ALAN WILSON
ATTORNEY GENERAL

August 14, 2014

Mr. William E. Gunn
Chief of Staff
Office of the Comptroller General
1200 Senate Street
305 Wade Hampton Office Building
Columbia, South Carolina 29201

Dear Mr. Gunn:

You indicate that the Comptroller General "has received a request from the South Carolina Retirement Systems Investment Commission ("RSIC") to process payment pursuant to South Carolina Code Annotated Section 9-16-370, for reimbursement of legal fees incurred by an RSIC Commission member. By way of background, you further state that

> [t]he request relates to an investigation of allegations surrounding a certain Commission Member and his relationship to an investment made by RSIC. From the materials provided me by RSIC's Chief Operating Officer (copy attached), it is my understanding the claims alleged that the Commission Member engaged in criminal, unethical and fraudulent conduct. The RSIC's Chief Operating Officer also indicates that the Commission Member has now been "cleared" of those allegations. The materials state that the allegations are related to the Commission Member's duties on the RSIC and that the request for payment is for "reimbursement of the actual expenses incurred in the defense of those claims." Given the information provided, I am requesting written guidance from the Office of the Attorney General on the application of the defense and indemnification provisions of S.C. Code Ann. 9-16-370. As Section 9-16-370 does not contain definitional provisions or set out a process by which State's obligations are incurred, I would ask for guidance from your office specifically addressing the following issues:
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> (A) What is meant by the term "claim" used in the Section? Does the term cover allegations that, while they produce investigations by SLED, the Ethics Commission, the Inspector General's Office, etc., eventually are deemed to not give rise to criminal, unethical and fraudulent conduct, and thus do not result in prosecution?
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> (B) Does the State's obligation to defend a covered member include reimbursement for attorneys' fees incurred and paid by the member when the attorney was engaged only by the covered member and not RSIC?
> (C) If the State's obligation to defend includes reimbursement for attorneys' fees when the attorney was engaged by the covered member, is there a mechanism or process to follow to determine the reasonableness of the fees?

(D) When the "State" is required to defend and indemnify a member, officer or covered employee of the RSIC when a claim has been made against them, who or what entity is responsible for paying the costs of such? Is the RSIC responsible for the defense and indemnification costs?

Law/Analysis

Section 9-16-370 provides in pertinent part as follows:

> [t]he State shall defend the members of the Retirement System Investment Commission established pursuant to this article against a claim or suit that arises out of or by virtue of their performance of official duties on behalf of the commission and must indemnify these members for a loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. The State shall defend officers and management employees of the commission against a claim or suit that arises out of or by virtue of performance of official duties unless the officer, or management employee was acting in bad faith and must indemnify these officers, and management employees for a loss or judgment incurred by them as a result of such claim or suit. . .

Your questions require construction of this statute, particularly the meaning of the terms "claim or suit." In interpreting Section 9-16-370, a number of principles of statutory construction are applicable. As our Supreme Court explained in SCANA Corp. v. South Carolina Dept. of Revenue, 384 S.C. 388, 392, 683 S.E.2d 468, 470 (2009) regarding the generally applicable rules of construction,

> [t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2008). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used; as that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537, 537 So.2d 543, 546 (2000). The Court should give the words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598 (2006).

In addition, "courts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intent." State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct App. 2011) Where the language of a statute is ambiguous or "lends itself to equally logical interpretations," a court may look beyond the borders of the act itself to determine the Legislature's intent. Kennedy v. S.C. Ret. Systems, 345 S.C. 339, 348 549 S.E.2d 243, 247 (2001). The true aim and intention of the legislature will be deemed controlling over the literal words used in the statute. Greenville Baseball Club v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942).

Finally, a remedial statute must be broadly construed to effectuate the legislative purpose. As we advised in an opinion, dated March 17, 2010 (2010 WL 1370091):

> . . . if a statute is remedial in nature, it must be liberally construed to carry out the purpose mandated by the General Assembly. As noted at 3 Sutherland Statutory Construction §60.1 (6th ed.),
>
> > [a] liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction . . . When there is ambiguity in a remedial statute, it should be construed to meet the cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, providing the interpretation is not inconsistent with the language used, resolving all reasonable doubts in favor of applicability of the statute to a particular case . . . . Courts also presume the ambiguous language in a remedial statute is entitled to a generous construction consistent with its reformative mission.

The purpose of §9-16-370 is obviously to compensate members of the Retirement Investment Commission for a "loss or judgment" incurred by them as a result of the claim or suit "without regard as to whether the claim or suit is brought against them in their individual or official capacities or both." As one authority has stated,

> [t]he purpose of a statute requiring a governmental entity to pay costs or fees incurred by or on behalf of an employee, in defense of a claim or suit for a loss occuring because of acts or omissions within the scope of employee's employment, is to protect office holders from litigation by those dissatisfied with the decisions they make . . . In contrast, public officials who pursue or defend personal suits ordinarily must bear their own legal expenses.

67 C.J.S. Officers, §387. Further, as stated in Fillipone v. Mayor of Newton, 352 Mass. 622, 629, 467 N.E.2d 182 (1984), "[a]s a matter of policy, public indemnification of public officials serves in part to encourage public service." Courts have concluded that such indemnification statutes are "quintessentially remedial legislation," enacted for the benefit of public employees, and thus are "to be liberally construed to effectuate [their] beneficial purpose." Montgomery County Bd. of Ed. v. Horace, 860 A.2d 909, 919 (Md. 2004).

Based upon these authorities, we think a broad construction of §9-16-370, consistent with its legislative purpose, is warranted. The statute speaks of losses incurred from a "claim or suit" in defense of actions in the performance of official duties by an RSIC member. The question here thus is whether a criminal investigation, in which prosecution is declined, is a "claim or suit" for purposes of §9-16-370.

As you note in your letter the term "claim" is not defined in §9-16-370. Nor is the word "suit." In such instances, the Supreme Court has concluded that the common and ordinary meaning of such undefined words is employed. Sloan, *supra.* No decision of our courts has yet construed §9-16-370. However, it is worthy of note that certain authorities in other jurisdictions have held that the terms "claim" and "suit" refer only to civil actions and not criminal proceedings when used in similar indemnification statutes. *See* Caddo v. Durham, 817 So.2d 1173 (La. 2002); Triplett v. Town of Oxford, 791 N.E.2d 310 (Mass. 2003); Monti v. Warwick Sch. Committee, 554 A.2d 638 (R.I. 1989). In Monti, for example, the Court concluded that ". . . the Legislature, by limiting its reference to the indemnification

of financial losses and legal expenses to those that arise out of any claim, demand or suit, intended that §9-1-31(a) was to be applied only to civil proceedings." 554 A.2d at 640. In those cases, and others typically, the criminal matter had proceeded to indictment, and did not involve a criminal investigation which resulted in no charges being brought.

On the other hand, there are authorities which read the terms "claim" or "suit" more broadly to include criminal matters. In Commonwealth v. Moore, 9 N.E. 25 (Mass, 1886), for instance, it was stated that "[t]he word 'suit' has, in practice, been considered to mean criminal prosecutions as well as civil proceedings." And, in U.S. v. Neifert White Co., 390 U.S. 228 (1968), the United States Supreme Court concluded that the term "claim" as used in the False Claims Act was sufficiently broad to encompass providing false information in support of an application to a federal agency. Moreover, in Lexin v. City of San Diego, 222 Cal.App.4th 662, 166 Cal.Rptr. 3d 335, 334 (2013), the court stated, in the context of an indemnification resolution, that "we reject the argument that the resolution's reference to 'claim or lawsuit' indicates that intent to limit its reach to civil actions." (citing authorities).

Particularly instructive is the Michigan decision, Sonnenberg v. Farmington Township, 197 N.W.2d 853 (Mich. 1972). The question there was whether a municipality has "the authority to indemnify a police officer for attorneys' fees sustained by him in his successful defense of criminal charges which arose out of the scope and course of his employment for the municipality?" The Michigan Court of Appeals referenced Messmore v. Kracht, 137 N.W. 549 (Michigan 1912), which concluded that a deputy sheriff could be reimbursed for the legal expenses incurred in successfully defending himself in a civil action which had arisen while acting within the scope of his employment. The Sonnenberg Court, however, concluded that it made little sense to limit indemnification to civil actions only. According to the Court,

> [i]n Messmore the Michigan Supreme Court was not called upon to decide whether it could have reached a similar result had a criminal action been involved. The Court did, however, state that certain cases cited by defendant in Messmore dealing with 'the public against the party claiming indemnity' I.e. impeachment or investigation' were not controlling in the disposition of that case.. Contrary to defendants' assertion, this Court is not persuaded that this statement by our Supreme Court had the effect of prohibiting discretionary indemnities in successful criminal defenses by a public employee acting within the scope of his employment. Indeed, such a distinction would appear arbitrary and unreasonable. Where a police officer has successfully defended both civil and criminal charges arising from measures he had taken in the scope of his employment, it would be absurd to limit his reimbursement to the civil action only, where both actions might have had their origins in the same incident. Clearly, such a result was never sanctioned by our Supreme Court.

197 N.W.2d at 854.

Thus, there appears to be a sharp difference of opinion regarding the meaning of the words "claim" and "suit" for purposes of indemnification statutes. Some courts read these terms strictly, concluding that the terms are restricted to civil actions, while other authorities find that a broader interpretation, to include criminal proceedings, is warranted.

In light of the ambiguity of these words, we believe it is appropriate to look outside the statute for guidance. As our Supreme Court recognized in Kennedy v. S.C. Ret. Systems, supra, where a statute is ambiguous or "lends itself to two equally logical interpretations," a court may look beyond the borders of the act itself to determine the Legislature's intent.

In this regard, we reference §1-7-50, which provides for the defense of public officers by the Attorney General, and states as follows:

> [i]n the event that any officer or employee of the State, or of any political subdivision thereof, be processed in any action, civil or criminal, or special proceedings in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf. Such appearance may be by any member of his staff or by any solicitor when directed to by the Attorney General.

(emphasis added). As can be seen, §1-7-50 provides for legal representation by the Attorney General even in criminal matters, if the requisite good faith requirements are met. Former Attorney General McLeod drafted this statute in 1960, and submitted it to the General Assembly, which enacted it that year. In a letter written to the Attorney General of Arkansas on January 13, 1969, General McLeod wrote that "[i]n the past this office, for a number of years and without specific statutory authority, represented officers and employees of the State who were charged criminals as a result of their actions. Thus, in order to alleviate the absence of express statutory authority for such representation, the Attorney General proposed what is now §1-7-50. In that same letter, General McLeod further advised that

> I suggested the enactment of the statute referred to in the belief that officers should not have to undertake the payment of their own expenses in defending actions brought against them for acts done in the performance of their duties.

If §9-16-370 is read together with §1-7-50, it is apparent that §9-16-370 may be deemed to include indemnification for a criminal investigation resulting in no charges being filed where the actions of the officer were in good faith, and were acts undertaken in the course of official duties. Such a reading is consistent with those decisions which have concluded that the common law provides for reimbursement of public officials for legal fees for the representation of the officer in a criminal matter when he or she is performing official duties in good faith. As the Florida Court of Appeals concluded in Leon County v. Dobson, 957 So.2d 12, 14 (Fla. 2007) concluded,

> [a]lthough the trial court incorrectly allowed reimbursement of fees under a contractual indemnity theory, the order should be affirmed under Florida's common law principle of reimbursement of fees to public officials under certain circumstances. The circuit judge found "as a matter of undisputed fact and as a matter of law in this particular case that . . . arose out of or was in connection with the performance of his duties as a Leon County Commissioner." See Thornsby v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990); see also Ellison v. Reid, 397 So.2d 352, 354 (Fla 1st DCA 1981) ("If a public officer is charged with misconduct while performing his official duties and while serving a public purpose, the public has a primary interest in such a controversy and should pay the necessary legal fees incurred by the public officer in successfully defending against

> unfounded allegations of official misconduct."). This common law doctrine applies to criminal proceedings. See Lomelo v. City of Sunrise, 423 So.2d 974, 976 (Fla. 4th DCA 1982).

Opinions of this office have attempted to delineate this "public purpose" line. In an Opinion, dated September 14, 1995 (1995 WL 606050), we restated that

> . . . our Office has often taken the position that no defense will be provided (pursuant to §1-7-50) where a judicial forum has made a finding of probable cause [which an indictment is] since this runs counter to the "good faith" finding specified in the statute. Under those circumstances, the employee is primarily responsible for selecting an attorney to provide a defense and for payment of any attorneys' fees and costs.

See also, Op. S.C. Atty. Gen., May 13, 1997 (1997 WL 323769).

Thus, where a criminal investigation ends in no charges being brought, and the alleged acts or omissions were in good faith and in the course of official duties, we construe §9-16-370 as permitting the reimbursement to a member of the RSIC for reasonable attorneys' fees. What is "reasonable" depends, of course, upon the facts and circumstances in a given case. However, it should be noted that, typically, this Office does not approve an agency to pay more than $200 per hour for outside counsel.

In addition, the determination of "good faith" is primarily a factual issue, beyond the scope an opinion in this office. See, Op. S.C. Atty. Gen., July 28, 2014 (2014 WL 3886691). Moreover, it would be inappropriate for this office to attempt such a determination as to whether the individual in question acted in good faith in view of our role in declining prosecution.

Conclusion

While the issue is a close question, we believe a court would likely conclude that where a member of the RSIC is subject to a criminal investigation involving acts taken as part of the member's official duties, and the member acts in good faith, and the investigation ends in no criminal charges, the member is entitled to reimbursement for reasonable attorney fees pursuant to §9-16-370. Reading §9-16-370 together with §1-7-50, we believe that such would be a "claim" or "suit" pursuant to the indemnification statute. Where acting in good faith in the performance of official duties, the law treats the acts as those of the Commission itself.

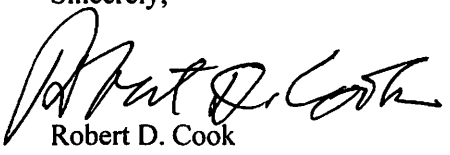
Section 9-16-370 provides the alternative that either the State defend the member of the RSIC or that the member be indemnified for reasonable fees. In this instance, the member employed his own attorney. Thus, indemnification to the member would be the result here.

However, there are certain factual issues which must be resolved prior to authorized indemnification. This office is not in the position to resolve those issues in an opinion. Thus, we would suggest that this matter be submitted to the RSIC to determine whether the member in question acted in good faith in this situation. In addition, the RSIC should determine whether the fees in question are "reasonable" under the circumstances. If the answer to these factual questions is "yes," then in this very

narrow circumstance, we would conclude that §9-16-370 is applicable as a means of reimbursing the member, and indemnification could be made from RSIC funds.

We caution, however, that this opinion should not be misapprehended as a mechanism for indemnification of attorneys' fees in other circumstances involving criminal matters, such as the situation where an individual officer has been indicted. As we have concluded previously, indictment is a probable cause determination that a crime has been committed, and thus is not "good faith" for purposes of §9-16-370.

Sincerely,



Robert D. Cook
Solicitor General

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