

RULES AND REGULATIONS

Title 4—ADMINISTRATION

EXECUTIVE BOARD

[4 PA. CODE CH. 39]

Defense of Suits Against Commonwealth Employees

The Executive Board (Board) amends Chapter 39, Subchapter A (relating to defense of suits against Commonwealth employees) to read as set forth in Annex A. These amendments are adopted under the authority of section 709(f) of The Administrative Code of 1929 (71 P. S. § 249(f)) and the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506). The existing provisions of Subchapter A govern the standards and procedures under which the Office of General Counsel (OGC) makes determinations regarding the defense of lawsuits against Commonwealth employees. The revisions are designed to: (1) clarify that the Commonwealth will provide a defense in specified situations, rather than provide an attorney or pay attorneys fees; (2) eliminate the requirements that the Commonwealth provide a defense for employees who have acted in bad faith in multidefendant cases when the Commonwealth is providing a defense for other employees; (3) eliminate a problematic provision which, in the case of alleged violations of Federal civil rights legislation, prevented an attorney from providing a full defense and required instead that the attorney defend solely on the basis that the employe in question was not acting under color of State law; (4) clarify and streamline the procedures for the OGC determinations in this area; (5) expressly require the employe to cooperate with the defense of the matter if the Commonwealth is providing a defense to the employe; and (6) clarify that if the Commonwealth is indemnifying the employe, the Commonwealth is authorized to settle the case and make other legal and strategic decisions as it deems appropriate.

Section 39.3(b)(1) (relating to civil cases involving intentional or malicious conduct) currently provides that, if an employe/defendant's conduct is determined to have been in bad faith, malicious or outside the scope of his employment, the Commonwealth will nevertheless afford legal representation to the defendant if there are other defendants in the case that the Commonwealth's attorneys are representing. These amendments will eliminate this requirement and instead vest the General Counsel with the discretion to evaluate, on a case-by-case basis, the wisdom of providing a defense to an employe whose actions are determined to be in bad faith, malicious or outside the scope of employment.

Section 39.3(b)(2) currently requires that, in a case involving an alleged violation of Federal civil rights legislation, the Commonwealth will provide a legal defense to a defendant whose conduct was outside the scope of his employment if there are other defendants represented by Commonwealth attorneys. The same section further provides that the defense presented by the Commonwealth attorneys is limited to the argument that the defendant was not acting under color of State law. These requirements are untenable and have presented numerous problems in implementation. Moreover, the latter provision may interfere with an attorney's obligation to provide his client with a complete and vigorous defense. Consequently, these amendments will eliminate these

provisions in their entirety. The amendments also add language to clarify that defendants/employees who are denied representation because of bad faith conduct and subsequently prevail in the litigation may seek reimbursement for costs and fees of a private attorney.

The addition of an express provision authorizing the Commonwealth to settle a case in which it is indemnifying an employe clarifies the right of the Commonwealth to act in the manner that is most economically reasonable. This is a common provision in liability insurance contracts which allows the entity that is going to pay the settlement or judgment to make the legal and strategic decisions in a case.

The remaining revisions in this rulemaking either address minor administrative matters or clarify existing language.

Statutory Authority

These amendments are adopted under the authority of section 709(f) of The Administrative Code of 1929 and the Commonwealth Attorneys Act. The existing provisions of Subchapter A govern the standards and procedures under which the OGC makes determinations regarding the defense of lawsuits against Commonwealth employees.

Fiscal Impact

The Board has determined that the amendments will have no significant fiscal impact on the Commonwealth.

Paperwork

The amendments will not generate significant additional paperwork for the public or the Commonwealth.

Effectiveness/Sunset Date

The amendments shall take effect upon publication in the *Pennsylvania Bulletin*. The regulations will be monitored annually. No sunset date has been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of these amendments on January 16, 1996, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on State Government and the Senate Committee on State Government. In addition to submitting the amendments, the Board provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Board in compliance with Executive Order 1982-2, "Improving Government Regulations." A copy of this material is available to the public upon request.

Findings

Public notice of intention to amend the regulations under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) (CDL), has been omitted as authorized under section 204(1)(ii)—(iv) of the CDL (45 P. S. § 1204(1)(ii)—(iv)). The amendments relate to agency personnel, employe benefits and the OGC and agency procedures and practice. In addition, under section 204(3) of the CDL, the procedures specified in sections 201 and 202 of the CDL are in some circumstances impracticable, unnecessary and may be contrary to the public interest.

Order

The regulations of the Executive Board, 4 Pa. Code Chapter 39, are amended by amending §§ 39.1—39.4 and adding § 39.6 to read as set forth in Annex A.

THOMAS G. PAESE,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 26 Pa.B. 814 (February 24, 1996).)

Fiscal Note: 99-5. No fiscal impact; (8) recommends adoption.

Annex A**TITLE 4. ADMINISTRATION****PART II. EXECUTIVE BOARD****Subpart D. EXECUTIVE BOARD REGULATIONS****CHAPTER 39. ENTITLEMENTS FOR COMMONWEALTH EMPLOYEES****Subchapter A. DEFENSE OF SUITS AGAINST COMMONWEALTH EMPLOYEES****§ 39.1. Criminal cases.**

(a) The Commonwealth will not provide an attorney to defend a present or former official or employe in a criminal case arising from acts or omissions occurring while in the service of the Commonwealth. If it is determined by the General Counsel or the General Counsel's designee that there is no basis for the prosecution as a matter of law or fact, the Commonwealth will reimburse the employe for reasonable attorneys fees and to that end will make any required advance of these fees, limited by the balance in the retirement account of the employe.

(b) In a case in which the General Counsel or the General Counsel's designee does not determine that there is no basis for the prosecution in law or fact, he may nevertheless authorize the reimbursement of reasonable attorneys fees if the employe's defense is successful.

§ 39.2. Civil cases involving unintentional conduct.

When a Commonwealth official or employe is sued in his official or individual capacity for alleged negligence or other unintentional misconduct occurring while in the scope of employment, the Commonwealth will provide a defense in all cases. If an insurance policy purchased by the Commonwealth affords coverage, the insurance company will undertake the defense with an attorney of its choosing at its expense. If there is no insurance coverage, the Commonwealth will provide an attorney to defend the official or employe. The Commonwealth will indemnify the defendant for the expense of a judgment against him in this case. The defendant may engage his own attorney but any attorneys fees will not be reimbursed by the Commonwealth and indemnification will be in the sole discretion of the General Counsel.

§ 39.3. Civil cases involving intentional or malicious conduct.

(a) *Good faith in exercise of authority.* Regardless of the allegations made against the defendant, if it appears to the General Counsel or to the General Counsel's designee that the defendant's conduct giving rise to the cause of action was within the scope of his employment and a good faith exercise of his authority, the Commonwealth, or its insurance company if there is coverage, will undertake the defense with an attorney of its choosing at its expense, and will indemnify the defendant for the expense of a judgment against him or a settlement that is approved by the

General Counsel or the General Counsel's designee. The defendant may engage his own attorney but indemnification and reimbursement of attorneys fees by the Commonwealth will be in the sole discretion of the General Counsel.

(b) *Bad faith or malicious conduct, or conduct outside the scope of employment.*

(1) If the General Counsel or the General Counsel's designee determines that the defendant's conduct was a bad faith exercise of his authority, malicious or outside the scope of his employment, the General Counsel, in his sole discretion, will determine whether the Commonwealth will undertake the defense of the defendant. The Commonwealth will not indemnify the defendant for a judgment against him, and will notify the defendant that he may be subject to personal liability and should engage his own attorney.

(2) If the General Counsel or the General Counsel's designee has determined initially that the defendant's conduct was a bad faith exercise of his authority, malicious or outside the scope of his employment, and the defendant ultimately prevails in the civil action, the General Counsel, in his sole discretion, may determine that the Commonwealth will reimburse the defendant for the costs of defense and fees of his private attorney.

§ 39.4. Employee responsibility.

(a) The Commonwealth will not provide a defense to an official or employe whose failure to notify the Commonwealth promptly of a suit or prosecution brought against him has jeopardized the defense of the case, and the Commonwealth will not indemnify the defendant for the expense of a judgment under these circumstances.

(b) If the Commonwealth provides a defense to an official or employe, the employe shall cooperate fully in the defense of the case.

(c) To the extent the Commonwealth is indemnifying the employe, the employe is deemed to authorize the Commonwealth to settle the case as it deems appropriate and is deemed to authorize the Commonwealth to make other legal and strategic decisions relating to defense of the case as it deems appropriate.

§ 39.6. Applicability.

To the extent a collective bargaining agreement in effect on March 9, 1996, refers to or incorporates this subchapter, these amendments published as Pa.B. Doc. No. 96-339 and codified at *Pennsylvania Code* serial pages _____ (*Editor's Note:* The blank refers to serial pages which will be published in the May 1996 *Pennsylvania Code Reporter* (MTS 258)) would not apply to or change the terms of the agreement.

[Pa.B. Doc. No. 96-339. Filed for public inspection March 8, 1996, 9:00 a.m.]

Title 61—REVENUE**DEPARTMENT OF REVENUE**

[Correction]

[61 PA. CODE CHS. 103, 108, 117 AND 125]**Personal Income Tax; Exempt and Nonexempt Income**

An error appeared at 26 Pa.B. 887, 888 (March 2, 1996). The statutory authority should read:

Authority

The amendments are adopted under section 354 of the Tax Reform Code of 1971 (code) (72 P. S. § 7354). Section 354 of the code specifically authorizes and empowers the Department to prescribe, adopt, promulgate and enforce rules and regulations relating to any matter or thing

pertaining to the administration and enforcement of the provisions of and the collection of taxes imposed by Article III of the code (72 P. S. §§ 7301—7361).

[Pa.B. Doc. No. 96-289. Filed for public inspection March 1, 1996, 9:00 a.m.]
