s indemnification for liability pursuant to [Wis. Stat. § 895.46](#).

OAG 2-06, 1

In my opinion, individual members of SWIB and the Employee Benefits Boards are entitled to damage limitations, notice of claim, indemnity, and legal representation for actions taken within the scope of their board duties because they are state officers. I also respond to your specific questions below.

Statutes Applicable

OAG 2-06, 1

893.82 Claims against state employees; notice of claim; limitation of damages. ... (3) Except as provided in sub. (5m) [medical malpractice], no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties, ... unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim

...

OAG 2-06, 2

(6) The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employee or agent ..., including any such action or proceeding based on contribution or indemnification, shall not exceed \$250,000. No punitive damages may be allowed or recoverable in any such action.

OAG 2-06, 2

895.46 State and political subdivisions thereof to pay judgments taken against officers. (1) (a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting in the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment

Discussion

OAG 2-06, 2

*2 The statutes cited above operate *in pari materia* as a complementary whole. 81 Op. Att'y Gen. 17, 19 (1993). If members of SWIB and the Employee Benefits Boards are "state officers" - a subclass of "public officers" - within the meaning of [Wis. Stat. § 895.46\(1\)\(a\)](#), they are entitled to notice of claims and damage limitations under [Wis. Stat. § 893.82\(3\) and \(6\)](#). 81 Op. Att'y Gen. at 18-19. The essential characteristics of a public officer are that an officer exercises some portion of the sovereign power of the state by law, [Burton v. State Appeal Board](#), 38 Wis. 2d 294, 300-01, 156 N.W.2d 386 (1968), and that an officer is not subordinate to any authority other than that of the law. [Martin v. Smith](#), 239 Wis. 314, 332, 1 N.W.2d 163 (1941). *See also* 81 Op. Att'y Gen. at 19-20, and *Black's Law Dictionary* 1115, 1117 (8th ed. 2004), defining "office" and "officer." Longstanding and uninterrupted interpretation of Wisconsin law has accorded members of state boards the status of "state officer" even though they are traditionally uncompensated for their service. 81 Op. Att'y Gen. at 19.

OAG 2-06, 2-3

SWIB is created by [Wis. Stat. § 15.76](#). When the board is constituted, its members exercise the legislatively-delegated powers and duties described in [Wis. Stats. §§ 25.01 through 25.187](#), subordinate only to the authority of law. SWIB's members are therefore state officers. In [Bahr v. State Inv. Board](#), 186 Wis. 2d 379, 521 N.W.2d 152 (Ct. App. 1994), the Wisconsin Court of Appeals held that SWIB was an "independent going concern" not protected by state sovereign immunity because the state had waived SWIB's sovereign immunity by granting it independent status with broad and independent proprietary powers. *See*

Bahr, 186 Wis. 2d 394. That decision, however, did not alter plaintiff Bahr's status as a state employee, and the chief holding of the decision was that Bahr retained his state employee civil service rights notwithstanding the Legislature's attempt to alter his status by statute. As such, Bahr cannot be read to alter SWIB members' status as state officers.

OAG 2-06, 3

The Public Employee Trust Fund is created by [Wis. Stat. § 40.01](#). When the Employee Benefits Boards are constituted, the members of each board exercise the powers legislatively delegated to them in [Wis. Stat. § 40.03](#). In exercising those powers and duties, the members of each board are subordinate only to the authority of law. The members of the Employee Benefits Boards are therefore state officers. I am unaware of any limitations on the Employee Benefits Boards' sovereign immunity.

OAG 2-06, 3

The members of SWIB and the Employee Benefits Boards are also required to comply with the Code of Ethics for State Public Officials. [Wis. Stats. §§ 15.07\(1\), 15.16\(1\), 15.76\(3\), 19.42\(13\) and \(14\)](#). As they are required to comply with the state code of ethics when performing acts in the course of their board duties, it follows that they are also entitled to state protections as state officers.

OAG 2-06, 3

*3 It must be noted that [Wis. Stat. § 895.46](#) is an excess indemnity statute. That is to say that the State of Wisconsin provides for indemnification of employees, officers, and agents for judgments "in excess of any insurance applicable." Some board members may be covered by separate insurance. For example, one SWIB member must be a non-elected, representative of local government, [Wis. Stat. § 15.76\(1r\)](#), and it is probable that individual's liability would first be covered by the insurance coverage maintained by his or her employer.

OAG 2-06, 3

You have expressed a concern that [Wis. Stats. §§ 895.46 and 893.82](#) specify indemnity coverage for certain boards of the state, but that neither lists SWIB or the Employee Benefits Boards. I assume that you are concerned because a principle of statutory construction holds that the express mention of one matter excludes other similar matters (*expressio unius est exclusio alterius*). See *C.A.K. v. State*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990). I do not share that concern in this instance. The principle applies only where there is some evidence that the Legislature intended it to apply. See, e.g., *State v. James P.*, 2005 WI 80, ¶ 26, 281 Wis. 2d 685, 698 N.W.2d 95.

OAG 2-06, 3-4

[Section 895.46](#) clearly indemnifies "public officers or employee[s]" acting in the scope of their duties. In neither [§ Wis. Stat. 895.46](#) nor [§ 893.82](#) is there an indication that the Legislature intended to provide an exclusive and exhaustive list by listing some examples. In subsections (4), (5), and (8) the statute states that it "applies" to various persons or entities, but these appear to be individuals or groups that may not traditionally or under agency principles be considered to be state officers or employees such as certain volunteer health care providers or members of the board of governors on health care liability risk-sharing plans thus rendering it necessary that they be specifically included within the statutory protection. To construe the statute so as to exclude liability coverage for any state officer, employee or agent not specifically mentioned would lead to absurd results leaving virtually all state officers or employees without indemnification. Statutes are to be construed to avoid such absurdities. See *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 376-77, 597 N.W.2d 687 (1999). This conclusion would also apply to an analysis of [Wis. Stat. § 893.82](#).

OAG 2-06, 4

Additionally, and as you have noted in your opinion request, my predecessors have previously opined that members of certain other public boards not expressly mentioned in the statutes are nevertheless covered by the statutory indemnification. *See*, 81 Op. Att’y Gen. 17 (1993) (State Emergency Response Board); 74 Op. Att’y Gen. 54 (1985) (Board of Curators of the Wisconsin Historical Society); and OAG 36-82 (unpublished opinions) (Higher Educational Arts Board). My opinion here is consistent with that rendered by my predecessors.

Responses to Specific Questions

OAG 2-06, 4

*4 I turn now to the specific questions you have set forth in your opinion request.

OAG 2-06, 4

1. Is each Member of the Investment Board, the Employee Trust Funds Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board, and the Deferred Compensation Board a “state officer” who is entitled to the limitation on liability provided by [Wis. Stat. § 893.82\(6\)](#)?

OAG 2-06, 4

Answer: Yes. Assuming that the member in question is sued in his or her official capacity or for an act undertaken in the scope of his or her Board membership, each member is entitled to the limitation on liability provided by [Wis. Stat. § 893.82\(6\)](#).

OAG 2-06.4

2. Is each Member of the Investment Board, the Employee Trust Funds Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board, and the Deferred Compensation Board a “public officer” who is entitled to the benefits provided by [Wis. Stat. § 895.46](#)?

OAG 2-06, 4

Answer: Yes.

OAG 2-06, 4-5

3. If a Member is a “public officer,” as referred to in [Wis. Stat. § 895.46](#), does the indemnity include a Member’s breach of his or her fiduciary duty as a board member? That is, under what circumstances could a court find that a Member’s breach of fiduciary duty was not “acting within the scope of employment” and, thus, the Member would not be subject to the benefits of [Wis. Stat. § 895.46](#)?

OAG 2-06, 5

Answer: A board member is entitled to indemnification under [Wis. Stat. § 895.46\(1\)\(a\)](#) if the board member is “proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer ... and the jury of the court finds that the [board member] was acting in the scope of employment.” Agents of any department of the state also are covered by [Wis. Stat. § 895.45\(1\)\(a\)](#) while acting within the scope of their agency. There is no

express exception for a board member's breach of his or her fiduciary duty as a board member. Although there may be circumstances when the breach of a board member's fiduciary duty might be sufficient to take the acts of the board member outside the scope of his or her employment or agency, and therefore any damages or costs against the board member would not be subject to indemnification under the statute, not every breach of the fiduciary duty will take the acts of the board member outside the scope of his or her employment or agency. Since indemnification will depend upon the particular circumstances of each case, I decline to address under what circumstances generally a court could find that a board member's breach of his or her fiduciary duty would be outside the scope of the board member's employment or agency.

OAG 2-06.5

4. Would the benefits under [Wis. Stat. § 895.46](#) apply where the action or special proceeding was brought by the federal government, other than the actions identified in [Wis. Stat. § 895.46 \(6\)](#)?

OAG 2-06, 5

*5 Answer: Because Wisconsin has traditionally indemnified state employees, officers, and agents for settlements or judgments in civil enforcement actions brought by the federal government, that indemnity would extend to the members described in this opinion. You correctly note that a different approach may be taken if the federal or state government brings certain criminal proceedings against a board or member. [Wis. Stat. § 895.46\(6\)](#). It should also be noted that state law limitations such as those applicable to damages and notice, do not apply to federal civil proceedings. See *Felder v. Casey*, 487 U.S. 131, 146-47 (1988) and *Casteel v. Vaade*, 167 Wis. 2d 1, 10-11, 481 N.W.2d 476 (1992).

OAG 2-06, 5

5. If a Member is entitled to the benefits of [Wis. Stat. § 895.46](#), under what circumstances, and under what authority will legal representation of the Member be provided by the Department of Justice?

OAG 2-06, 5

Answer: If a member is a defendant in a proceeding because of acts committed while carrying out duties as an officer on the board, then he or she will be provided with legal representation as set forth in [Wis. Stat. § 895.46](#). Generally, that representation is provided by the Attorney General pursuant to [Wis. Stat. § 165.25\(6\)](#) which states that,

OAG 2-06, 6

At the request of the head of any department of state government, the attorney general may appear for and defend any ... state officer ... in any civil action or other matter brought before a court or an administrative agency which is brought against the state ... officer ... for or on account of any act growing out of or committed in the lawful course of an officer's ... duties.

OAG 2-06, 6

6. Under [Wis. Stat. § 895.46](#), is a Member entitled to elect to be represented by outside counsel of the Member's choice and to have the reasonable expenses and costs of that counsel paid by the state?

OAG 2-06, 6

Answer: No. "The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer ... legal counsel and the offer is refused by the defendant officer ..." [Wis. Stat. § 895.46\(1\)\(a\)](#).

OAG 2-06, 6

7. If the jury or the court finds that the Member was not acting within the scope of his or her employment duty, could the Member be required to pay or reimburse the state for any portion of the costs of legal representation in the proceeding?

OAG 2-06, 6

Answer: [Wis. Stat. § 895.46\(1\)\(a\)](#) does not specifically address the question you pose. In theory, the attorney general could seek reimbursement for fees and costs expended in representing a member who is subsequently found to have acted outside the scope of his or her employment. In practice, this situation is unlikely to arise because the attorney general makes the determination as to scope early in the defense of the matter, and would have to demonstrate a significant change in circumstances to justify a suit for reimbursement. As such, and given that there is no particular fact scenario presented by your question, we are unable to provide a specific response.

OAG 2-06, 6

*6 For the reasons set forth, it is my opinion that, where the requirements of the statutes have been satisfied, the state would pay the judgment entered, in the course of their duties as officers, against a member of SWIB or the Employee Benefits Boards.
Very truly yours,

Peggy A. Lautenschlager
Attorney General

2006 WL 4737913 (Wis.A.G.)