

SUBJECT: REVISED INDEMNIFICATION POLICY

2006-32

RESOLUTION
OF THE
BOARD OF DIRECTORS
OF THE
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

WHEREAS, On December 12, 1991, by Resolution 91-64, the Board of Directors adopted an indemnification policy for WMATA Directors, Officers and Non-represented Employees (Indemnification Policy); and

WHEREAS, On January 12, 1995, by Resolution 95-03, the Board of Directors amended the Indemnification Policy to include Local 2 employees; and

WHEREAS, On December 9, 1999, by Resolution 99-72, the Board of Directors revised the Indemnification Policy to include medical personnel employed in the Medical Office; and

WHEREAS, On February 15, 2001, by Resolution 2001-16, the Board of Directors amended the Indemnification Policy to allow reimbursement of legal expenses incurred during the investigatory phase of an administrative proceeding if the Director, Officer or employee was subsequently exonerated; and

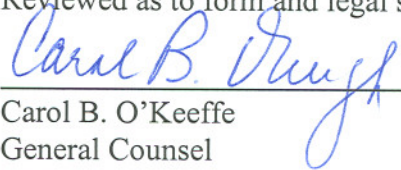
WHEREAS, The Indemnification Policy only provides for reimbursement of a Director, Officer or employee's expenses incurred during the investigatory phase of an administrative proceeding after the Director, Officer or employee is subsequently exonerated; and

WHEREAS, In appropriate circumstances it may be in the Authority's best interest to provide legal representation to its Directors, Officers or employees during the investigatory period of an administrative proceeding; now, therefore be it

RESOLVED, That the Indemnification Policy shall be amended, as provided in Exhibit "A" attached hereto, to permit the provision of legal services during the investigatory phase of administrative proceedings where appropriate criteria have been met and where it is in the Authority's best interest to provide such legal representation; and be it further

RESOLVED, That this resolution shall be effective immediately.

Reviewed as to form and legal sufficiency



Carol B. O'Keeffe
General Counsel

Motioned by Mrs. Mack, seconded by Mr. Zimmerman

Ayes: 6 - Mrs. Mack, Mr. Deegan, Mr. Zimmerman, Mr. Graham, Mr. Smith, Mr. Kauffman

REVISED INDEMNIFICATION POLICY

A. Civil Liability

- (1) WMATA will indemnify Directors, Officers and employees, who are exercising discretion within the scope of their duties, against liability to third parties for such acts or omissions that would not constitute:
 - (a) intentional violations of a statute, law, rule, regulation or ordinance; or
 - (b) willful violations of a statute, law, rule, regulation or ordinance;
 - (c) knowing violations of a statute, law, rule, regulation or ordinance that are not within paragraph B(1)(c) below.
- (2) WMATA will also indemnify Directors, Officers and employees who are acting within the scope of their duties, against liability to third parties resulting from acts or omissions that do not involve the exercise of discretion and that are not the result of actual malice or gross negligence.
- (3) WMATA will, in any proceeding defend or pay a reasonable amount for the defense of Directors, Officers and employees who have been sued for tortious acts or omissions that, in WMATA's judgment, are described in paragraphs (1) and (2) above.
- (4) In the event that WMATA declines to defend or pay for the defense in any proceeding involving a Director, Officer or employee otherwise covered by this policy who ultimately prevails on the merits of a lawsuit, WMATA will reimburse the Director, Officer or employee for all non-reimbursed reasonable costs and attorney's fees incurred in the defense of the action.

B. Criminal Matters and Civil Fines and Penalties.

- (1) WMATA will indemnify a Director, Officer or employee for civil or criminal fines and penalties imposed upon that person as a result of acts or omissions that were within the scope of their duties only if the relevant statute, law, rule, regulation or ordinance was violated:
 - (a) with no culpable state of mind; or
 - (b) by mere negligence; or

- (c) knowingly, but only those knowing violations wherein
 - (i) actual knowledge is not required, but rather knowledge is imputed or constructive; or
 - (ii) knowledge that such acts or omissions were proscribed by statute, law, rule, regulation or ordinance is not required, but rather mere knowledge of such acts or omissions.
- (2) WMATA will not indemnify a Director, Officer or employee for civil or criminal fines imposed upon that person as a result of acts or omissions that were:
 - (a) intentional violations of a statute, law, rule, regulation or ordinance; or
 - (b) willful violations of a statute, law, rule, regulation or ordinance; or
 - (c) knowing violations of a statute, law, rule, regulation or ordinance that are not within paragraph B(1)(c) above; or
 - (d) any violations of a statute, law, rule, regulation or ordinance related to the operation of motor vehicles unless the cause of the violation can be attributed to WMATA and is not the fault of the Director, officer or employee.
- (3) WMATA will, in any proceeding, defend or pay a reasonable amount for the defense of a Director, Officer, or employee who has been charged with a violation that, in WMATA's judgment, is described in paragraph B(1) above.
- (4) In the event that WMATA declines to defend or pay for the defense of a Director, Officer or employee who has been charged with the violation of a statute, law, rule, regulation or ordinance in any proceeding, that is within paragraph B(1) or B(2) above, who ultimately prevails on the merits of the prosecution of that violation and who is otherwise covered by this policy, WMATA will reimburse the Director, Officer or employee for all reasonable costs and attorneys' fees incurred in the defense of that prosecution, even if that person is convicted of a violation within paragraph B(1) above.
- (5) WMATA will only indemnify contract physicians used by the Office of Human Resources to the extent that other insurance policies which such personnel are required to obtain as part of their contracts with the Authority do not cover the claim and only in accordance with the provisions of this policy. Unless the contract physicians are required under their contracts to obtain general liability coverage, the contract physicians will not be required to indemnify the Authority

or to hold the Authority harmless for liability claims regarding their implementation of Authority policies within the scope of their duties. To the extent the contract physicians are required to obtain professional liability insurance, they will be required to indemnify the Authority or to hold it harmless for liability claims resulting from their medical malpractice. WMATA will be secondarily liable - it will only provide coverage after the medical contractor has received a written denial from his or her insurance carrier, stating that the claim is not covered by the policy.

C. Administrative Investigations

- (1) WMATA Directors, Officers, and employees who are named as defendants or respondents in third-party administrative proceedings or whose conduct is under review by federal, state or local investigative agencies may be entitled to indemnification and reimbursement of reasonable attorneys fees actually incurred by them if the proceeding or investigation arises from acts taken in the course of their employment with WMATA that fall within the scope of paragraphs (A)(1) and (A)(2) above and if, following completion of the proceedings or investigation, there has not been a finding of culpability or probable cause to believe that a particular statute has been violated.
- (2) An internal investigation by WMATA, such as those conducted by the Office of Civil Rights or the Office of Safety, does not by itself give rise to a right to indemnification or payment of defense costs. Nothing in this policy shall be construed as giving rise to a right to an attorney in any internal proceeding.
- (3) In the event that the third-party administrative proceeding or federal, state or local investigation gives rise to civil or criminal proceedings, actions on a request for indemnification or payment of reasonable attorneys fees for pre-litigation expenses shall be deferred, pending resolution of the civil or criminal proceedings and payments for pre-litigation expenses shall only be made in accordance with paragraph A.(4) or B.(4) above. ~~Nothing in this section shall be construed to provide a right to separate counsel to be paid for by WMATA in the event of subsequent litigation. In the event of subsequent litigation, the WMATA Director, Officer or employee must make a separate request for indemnification and defense in accordance with section A or B above and implementing regulations issued by the General Manager.~~
- (4) **The General Manager may authorize the provision of pre-litigation legal representation for WMATA Officers or employees under this section upon a recommendation of the General Counsel that:**
 - (a) **appropriate due diligence has been performed prior to the recommendation and the General Counsel has determined that the**

**incident being investigated would qualify for indemnification under sections A or B above if charges were brought; and
(b) it is in the Authority's interest to provide legal representation.**

- (5) **Nothing in this section shall be construed to provide a right to separate counsel to be paid for by WMATA in the event of subsequent litigation. In the event of subsequent litigation, the WMATA Director, Officer or employee must make a separate request for indemnification and defense in accordance with section A or B above and implementing regulations issued by the General Manager.**

D. General Provisions

- (1) Nothing in this policy is intended to benefit third parties.
- (2) Nothing in this policy is intended to expand the liability of WMATA's Directors, Officers or employees beyond that which would exist without this policy.
- (3) Nothing in this policy shall operate to permit a direct suit against WMATA when such suit would not otherwise be permitted by law.
- (4) Nothing in this policy shall operate to waive WMATA's immunity or the immunity of any Director, Officer or employee beyond the waiver contained in Section 80 of the Compact.
- (5) When WMATA has indemnified, or reimbursed its Directors, Officers or employees pursuant to this policy, WMATA is thereby subrogated to all rights that the Directors, Officers, and employees would have against any and all third parties in relation to the matter that gave rise to the indemnification or reimbursement.
- (6) Nothing in this policy shall be construed as permitting indemnification of any Director, Officer or employee who has benefitted from the act or omission that gave rise to a liability which would otherwise be hereby indemnified. In the event that a Director, Officer or employee is indemnified and/or defended under this policy for an act or omission that personally benefitted that person, then WMATA shall have the right to recover the amount that has been indemnified or the amount that has been expended in the defense of the Director, Officer or employee.
- (7) Notwithstanding any other provision of this indemnification policy, any WMATA Director, Officer or employee on whose behalf WMATA has paid punitive damages, civil penalties or costs shall be subject to disciplinary action, where appropriate.

- (8) WMATA may, subject to appropriations, purchase insurance as the Board deems appropriate to insure against any liabilities or expenses incurred under this policy.
- (9) This policy will only apply to Directors, Officers and employees whose acts or omissions are within the scope of their duties.
- (10) If fees are incurred through the use of outside counsel, the Comptroller shall identify and make available the necessary funds to pay for such costs, from the budget of the Department or Office in which the officer or employee was employed at the time of the events which gave rise to the administrative proceedings, investigation or litigation, unless or until a reserve is established by the Board for this purpose.
- (11) The General Manager shall develop procedures for implementing this policy for Officers and employees. All decisions regarding the defense and the indemnification of members of the Board of Directors shall be made by the Board of Directors. Directors may not sue for enforcement of this policy.
- (12) For the purposes of this policy, the following terms shall have the following meaning:
 - (a) “employee”: An employee is a person who, at the time of the act or omission for which he seeks indemnification or defense, was employed by WMATA in any job category under a regular, part-time, full-time, temporary or exempt status. This definition includes seasonal employees, full-time temporary employees, employees of limited duration, as well as intern appointments. This definition does not include independent contractors, except contract physicians used by the Office of Human Resources and Management Planning. This definition does not include persons represented by a labor union, except (1) persons represented by OPEIU Local 2 and (2) persons who face civil **or criminal** fines and penalties where the cause of the violation can be attributed to WMATA, under circumstances described in paragraphs (B)(1) and (B)(2) above, **and (3) persons who face civil or criminal investigations where the cause of the violation can be attributed to WMATA under circumstances described in paragraphs (C)(1).**
 - (b) “Scope of Duties”: A WMATA employee is acting within the scope of his or her duties when his or her conduct: i) is of the kind that he or she was hired to perform; ii) occurs within the authorized time and space limits; and iii) would have furthered the interest of WMATA if properly accomplished.

- (13) Officers and employees may not sue for enforcement of this policy nor may they use any grievance or arbitration procedures to challenge decisions regarding indemnification or defense. The sole recourse for officers and employees seeking indemnification or reimbursement of attorneys fees under this policy shall be set forth in the procedures developed by the General Manager.