

Subpart D. EXECUTIVE BOARD REGULATIONS

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CHAPTER 39. ENTITLEMENTS FOR COMMONWEALTH EMPLOYES

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Subchapter A. DEFENSE OF SUITS AGAINST COMMONWEALTH EMPLOYES

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Authority

The provisions of this Subchapter A issued under sections 709(f) and 903(b) of The Administrative Code of 1929 (71 P. S. §§ 249(f) and 293(b)), unless otherwise noted.

Source

The provisions of this Subchapter A adopted by Executive Board Resolutions numbered IN-5-105 and IN-5-356 February 28, 1976, 6 Pa.B. 389, unless otherwise noted.

Notes of Decisions

Since an administrative remedy has been provided for reimbursing state employes for their costs of defending criminal and civil cases arising from their performance of official duties, a court is without jurisdiction to entertain a direct action by the employes for such counsel fees. *Burroughs v. Zimmerman*, 503 A.2d 1014 (Pa. Cmwlth. 1986).

Cross References

This subchapter cited in 4 Pa. Code § 39.11 (relating to purpose); and 4 Pa. Code § 39.14 (relating to independent agencies).

§ 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.

Source

The provisions of this § 39.1 amended November 11, 1994, effective November 12, 1994, 24 Pa.B. 5655; amended March 8, 1996, effective March 9, 1996, 26 Pa.B. 993. Immediately preceding text appears at serial page (196930).

Notes of Decisions*Scope*

This section authorizes designated members of the executive branch to determine whether to reimburse legal fees to employes of the executive branch who are charged with a crime; as the appellant is an elected district justice of a district court, that is, a judicial officer, this section has no application. *Yurgosky v. Commonwealth*, 722 A.2d 631 (Pa. 1998).

Executive Board regulations do create a conditional entitlement in State employes to reimbursement for counsel fees. *Burroughs v. Zimmerman*, 503 A.2d 1014 (Pa. Cmwlth. 1986).

Where attorneys who successfully defended a DPW employe against criminal charges sought payment of their fees by DPW, the court held that the Attorney General could authorize payment under subsection (b) even though the employe had not paid the fees. *In re Plevyak*, 476 A.2d 487 (Pa. Cmwlth. 1984).

The provisions of §§ 39.1—39.3 are substantive with the force and effect of law, rather than policy statements for two reasons. First the provisions in §§ 39.1—39.3 are substantive because they create a controlling standard of conduct. Second, the provisions in §§ 39.1—39.3 are substantive because §§ 39.1—39.3 cannot be converted into discretionary rules, even though the benefits of the regulation may be dependent on the determination of the Office of General Counsel. *Dep't of Corrections v. Pennsylvania State Corrections Officers Ass'n*, 12 A.3d 346, 360 (Pa. 2011).

Cross References

This section cited in 4 Pa. Code § 39.12 (relating to criminal cases).

§ 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.

Source

The provisions of this § 39.2 amended March 8, 1996, effective March 9, 1996, 26 Pa.B. 993. Immediately preceding text appears at serial pages (196930) and (193847).

Notes of Decisions

Executive Board regulations do create a conditional entitlement in State employees to reimbursement for counsel fee. *Burroughs v. Zimmerman*, 503 A.2d 1014 (Pa. Cmwlth. 1986).

The provisions of §§ 39.1—39.3 are substantive with the force and effect of law, rather than policy statements for two reasons. First the provisions in §§ 39.1—39.3 are substantive because they create a controlling standard of conduct. Second, the provisions in §§ 39.1—39.3 are substantive because §§ 39.1—39.3 cannot be converted into discretionary rules, even though the benefits of the regulation may be dependent on the determination of the Office of General Counsel. *Dep't of Corrections v. Pennsylvania State Corrections Officers Ass'n*, 12 A.3d 346, 360 (Pa. 2011).

Cross References

This section cited in 4 Pa. Code § 39.13 (relating to civil cases).

§ 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.

Source

The provisions of this § 39.3 amended November 11, 1994, effective November 12, 1994, 24 Pa.B. 5655; amended March 8, 1996, effective March 9, 1996, 26 Pa.B. 993. Immediately preceding text appears at serial pages (193847) to (193848).

Notes of Decisions*Reimbursement for Counsel Fees*

University police officer was not within scope of employment and not on official business during incident when he conducted pat-down search of citizen who confronted him in off-campus store after he purchased newspaper, coffee, and lottery tickets; officer left campus to buy things for himself which were not required by his employment, therefore he was not entitled to representation. *Flagg v. State System of Higher Education*, 904 A.2d 1004, 1008-1009 (Pa. Cmwlth. 2006).

Executive Board regulations do create a conditional entitlement in State employees to reimbursement for counsel fees. *Burroughs v. Zimmerman*, 503 A.2d 1014 (Pa. Cmwlth. 1986).

The provisions of §§ 39.1—39.3 are substantive with the force and effect of law, rather than policy statements for two reasons. First the provisions in §§ 39.1—39.3 are substantive because they create a controlling standard of conduct. Second, the provisions in §§ 39.1—39.3 are substantive because §§ 39.1—39.3 cannot be converted into discretionary rules, even though the benefits of the regulation may be dependent on the determination of the Office of General Counsel. *Dep't of Corrections v. Pennsylvania State Corrections Officers Ass'n*, 12 A.3d 346, 360 (Pa. 2011).

Cross References

This section cited in 4 Pa. Code § 39.5 (relating to independent constitutional offices); and 4 Pa. Code § 39.13 (relating to civil cases).

§ 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.

Source

The provisions of this § 39.4 amended March 8, 1996, effective March 9, 1996, 26 Pa.B. 993. Immediately preceding text appears at serial page (193848).

Notes of Decisions

Executive Board regulations do create a conditional entitlement in State employes to reimbursement for counsel fees. *Burroughs v. Zimmerman*, 503 A.2d 1014 (Pa. Cmwlth. 1986).

Cross References

This section cited in 4 Pa. Code § 39.13 (relating to civil cases).

§ 39.5. Independent constitutional offices.

(a) With respect to officials and employes of the Office of Attorney General, the Department of Auditor General and the Treasury Department, the responsibilities assigned by this subchapter to the General Counsel shall be performed respectively for each agency by a designee of the Attorney General, the Auditor General and the State Treasurer, except as provided by subsection (b).

(b) Determinations of eligibility under § 39.3 (relating to civil cases involving intentional or malicious conduct) affecting payments by or obligations of

insurance or self-insurance plans or programs maintained by the Department of General Services shall be made independently by the General Counsel or a designee under this subchapter and applicable regulations, statements of policy and management directives.

Source

The provisions of this § 39.5 adopted November 11, 1994, effective November 12, 1994, 24 Pa.B. 5655.

§ 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 page (212453) would not apply to or change the terms of the agreement.

Source

The provisions of this § 39.6 adopted March 8, 1996, effective March 9, 1996, 26 Pa.B. 993.

Subchapter B. STATEMENT OF POLICY OF OFFICE OF GENERAL COUNSEL REGARDING DEFENSE OF SUITS

- Sec.
- 39.11. Purpose.
- 39.12. Criminal cases.
- 39.13. Civil cases.
- 39.14. Independent agencies.

§ 39.11. Purpose.

This subchapter establishes the guidelines, policies and procedures of the General Counsel and the Office of General Counsel regarding matters governed by Subchapter A (relating to defense of suits against Commonwealth employees). This subchapter should be read in conjunction with Subchapter A and Management Directives 205.6 and 630.2 (relating to defense of suits against Commonwealth employees; and reporting of employe liability claims).

Source

The provisions of this § 39.11 adopted by Executive Board Resolution Number ER-6-40, 6 Pa.B. 826; amended May 11, 1979, effective May 12, 1979, 9 Pa.B. 1532; reserved September 13, 1985, effective September 14, 1985, 15 Pa.B. 3244; amended August 5, 1994, effective August 6, 1994, 24 Pa.B. 3850; amended December 2, 1994, effective December 3, 1994, 24 Pa.B. 5986. Immediately preceding text appears at serial pages (191250) to (191251).

§ 39.12. Criminal cases.*(a) Reporting of cases.*

(1) Subject to § 39.14 (relating to independent agencies), when a current or former member, official or employe of the executive branch of the Commonwealth is charged with a crime or is otherwise the subject of a criminal investigation or prosecution arising from alleged acts or omissions occurring while in the service of the Commonwealth, the agency shall report the matter to the Office of General Counsel (OGC) under paragraph 3a of Management Directive 205.6 (relating to defense of suits against Commonwealth employe). The report, which is required to include all of the circumstances known to the agency concerning the prosecution, shall be directed to the deputy general counsel assigned as liaison to the agency involved or, if none, to the deputy designated for that purpose by OGC.

(2) The reporting requirements of Management Directive 205.6 are in addition to those required under §§ 7.171—7.179 (relating to criminal charges), if applicable to the member, official or employe of the agency involved.

(b) Requests for advancement or reimbursement.

(1) *Reporting.* Subject to § 39.14, if a member, official or employe charged with a crime or otherwise the subject of a criminal investigation or prosecution arising from alleged acts or omissions occurring while in the service of the Commonwealth has requested advancement of counsel fees and expenses to defend the action or has requested reimbursement of counsel fees and expenses incurred in the defense, the chief counsel of the involved agency shall forward the request, along with his recommendations and those of the agency, to the assigned liaison deputy general counsel or, if none, to the deputy designated for these purposes. Agency counsel may not send the request directly to the General Counsel or to the Executive Deputy General Counsel since one or both of those officials could ultimately serve as an adjudicator in the matter.

(2) *Decision by OGC.* After investigation and consultation with agency counsel and other appropriate officials, the decision whether to advance counsel fees and in what amounts will be made by the designated deputy general counsel. The decision will be communicated to the agency's chief counsel and to the affected member, official or employe.

(3) *Approval.* A decision by the designated deputy general counsel to advance counsel fees to a member, official or employe will constitute authorization under § 39.1 (relating to criminal cases) and Management Directive 205.6 to the agency to advance the fees approved from the agency's authorized appropriations, but the decision will not constitute authorization to advance or reimburse additional fees or expenses incurred. Each request for additional advancement or for reimbursement of fees or expenses shall be submitted to OGC for separate determination.

(c) *Appeal to the General Counsel.*

(1) *Appeal by the member, official or employe.* If the requested advancement or reimbursement is disapproved, or if the member, official or employe is dissatisfied with the amount of the advancement or reimbursement approved, the member, official or employe may file with the General Counsel a petition of appeal under 1 Pa. Code § 35.20 (relating to appeals from actions of the staff) within 10 days after service of the notice of the decision by OGC. That person may also request an evidentiary hearing in accordance with 2 Pa.C.S. §§ 501—508 and 701—704 (relating to Administrative Agency Law) and 1 Pa. Code Part II (relating to the general rules of administrative practice and procedure).

(2) *Appeal by the agency.* If the involved agency is dissatisfied with the decision of the designated deputy general counsel, it may within 10 days after service of notice of the decision of OGC request that the decision be reviewed by the Executive Deputy General Counsel. Review by the Executive Deputy General Counsel will be made in his sole discretion.

(3) *Further appeal to the General Counsel.* If the Executive Deputy General Counsel, upon his discretionary review, modifies the decision of OGC to the dissatisfaction of the affected member, official or employe, that person may, within 10 days after service of the notice of the revised decision, file with the General Counsel a petition of appeal under 1 Pa. Code § 35.20 and request a hearing under to the same procedures applicable as if an appeal were taken from the original determination by the designated deputy general counsel. The agency will not have the right to appeal to the General Counsel.

(d) *Notice regarding opportunity for appeal.*

(1) *Right to appeal.* The notice to the member, official or employe of the decision of OGC approving or disapproving advancement or reimbursement of counsel fees or expenses will state expressly that the member, official or employe has a right to appeal the decision to the General Counsel or a designee within 10 days after service of the notice of decision and that that person may request a hearing under 2 Pa.C.S. §§ 501—508 and 701—704 and 1 Pa. Code Part II. The notice will specify that a petition of appeal filed by the member, official or employe shall state facts necessary to establish the member's, official's or employe's eligibility for the fees requested, be verified and served on agency counsel, and otherwise comply with 1 Pa. Code Part II.

(2) *Option to await completion of criminal case.*

(i) In the case of requests for advancement of counsel fees and expenses or requests for reimbursement made prior to the termination of the criminal prosecution, failure to appeal to the General Counsel or a designee the decision denying or limiting advancement or reimbursement of fees prior to termination of the criminal proceedings will not prejudice the employe's opportunity later to request reimbursement of fees and expenses under § 39.1(a) and (b) if his defense ultimately is successful.

(ii) If the member, official or employe appeals an adverse decision of OGC immediately to the General Counsel, and the General Counsel or a designee then issues a formal adjudication, the member, official or employe is thereafter precluded from re-litigating eligibility for counsel fees and expenses under § 39.1(a) even if his defense ultimately proves successful. Only a request after acquittal for reimbursement under § 39.1(b), providing for discretionary authorization for reimbursement of counsel fees, will be considered under those circumstances.

(e) *Procedures on appeal.*

(1) If a petition of appeal is filed with the General Counsel by the affected member, official or employe under 1 Pa. Code § 35.20, the OGC will designate a deputy general counsel not involved in the initial decision approving, disapproving or limiting advancement or reimbursement, or another attorney outside OGC, to serve as presiding officer under 1 Pa. Code Part II and to act as advisor to the General Counsel or a designee in preparing and issuing an adjudication. The presiding officer will not prepare a proposed report but will certify the record to the General Counsel or a designee for adjudication under 1 Pa. Code § 35.201 (relating to certification of record without proposed report).

(2) Unless the Executive Deputy General Counsel has previously reviewed or been otherwise involved in the initial decision made by OGC, he ordinarily will serve as the designated adjudicator for the General Counsel.

(f) *Consolidation of requests under § 39.1(a) and (b) after successful defense.*

(1) If a member, official or employe of the executive branch is successful ultimately in his defense of a criminal investigation or prosecution as to which there has been no previous adjudication of eligibility or ineligibility for counsel fees, that person may make a consolidated request for reimbursement of fees and expenses under § 39.1(a) and (b). If the General Counsel or a designee has previously rendered an adjudication that the member, official or employe is not entitled to advancement or reimbursement of counsel fees, the member, official or employe will be limited to making a request for discretionary reimbursement under § 39.1(b).

(2) Requests for reimbursement will be decided in accordance with the procedures described in subsections (b)—(e). A decision regarding a request or petition for reimbursement made under § 39.1(b) is not and may not be treated or construed as an adjudication. Determinations under § 39.1(b) are made within the sole discretion of the General Counsel or a designee.

Source

The provisions of this § 39.12 adopted by Executive Board Resolution Number ER-6-40, 6 Pa.B. 826; amended May 11, 1979, effective May 12, 1979, 9 Pa.B. 1532; reserved September 13, 1985, effective September 14, 1985, 15 Pa.B. 3244; amended August 5, 1994, effective August 6, 1994, 24 Pa.B. 3850. Immediately preceding text appears at serial page (34829).

§ 39.13. Civil cases.

(a) *Reporting of cases.* In the case of a current or former member, official or employe of the executive branch of the Commonwealth sued in his personal capacity in a civil action, the reporting requirements are set forth in § 39.4 (relating to employe responsibility), paragraphs 3b through 3d of Management Directive 205.6 (relating to defense of suits against Commonwealth employes), Management Directive 630.2 (relating to reporting of employe liability claims) and this subchapter.

(1) *Cases involving allegations or the possibility of bad faith, malicious conduct or conduct otherwise outside the scope of employment.*

(i) Subject to § 39.14 (relating to independent agencies) in cases which might not be fully covered by the Commonwealth's Tort Liability Program, including the Automobile Liability Self-Insurance Program (ALSIP), or the Employes' Liability Self-Insurance Program (ELSIP) (for example—cases in which a member's, official's or employe's conduct giving rise to the cause of action is alleged to have been in bad faith, malicious or otherwise outside the good faith exercise of his duties or employment), the member's, official's or employe's agency is required to report the civil suit immediately to Office of General Counsel (OGC) as follows:

(A) The agency report to OGC shall include a detailed description of the circumstances known to the agency concerning the case.

(B) The agency's report shall be delivered through the agency's chief counsel and directed to the deputy general counsel assigned as liaison to the agency involved or, if none, to the deputy general counsel designated for those purposes.

(C) The chief counsel of the agency shall include with the report his recommendations regarding whether legal representation should be provided by the Commonwealth and advise whether a Commonwealth attorney has already undertaken the defense.

(ii) The reporting requirement of this paragraph is in addition to the report to the Bureau of Risk Insurance Management (BRIM) required under Management Directives 205.6 and 630.2

(2) *Other cases.*

(i) If the allegations of the complaint or petition for review aver only that a member, official or employe was negligent or otherwise acting in an unintentional manner, and while within the scope of his duties or employment, the matter shall be reported by the agency only to BRIM in the Depart-

ment of General Services in accordance with paragraphs 3b or 3c of Management Directive 205.6 and paragraphs 4 and 5 of Management Directive 630.2. A separate report is not required to be made to OGC, but a report may be made to OGC in the discretion of the chief counsel.

(ii) In the cases described in subparagraph (i), the agency chief counsel shall inform the member, official or employe that, subject to a decision of the Attorney General under 42 Pa.C.S. § 8525 (relating to legal assistance), if applicable, the member, official or employe has the option under § 39.2 (relating to civil cases involving unintentional conduct) to accept representation by the Attorney General or other Commonwealth attorneys assigned under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506) or to engage his own attorney at his own expense. Chief counsel shall further inform the member, official or employe that whether he is represented by Commonwealth attorneys or private counsel, the Commonwealth will pay for the expense of any judgment, excluding private counsel fees, which might be entered against him in the case in accordance with § 39.2. If the official or employe opts for private counsel, the payment for the expense of a judgment made against him will not be made by ELSIP. See Management Directive 630.2. Payment under those circumstances will be made by the employing agency from its own authorized appropriations.

(b) *Determination by the OGC.*

(1) *Question of representation by Commonwealth attorney.* In cases reported to OGC under paragraph 3c of Management Directive 205.6 and subsection (a)(1), the liaison or designated deputy general counsel will determine, in accordance with §§ 39.2—39.4 (relating to civil cases involving unintentional conduct; civil cases involving intentional or malicious conduct; and employe responsibility), whether the Commonwealth may provide an attorney to defend the member, official or employe. If OGC approves representation, counsel will be assigned in accordance with the Commonwealth Attorneys Act by the appropriate authority under that act. OGC will make its determination after appropriate investigation and consultation with agency counsel, responsible agency personnel, BRIM and, if appropriate, the Office of Attorney General. If the agency retains outside counsel to defend its officials or employes, the agency shall pay counsel fees from its own authorized appropriations. ELSIP will not reimburse agencies for outside counsel fees.

(2) *Interim representation.* Pending a determination by OGC under paragraph (1), the Commonwealth may, at the discretion of the OGC, extend representation to a member, official or employe, but any representation undertaken by the Commonwealth shall be deemed to be with reservation of all of its rights under §§ 39.2—39.4 to later withdraw representation and to refuse indemnification for the expense of any judgment which might be entered personally against the official or employe. If the Commonwealth does not afford representation to the member, official or employe pending a decision by OGC of his

request for representation, that person is nevertheless obligated to retain counsel to defend himself as a condition to preserving any claim for indemnification by the Commonwealth for the expense of any judgment a court or other tribunal might enter against him in the case.

(3) *Determination of good faith exercise of duties.*

(i) If a deputy general counsel determines that a member's, official's or employe's conduct giving rise to the cause of action "was within the scope of his (duties or) employment and a good faith exercise of his authority . . .," as described in § 39.3(a), agency counsel will inform the member, official or employe of the decision and further advise that he has the choice to be represented by Commonwealth attorneys or to engage his own attorney at his own expense. If the official or employe opts for private counsel, ELSIP will not provide coverage for any judgment; payment for any judgment under those circumstances will be made from the employing agency's authorized appropriations.

(ii) The rejection of ELSIP coverage by the official or employe shall be in writing, notarized and sent to BRIM by hand-carry or certified mail. *See* Management Directive 630.2, paragraph 3d.

(iii) If a Commonwealth attorney is not already representing the member, official or employe, and if the member, official or employe wishes to be represented by a Commonwealth attorney, legal representation will be provided to the member, official or employe in accordance with the Commonwealth Attorneys Act. Outside counsel fees will be paid by the employing agency. BRIM will not make reimbursement for defense counsel fees.

(4) *Determination of bad faith where other defendants are represented by the Commonwealth.*

(i) If the designated deputy general counsel determines that a member's, official's or employe's conduct appears to have been in bad faith, malicious or outside the scope of his employment, but there are other defendants in the case that the Commonwealth's attorneys are or will be representing, the agency shall inform them that the member, official or employe will be informed of the following:

(A) The determination of OGC that the member, official or employe has acted in bad faith, maliciously or outside the scope of his employment.

(B) The right to legal representation provided by the Commonwealth, but that that person will not be indemnified by the Commonwealth for any judgment which might be entered against him in the case.

(C) Under § 39.3(b)(1), he may be subject to personal liability.

(D) He is entitled to engage his own attorney at his own expense.

(E) Private counsel fees and litigation expenses incurred can be reimbursed to the employe from the employing agency's authorized appropriations only if the member, official or employe wins the case.

(ii) When representation is afforded by the Commonwealth under § 39.3(b)(1), the Commonwealth will neither undertake an obligation nor make a promise under any circumstances to indemnify the member, official or employe for the expense of a judgment which might be entered against him or to pay or indemnify him for the expense of a settlement of the civil action.

(iii) If the case involves an alleged violation of Federal civil rights legislation and there are other defendants represented by Commonwealth attorneys, the chief counsel of the agency involved shall inform the member, official or employe of the provisions of § 39.3(b)(2).

(iv) The decision of OGC under § 39.3(b)(1) will be communicated to BRIM.

(v) If the member, official or employe accepts representation by Commonwealth attorneys, counsel will be appointed in accordance with the Commonwealth Attorneys Act. Outside counsel fees will be paid by the responsible agency. BRIM will not pay or reimburse agencies for defense counsel fees.

(5) *Determination of bad faith where there are no other defendants represented by the Commonwealth.*

(i) If the designated deputy general counsel determines that the member's, official's or employe's conduct giving rise to the civil action appears to have been in bad faith, malicious or outside the scope of his employment, and there are no other defendants in the case that the Commonwealth's attorneys will be representing, the agency shall inform the member, official or employe that the Commonwealth will not afford legal representation.

(ii) In accordance with § 39.3(b)(1), agency counsel will inform the member, official or employe of the following:

(A) He may be subjected to personal liability.

(B) The Commonwealth will not indemnify the member, employe or official for any judgment which might be entered against him or pay or indemnify him for the expense of a settlement of the action.

(C) Private counsel fees and litigation expenses can be reimbursed by the employing agency only if he wins the case.

(iii) If a Commonwealth attorney has previously undertaken to represent the member, official or employe in accordance with paragraph (2), he will take the steps necessary to withdraw as counsel. If the member, official or employe resists the withdrawal by the Commonwealth attorney, the member, official or employe will be considered liable and will be billed for the legal services rendered and expenses incurred for his representation after notice of the determination by OGC that the member, official or employe is not entitled to representation.

(c) *Request for indemnification.*

(1) Unless the General Counsel or a designee has previously rendered a formal adjudication that the member's, official's or employe's conduct giving rise to the cause of action was in bad faith, malicious or otherwise outside the scope of his employment, a member, official or employe, at the termination of a civil case against him, may request that the Commonwealth provide indemnification for the expense of a judgment which might have been entered against him or that he be reimbursed for private counsel fees and litigation expenses incurred in the defense.

(2) The member's, official's or employe's entitlement to reimbursement or indemnification will be determined in accordance with the standards of §§ 39.2—39.4 and in accordance with the procedures described in subsection (b).

(3) If the General Counsel or a designee has previously issued a formal adjudication that the defendant's conduct giving rise to the cause of action was in bad faith, malicious or otherwise outside the scope of his employment, the member, official or employe is legally precluded from thereafter seeking indemnification for the expense of a judgment or settlement in the case.

(d) *Appeal.*

(1) *Right to appeal by member, official or employe.* If OGC disapproves a request for legal representation by Commonwealth attorneys or attorneys retained by the Commonwealth under subsection (b); denies a request for reimbursement of fees and expenses under subsection (b) or (c); or determines under subsection (b) or (c) that a member, official or employe is not entitled to indemnification for the expense of a judgment or settlement—the member, official or employe may file a petition of appeal to the General Counsel under 1 Pa. Code § 35.20 (relating to appeals from actions of the staff) within 10 days after service of the notice of the decision of OGC. The member, official or employe may request an evidentiary hearing under 2 Pa.C.S. §§ 501—508 and 701—704 (relating to the Administrative Agency Law) and 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure).

(2) *Discretionary appeal by agency.* If the involved agency is dissatisfied with the decision of the designated deputy general counsel regarding a member's, official's or employe's request for legal representation, reimbursement of fees and expenses or indemnification of the expense of a judgment, the agency may within 10 days after service of notice of the decision request review of the decision by the Executive Deputy General Counsel. Review by the Executive Deputy General Counsel will be made solely at his discretion.

(3) *Further appeal by member, official or employe or by the agency.* If the Executive Deputy General Counsel modifies the decision of OGC to the dissatisfaction of the affected member, official or employe, that person may within 10 days after service of the notice of the decision appeal the determination to the General Counsel under 1 Pa. Code § 35.20 and request a hearing in accor-

dance with the procedures described in paragraph (1). The agency does not have the right to appeal to the General Counsel.

(4) *Notice of right to appeal.* The notice sent to the member, official or employe and the agency regarding the decision of OGC disapproving a request for legal representation by the Commonwealth or denying a request or disclaiming responsibility for reimbursement of fees or expenses or indemnification for the expense of a judgment will state the following:

(i) The member, official or employe has a right under 1 Pa. Code § 35.20 to appeal the decision of OGC to the General Counsel or a designee within 10 days after service of the notice, and that person may request a hearing under 2 Pa.C.S. §§ 501—508 and 701—704 and 1 Pa. Code Part II.

(ii) Failure to appeal a decision disapproving a request for legal representation will not prejudice the member's, official's or employe's right, at the termination of the case, to request reimbursement of reasonable private counsel fees and litigation expenses incurred in the defense, or to request indemnification for the expense of a judgment which might be entered against him.

(iii) If the member, official or employe immediately appeals a determination denying legal representation or disclaiming responsibility for indemnification, and a formal adjudication is issued by the General Counsel or a designee ruling that the member, official or employe is not entitled to legal representation or indemnification by the Commonwealth, the member, official or employe is thereafter legally precluded from seeking reimbursement for private counsel fees and expenses unless he wins the case, and he is legally barred from seeking indemnification for the expense of a judgment which might be entered against him in the case or reimbursement or contribution for payment made or agreed to by the member, official or employe under settlement.

(5) *Procedure*

(i) If a petition of appeal to the General Counsel or a designee is timely filed under paragraph (1) or (3), the OGC will designate a deputy general counsel not involved in a previous determination, or an attorney outside OGC, to serve as presiding officer under 1 Pa. Code Part II and to act as advisor to the General Counsel or a designee in preparing and issuing an adjudication. The presiding officer will not prepare a proposed report but will certify the record to the General Counsel or a designee for adjudication under 1 Pa. Code § 35.201 (relating to certification of record without proposed report).

(ii) In most instances, the Executive Deputy General Counsel will serve as the General Counsel's designated adjudicator, unless he has previously participated in any of the initial determinations by OGC or conducted discretionary review under paragraph (2).

Source

The provisions of this § 39.13 adopted August 5, 1994, effective August 6, 1994, 24 Pa.B. 3850.

Notes of Decisions

General

Even though a Commonwealth employee, who had the right to engage his own counsel when added as a defendant in a civil action, was eventually represented by counsel for the other defendants, the “shared counsel” provision for imputing notice under Fed.R.Civ.P. 15(c)(3) doesn’t apply where the representation of the added employee started after the relevant 120-day notice period had expired. *Singletary v. Department of Corrections*, 266 F.3d 186 (3rd Cir. 2001).

§ 39.14. Independent agencies.

(a) *Purpose and scope.*

(1) Under sections 216 and 709(f) of The Administrative Code of 1929 (71 P. S. §§ 76 and 249(f)), the Executive Board has authority to make rules and regulations defining the expenses incurred in the performance of public duties for which officers and employes of the executive branch of State Government may be reimbursed. Under that authority, Subchapter A (relating to defense of suits against Commonwealth employes) defines those expenses relating to the defense of personal criminal and civil actions asserted against Commonwealth officials and employes of an executive branch agency of the Commonwealth government which might be paid by the Commonwealth from any source.

(2) Under Subchapter A, the General Counsel or a designee is required to determine, except in the cases involving officials and employes of the Office of Attorney General, the Department of Auditor General and the Treasury Department, whether, in each individual case, a Commonwealth official or employe is entitled to receive the benefits prescribed in that subchapter.

(3) This section is adopted to harmonize the requirements of Subchapter A with the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506) and other statutes establishing the independence of certain agencies from the General Counsel and the fiscal independence of certain executive branch agencies from the Governor.

(b) *Definitions.* As used in this section, an independent agency is defined as follows:

(1) For purposes of providing legal representation to a Commonwealth official or employe, or advancing or paying legal fees incurred in his defense, an independent agency is defined as provided by section 102 of the Commonwealth Attorneys Act (71 P. S. § 732-102) and is further defined to include the Public Utility Commission and other agencies specified by law as independent agencies under the Commonwealth Attorneys Act.

(2) For purposes of providing reimbursement of expenses, other than attorneys’ fees, or indemnification to a Commonwealth official or employe in connection with a criminal or civil action involving the official or employe in his personal capacity, an independent agency is defined as an agency for which the Governor has no power or authority under law to appoint a comptroller.

(c) *Legal representation.* In cases when an official or employe of an independent agency, as defined by subsection (b)(1), is the subject of a criminal or civil proceeding in his personal capacity arising out of the performance of his public duties, the General Counsel designates the chief counsel of the agency, or a designee, to determine under Subchapter A whether the Commonwealth must or should provide legal representation to the official or employe or pay, advance or reimburse legal fees incurred by him.

(d) *Reimbursement and indemnification.*

(1) In cases when an official or employe of an independent agency, as defined by subsection (b)(2), is the subject of a criminal or civil proceeding in his personal capacity arising out of the performance of his public duties, the General Counsel designates the chief counsel of the agency, or a designee, to determine under Subchapter A whether the Agency must or should reimburse or indemnify the official or employe for his expenses or otherwise make payment in satisfaction of his personal liabilities or obligations.

(2) In those cases described in paragraph (1), the General Counsel does not designate the chief counsel of the agency to determine whether the Department of General Services, Bureau of Risk and Insurance Management (BRIM), will make payments on behalf of the official, employe or agency from any insurance or self-insurance program which it maintains. Determinations affecting the obligation of BRIM to make payments on behalf of an official, employe or agency, including the Office of Attorney General, the Department of Auditor General and the Treasury Department, will be made by the General Counsel or a designee.

Source

The provisions of this § 39.14 adopted August 5, 1994, effective August 6, 1994, 24 Pa.B. 3850; amended December 2, 1994, effective December 3, 1994, 24 Pa.B. 5986. Immediately preceding text appears at serial pages (191261) to (191263).

Cross References

This section cited in 4 Pa. Code § 39.12 (relating to criminal cases); and 4 Pa. Code § 39.13 (relating to civil cases).

Subchapter C. [Reserved]

Source

The provisions of this Subchapter C adopted by Executive Board Resolution Number ER-6-40, 6 Pa.B. 826; reserved September 13, 1985, effective September 14, 1985, 15 Pa.B. 3244. Immediately preceding text appears at serial pages (34828) and (41808).

Subchapter D. SECRETARY OF EXECUTIVE BOARD

Sec.
39.31. Secretary of Executive Board.

Source

The provisions of this Subchapter D adopted August 13, 1976, 6 Pa.B. 1886, unless otherwise noted.

§ 39.31. Secretary of Executive Board.

The Secretary of Administration is designated Secretary of the Executive Board and is to provide the necessary staff support to review, analyze, recommend actions and coordinate the origination, processing and control of Executive Board matters.

Subchapter E. [Reserved]

Source

The provisions of this Subchapter E adopted September 10, 1976, 6 Pa.B. 2241; reversed September 13, 1985, effective September 14, 1985, 15 Pa.B. 3244. Immediately preceding text appears at serial pages (41809) and (52550).

Subchapter F. [Reserved]

Source

The provisions of this Subchapter F adopted September 17, 1976, 6 Pa.B. 2274; reserved September 13, 1985, effective September 14, 1985, 15 Pa.B. 3244. Immediately preceding text appears at serial pages (52550) to (52551) and (73387).

Subchapter G. [Reserved]

Source

The provisions of this Subchapter G reserved September 13, 1985, effective September 14, 1985, 15 Pa.B. 3244. Immediately preceding text appears at serial pages (73387) to (73390).

Subchapter H. [Reserved]

Editors' Note: The provisions of Subchapter H set for the regulation of the Cost Reduction Program as promulgated at 9 Pa.B. 2336. However, the Governor's Office determined that a centralized cost reduction activity was no longer needed at 9 Pa.B. 3312 and thus the provisions of this subchapter were rescinded.

Subchapter I. [Reserved]**Source**

The provisions of this Subchapter I adopted December 7, 1979, effective December 8, 1979, 9 Pa.B. 3978; reserved September 13, 1985, effective September 14, 1985, 15 Pa.B. 3244. Immediately preceding text appears at serial pages (73391) and (59523).

Subchapter J. USE OF STATE AUTOMOBILES

- Sec.
39.91. Purpose.
39.92. Applicability.
39.93. General.
39.94. Definitions.
39.95. Operation of State automobiles.
39.96. Use of personal automobiles.
39.97. Insurance coverage.
39.98. Permanent assignments.
39.99. Powers of the Secretary of General Services.

Source

The provisions of this Subchapter J adopted February 1, 1980, effective February 2, 1980, 10 Pa.B. 460, unless otherwise noted.

Cross References

This subchapter cited in 4 Pa. Code § 73.6 (relating to permanent assignment of Commonwealth motor vehicles).

§ 39.91. Purpose.

The purpose of this subchapter is to establish rules for the use of State automobiles by State officers and employees.

§ 39.92. Applicability.

State officers and employees, except those in the Department of Auditor General and the Treasury Department, are subject to the provisions contained in this subchapter as to the use of State automobiles.

§ 39.93. General.

(a) The Department of General Services (Department) may assign to any department, board, or commission such automobiles as may be required by it for full-time daily use, and such automobiles shall be operated by employees of such departments, boards, or commissions.

(b) The Department shall maintain a sufficient number of automobiles not assigned to departments, boards, or commissions to meet the requirements of departments, boards, or commissions which do not require the full-time daily use of automobiles.

§ 39.94. Definitions.

The following words and terms, when used in this subchapter, have the following meanings:

Agency—The Governor; an administrative department, board or commission; an officer; departmental administrative board or commission; an authority; or another agency of the Commonwealth subject to The Administrative Code of 1929 (71 P. S. §§ 51—732), now in existence or hereafter created.

Personal automobile—A passenger car, station wagon, van or any motorized vehicle used by an individual as a private conveyance.

State automobile—An automobile or station wagon maintained by the Department of General Services to satisfy the needs of agencies.

State employe—An officer other than a State officer, or an employe of the Governor's Office or of any administrative department, board, commission, authority, or other agency subject to The Administrative Code of 1929 (71 P. S. §§ 51—732).

State officer—embers of the Executive Department, consisting of the Governor, Lieutenant Governor, Secretary of the Commonwealth, Attorney General, and Secretary of Education; heads of administrative departments; and chairpersons and members of administrative boards and commissions.

§ 39.95. Operation of State automobiles.

(a) State automobiles shall be operated only by properly licensed and responsible State employes or officers. They shall be operated at all times in accordance with the provisions of the Vehicle Code or other applicable regulations, laws and ordinances. State automobiles shall be operated only for the conduct of Commonwealth business. A State automobile may be driven between a duty location and the operator's residence only if such action is appropriate and approved by the Secretary of General Services except as otherwise provided for in this subchapter.

(b) An operator of a State automobile must abide by the procedures promulgated by the Department of General Services for purchasing fuel and other services, for maintaining and repairing State automobiles, and for fulfilling reporting requirements.

(c) Operators of State automobiles may be held pecuniarily liable for costs of operation and repairs to or replacement of an automobile when it is determined that the automobile was used for other than official business or has been physically abused by the operator. Such a determination shall be made by the Secretary of General Services.

(d) An operator's personal equipment shall not be installed in a State automobile.

(e) State automobiles shall not be operated outside of this Commonwealth to a point beyond 300 miles from place of origin, official headquarters, or residence unless authorized in advance by the head of the agency to which the automobile was assigned.

(f) Operators of State automobiles shall be responsible for the immediate payment of all parking and traffic violations.

(g) The Pennsylvania State Police are authorized and encouraged to report to the Secretary of General Services the license numbers of State automobiles observed in use on weekends, holidays, and before and after normal working hours. They are further authorized to stop probable violators and question their authority to operate at such time. Unlawful operation will result in the operator's classification as irresponsible and may result in the forfeiture of any future rights to operate State automobiles. The sanction of forfeiture may be avoided by a showing of good cause to the Secretary of General Services.

§ 39.96. Use of personal automobiles.

The use of personal automobiles shall be governed by issuances of the Directives Management System. Section 2407 of The Administrative Code of 1929 (71 P. S. § 637) permits reimbursement to a State officer or employe for the use of his own automobile on Commonwealth business. Reimbursement is made in accordance with Chapter 40 (relating to travel and subsistence).

§ 39.97. Insurance coverage.

(a) The Commonwealth provides excess liability insurance coverage for employes who use their personal vehicles for travel in the conduct of official Commonwealth business. Excess means that any other valid and collectible insurance will be primary. The coverage provided by the Commonwealth will be considered primary if no other valid and collectible insurance was in effect. Excess liability coverage is provided through the Employee Liability Self-Insurance Fund administered by the Bureau of Risk and Insurance Management, Department of General Services, and is limited to the coverage required on a per person-per occurrence basis as defined in the Pennsylvania No-fault Motor Vehicle Insurance Act (40 P. S. §§ 1009.101—1009.701) (Repealed).

(b) Employes using or anticipating the use of their personal automobiles on Commonwealth business are advised that they should notify the underwriter providing liability coverage of such use or anticipated use. They shall:

(1) Certify as to insurance coverage on Form OA-191, Travel Expense Voucher, when seeking reimbursement for use of personal automobiles.

(2) Report accidents involving personal automobiles while on Commonwealth business to their insurance underwriter and the Bureau of Risk Management, Department of General Services.

(c) Compliance with the provisions of subsection (b)(1) and (2) does not relieve an operator or owner of an automobile of any responsibility to comply with the requirements of the Vehicle Code or other applicable laws or ordinances.

(d) Rates at which reimbursement is made for the use of personal automobiles include a portion to reimburse employes for additional insurance coverage required when using personal automobiles on Commonwealth business.

§ 39.98. Permanent assignments.

(a) State officers, cabinet officers, deputy secretaries of administrative departments and members of the Governor's staff of equivalent rank may retain assigned automobiles in their possession at all times. Proper judgment must be exercised in the use of these automobiles.

(b) State employes subject to call or certain types of duties which require constant access to a State automobile may, upon personal request of their agency head and approval of the Secretary of General Services, retain an assigned automobile. The scope of proper use of such automobiles shall be defined by the Secretary of General Services.

Source

The provisions of this § 39.98 amended March 21, 1980 effective March 29, 1980, 10 Pa.B. 1385.

Cross References

This section cited in 4 Pa. Code § 73.6 (relating to permanent assignment of Commonwealth motor vehicles); 4 Pa. Code § 73.8 (relating to operation of Commonwealth motor vehicles); and 4 Pa. Code § 73.12 (relating to reporting).

§ 39.99. Powers of the Secretary of General Services.

(a) In times of emergency, the Secretary of General Services may temporarily waive such parts of this subchapter as are necessary to properly respond to the emergency.

(b) Where authority has been granted in this subchapter, the Secretary of General Services may clarify these rules through the Directives Management System.

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