

M. M. M.

4/10/62

Memorandum No. 16(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Defense of Public Officers and Employees)

The Commission considered the matters of defense of public officers and employees at public expense and insurance for public entities and public officers and employees at the time it considered the statutes relating to the presentation of claims against public officers and employees. The Commission decided, however, that a recommendation covering these matters was not within the scope of the recommendation relating to claims against public officers and employees. Assemblyman Bradley decided to submit bills relating to both matters (based on rough drafts of statutes prepared by the staff of the Commission but not considered by the Commission) to the 1961 Legislature and his bills were enacted as law.

Our experience with the personnel claims statutes recommendation clearly demonstrates the practical necessity of considering the various techniques that are available to minimize the adverse financial consequences of sovereign liability and the liability of public personnel. We have already considered some of these techniques. Insurance and defense at public expense are matters that are considered to be of great importance by public officers and employees. It is strongly urged that recommendations on these two matters be included in our recommendation on sovereign immunity in 1963. Both matters can be considered in a relatively short time. This memorandum is concerned with defense at public expense. Insurance for public entities and for public personnel is discussed in Memorandum No. 17(1962).

There are two principal statutes relating to defense of public personnel at public expense: Section 2001 of the Government Code and Section 13007.1 of the Education Code. Section 2001 was substantially revised in 1961 and Section 13007.1 was enacted in 1961. The text of both sections is set out in Exhibit I attached (yellow pages). An important opinion of the Attorney General construing Section 2001 is attached as Exhibit II (green pages).

Section 2001 of the Government Code requires that a public entity provide a legal defense at public expense for its officers and employees against actions and proceedings brought against them for their acts and omissions during the course of their service or employment. The section covers all public entities and includes all torts, whether negligent or intentional. Unless provision is made by the public entity for the employment of other counsel, the attorney for the public entity is required to act as defense counsel. The lack of a regular or part time counsel, or the disqualification or incapacity of regular counsel, does not relieve the public entity from the duty of providing a legal defense at public expense upon request.¹

Prior to the amendment of Section 2001 in 1961, the section required a preliminary determination as to the good faith of the public officer or employee requesting the defense. Section 2001 now requires that the public entity furnish the defense even though the public entity believes that the officer or employee may have acted or failed to act because of bad faith or malice. In other words, Section 2001 gives the public officer or employee an absolute right to a defense at public expense

1. See 39 Ops. Cal. Atty. Gen. 103 (1962). The text of this opinion is set out as Exhibit II (green pages).

where the action arises out of his act or omission during the course of his public service or employment. He cannot be deprived of this defense because the public entity determines that he did not act in good faith. The cost of the defense can be recovered from the public officer or employee, however, if it is later established that he acted or failed to act because of bad faith or malice.

Section 2001 does not spell out the remedies available to the officer or employee in case the entity refuses to provide him with a legal defense upon request. The traditional remedy would be to mandate the appropriate public officials to compel the performance of the statutory duty of providing legal representation at public expense.² In cases where this remedy would not be adequate--where it is necessary to retain defense counsel immediately--the public officer or employee apparently may retain his own counsel upon the refusal of the public entity to provide a legal defense, and the public entity must reimburse him for the reasonable amount of attorney's fees and costs incurred.³

Section 2001 overlaps and conflicts with Section 2000 of the Government Code. The text of Section 2000 is set out in Exhibit I (yellow pages). Note that Section 2000 apparently permits a public officer included within its terms to retain his own attorney and to charge the expense of the defense to the public entity. Section 2000 applies only to cities, counties and school districts. It would appear that if the policy of Section 2000 is sound, it should be made generally applicable. On the other hand, if the policy of Section 2001 is sound--that the public

2. Ibid.

3. Although Section 2001 does not expressly authorize this remedy, this is the interpretation given the section by the Attorney General. See 39 Ops. Cal. Atty. Gen. 103 (1962).

entity has the option of providing a defense with its regular counsel or securing other counsel--then Section 2000 should be repealed.

Section 2002.5 of the Government Code (text on yellow sheets) applies only to an employee or officer of the State licensed in one of the healing arts. The section provides for defense of such officer or employee by the Attorney General upon request. It is not clear whether Section 2002.5 incorporates the terms of Section 2001. In other words, can the State recover back the expenses of the defense if it is later established that the public officer or employee acted with bad faith or malice? It would appear that Section 2002.5 should be made consistent with Section 2001.

Although Section 2001 by its terms applies to all public officers and employees, school district officers and employees are covered by a special statute--Section 13007.1 of the Education Code. Section 13007.1 was enacted in 1961, the same year that Section 2001 was revised. Section 13007.1 is based on a completely different theory than Section 2001. It uses the same theory that was rejected when Section 2001 was revised in 1961. Thus, Section 13007.1 provides that a school district officer or employee is entitled to a defense at public expense only after a determination by the governing board of the school district that "the officer or employee performed his official duty in good faith in the apparent interests of the school district and without malice and that such defense would otherwise be in the best interests of the school district." In other respects, Section 13007.1 closely follows the form of Section 2001 since it was based on the bill that ultimately was enacted as Section 2001.

Attached as Exhibit III (pink pages) is a redraft of Section 2001. The redraft eliminates unnecessary language and inserts the substance

of the opinion of the Attorney General. The staff suggests that Section 2001 be revised to read as set out in Exhibit III, that Sections 2000 of the Government Code and Section 13007.1 of the Education Code be repealed, and that Section 2002.5 be made consistent with Section 2001.

The staff recommendation raises the question as to whether the right to a defense at public expense should be an absolute right of the officer or employee (subject to right of entity to recover back the expenses of defense if employee acted in bad faith or with malice) or whether the right to a defense should be discretionary with the public entity. The language used in Section 2001 is important because we plan to use the same language in the insurance and indemnity statutes. In other words, is the phrase "negligent or wrongful act or omission occurring during the course of his service or employment" satisfactory? Is the phrase permitting recovery of expense of defense "if it is established that the public employee acted or failed to act because of bad faith or malice" satisfactory?

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Government Code Section 2000 provides:

2000. Whenever suit for damages resulting from

(a) injuries caused by or due to the inefficiency or incompetency of any appointee or employee of any board or any member thereof, or

(b) negligence in failing or neglecting to remedy the dangerous or defective condition of any public property or to take such action as is reasonably necessary to protect the public against the condition is brought against any member of a board, the cost of defending the suit, including attorney fees actually expended in defending the suit, is a charge against the county, city or school district of which the member was an officer if the member had neither knowledge nor notice of

(1) the inefficiency or incompetency of the appointee or employee at the time of the injury, or

(2) the dangerous or defective condition.

Government Code Section 2001 provides:

2001. (1) As used in this section:

(a) "Action or proceeding" does not include an action or proceeding to remove an employee from his employment, a criminal action or proceeding against a public employee, or an action or proceeding brought by a public entity against a public employee as an individual and not in his official capacity.

(b) "Employee" includes an officer, agent or employee.

(c) "Public entity" includes the State, a county, city, district or other public agency or public corporation.

(2) Unless provision has been made by the public entity for the employment of other counsel in connection therewith, the attorney for the public entity, upon request of the employee, shall act as counsel in the defense of any action or proceeding brought against an employee of the public entity, in his official or individual capacity, or both, on account of:

(a) The death or physical injury to person or property as a result of the dangerous or defective condition of any public property; or

(b) The death or physical injury to person or property as a result of the negligence of such employee occurring during the course of his service or employment; or

(c) Any damages caused by any act or failure to act by such employee occurring during the course of his service or employment.

(3) The attorney's fees, costs and expenses of defending

the action or proceeding pursuant to this section are a lawful charge against the public entity. The public entity may recover from the public employee any attorney's fees or the reasonable value of legal services rendered, costs or expenses paid or incurred by it under the provisions of this section if the action or proceeding is one described in subdivision (2) (c) of this section and it is established that the public employee acted or failed to act because of bad faith or malice.

(4) The rights of a public employee under this section are in addition to and not in lieu of any rights the employee may have under any other law, charter, ordinance or regulation providing for the defense of a public employee.

Government Code Section 2002.5 provides:

2002.5. Whenever a suit is filed against an employee or officer of the State of California licensed in one of the healing arts under Division 2 of the Business and Professions Code, for malpractice alleged to have arisen out of the performance of his duties as a state employee, a copy of the complaint shall also be served upon the Attorney General and the Attorney General upon the request of such employee shall defend said suit on behalf of such employee. If there is a settlement or judgment in the suit the State shall pay the same; provided, that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General. The settlement of such claims or judgments shall be limited to those arising from acts of such officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public.

Education Code Section 13007.1 provides:

13007.1. As used in this section the term "action or proceeding" does not include an action or proceeding to remove an officer or employee from his employment or a criminal action or proceeding brought against an officer or employee. The term includes all other civil actions or proceedings brought against a school district officer or employee for an act committed during his assigned hours of duty and within the apparent course and scope of his employment.

The attorney for a school district, upon the request of the officer or employee, shall act as counsel in the defense of any action or proceeding brought against an officer or employee of the school district in his official or individual capacity, or both, on account of any alleged tortious or criminal conduct arising out of the performance of any official duty, upon, and following, the determination of the governing board of said school district that the officer or employee performed his official duty in good faith in the apparent interests of the school district and without malice and that such defense would otherwise be in the best interests of the school district.

The fees, costs and expenses of defending the action or proceeding pursuant to this section are a lawful charge against the funds of the school district. The school district may recover from the officer or employee any fees, costs or expenses paid or incurred by it under the provisions of this section if it is established that the officer or employee acted or failed to act because of bad faith or malice.

Opinion No. 61-246--February 5, 1962

SUBJECT: PEACE OFFICER--Obligation of Public entity to provide legal counsel to defend against false arrest charge, regardless of provisions in insurance policy procured by officer concerning legal representative, and remedies of peace officer in case of failure to provide defense discussed.

Requested by: DISTRICT ATTORNEY, SACRAMENTO COUNTY

Opinion by: STANLEY MOSK, Attorney General
V. Barlow Goff, Deputy

The Honorable John M. Price, District Attorney of the County of Sacramento, has requested the opinion of this office on the following questions:

1. If a false arrest insurance policy procured by the insured police officer at his own expense provides for the reimbursement of the insured for legal expenses incurred in defense of a claim, but reserves to the insurer the right to take over the conduct of the legal defense, although not requiring the insured to contest legal proceedings unless a mutually agreed upon counsel so advises and the insured consents thereto, the consent not to be unreasonably withheld, is the employing public entity under a duty to provide a legal defense for such peace officers against an action arising out of acts performed within the course of their employment and covered within the risk insured against?

2. If a public entity does not employ counsel, part time or at all, is it relieved from the responsibility of providing a legal defense for peace officers sued under the circumstances set forth in question 1 above?

3. If a public entity is legally obligated but refuses to provide a legal defense for peace officers sued as stated in question 1 above, what legal remedies are then available to the employee?

The conclusions are as follows:

1. If requested by the peace officer employee, the public entity is under a duty pursuant to section 2001 of the Government Code to provide a legal defense for such employees against actions arising out of acts, or the failure to act, performed within the course of their employment, notwithstanding the provision of the employee's insurance policy relative to counsel.

2. The public entity is not relieved of its responsibility to provide a legal defense by reason of the fact that it does not employ counsel.

3. If the public entity refuses to provide a legal defense upon the employee's request, the employee may mandate the public officials to compel the performance of the statutory duty of providing legal representation at public cost. However, should it become necessary to immediately obtain defense counsel by reason of limitations upon the time within which to appear and answer the complaint in the aforementioned actions, the employee may retain counsel upon the refusal of the public entity to provide a legal defense, and thereafter present a claim in the manner provided by law for the reasonable amount of attorney's fees and costs incurred.

ANALYSIS

The questions presented involve the application and construction of section 2001 of the Government Code which was amended by Statutes of 1961, chapter 1692 and now provides as follows:

"(1) As used in this section:

"(a) 'Action or proceeding' does not include an action or proceeding to remove an employee from his employment, a criminal action or proceeding against a public employee, or an action or proceeding brought by a public entity against a public employee as an individual and not in his official capacity.

"(b) 'Employee' includes an officer, agent, or employee.

"(c) 'Public entity' includes the State, a county, city, district or other public agency or public corporation.

"(2) Unless provision has been made by the public entity for the employment or other counsel in connection therewith, the attorney for the public entity, upon request of the employee, shall act as counsel in the defense of any action or proceeding brought against an employee of the public entity, in his official or individual capacity, or both, on account of:

"(a) The death or physical injury to person or property as a result of the dangerous or defective condition of any public property; or

"(b) The death or physical injury to person or property as a result of the negligence of such employee occurring during the course of his service or employment; or

"(c) Any damages caused by any act or failure to act by such employee occurring during the course of his service or employment.

"(3) The attorney's fees, costs and expenses of defending the action or proceeding pursuant to this section

are a lawful charge against the public entity. The public entity may recover from the public employee any attorney's fees or the reasonable value of legal services rendered, costs or expenses paid or incurred by it under the provisions of this section if the action or proceeding is one described in subdivision (2)(c) of this section and it is established that the public employee acted or failed to act because of bad faith or malice.

"(4) The rights of a public employee under this section are in addition to and not in lieu of any rights the employee may have under any other law, charter, ordinance or regulation providing for the defense of a public employee."

(All statutory references in this opinion are to the Government Code unless otherwise noted.)

Although prior to this amendment section 2001 and the now repealed section 2002 indicated a legislative intent to provide a legal defense for public employees at public cost, the sections contained serious ambiguities including when and by whom the issue of good faith of the employee was to be determined in order to ascertain whether or not he was entitled to a legal defense at public cost, and the circumstances under which other counsel would be provided (see Tracy v. County of Fresno, 125 Cal. App.2d 52; 35 Ops. Cal. Atty. Gen. 103). Since under subsection (3) of the existing provisions the determination of the employees' good faith arises only in connection with the recovery of attorney's fees or the reasonable value of legal services rendered, the duty to defend by implication is not contingent upon a preliminary finding of good faith. Also, subsection (2) clearly indicates that if the employee desires legal representation at public cost, it is the responsibility of the public entity and not the employee to make provision for the employment of counsel other than the attorney for the public entity, a situation which might occur, for example, when the official attorney was properly disqualified or incapacitated, or when an insurance contract procured under section 1956 imposed the duty and right to conduct the defense upon the insurer, or where the local public entity did not have an attorney.

The broad definition of "public entity," which does not draw a distinction upon whether or not the public entity has regular, part time or any counsel, when considered with the mandatory language of section 2 (shall impose a mandatory duty where public policy favors such a meaning and where addressed to a public officer, People v. Municipal Court, 145 Cal. App.2d 767, 778) and the further provision that attorney's fees and other costs are a lawful charge against the public entity, not only imposes a duty upon the attorney for the public entity,

but also upon the public entity itself to provide a defense at public costs for its employees who request such legal representation in an action against them in either their official or individual capacities and based upon acts or the failure to act occurring during the course of their employment. This conclusion is consistent with the policy of such statutes to provide public employees with a measure of protection from the harrassment of vexatious lawsuits (see Huffaker v. Decker, 77 Cal. App.2d 383, 388 construing former sections).

Of course, section 2001 does not require the public entity to indemnify its employees for judgments arising out of such action (cf. section 1956 authorizing the public entity to insure against such risks at public cost) and, therefore, many peace officers have acquired false arrest insurance to protect themselves against such risks. The policy, in addition to indemnifying the insured peace officer, frequently provides for reimbursement for legal expenses incurred, but reserves to the insurer the right to take over the legal defense, although not requiring the insured to contest legal proceedings unless a mutually agreed upon counsel so advises and the insured consents thereto, such consent not to be unreasonably withheld. However, the duty of the public entity to provide a legal defense is not dependent upon the contractual rights of the employee with third parties, but upon the employee's request for representation, assuming the action to be within section 2001. The conventional view is that a contract incorporates rather than modifies existing statutes, (see Wing v. Forest Lawn Cemetery Assn., 15 Cal.2d 472). To permit the public entity to avoid a statutory duty by relying upon the contractual duty owed by a third party would be akin to the creation of a novation without the necessary consent or agreement of the obligee to release the original obligor (see Alexander v. Angel, 37 Cal.2d 856, 860). It is concluded, therefore, that the terms of the insurance contract relative to the insurer's duty to defend have no bearing upon the statutory duty of the public entity which upon request of the employee is responsible for providing a legal defense at public expense against action for false arrest and imprisonment or assault and battery arising out of acts performed during the course of his duties.

As previously noted and in answer to the second question, section 2001 does not distinguish between public entities which do have counsel and those which do not and, further, by recognizing that provisions may be made for other counsel, the fees of which are a legal charge against the entity, the lack of regular or part time counsel does not relieve the public entity from the responsibility of providing a legal defense for peace officer employees who have been sued in the above-mentioned actions.

Since it is concluded that the public entity is under a duty to provide a legal defense for its employees who have requested legal representation in actions based upon acts or the failure to act occurring in the course of their employment, the question of the employee's remedy in the event of the refusal of the public entity to make provision for counsel is then raised. After the request for legal representation has been denied, the employee may mandate the public officials to compel the performance of their statutory duty of providing legal representation at public cost (Code of Civil Procedure, secs. 1085-1086; Parker v. Bowron, 40 Cal.2d 344; Palmer v. Fox, 118 Cal. App.2 45.3).

However, should it become necessary to immediately obtain defense counsel by reason of limitations upon the time within which to appear and answer the complaint in the aforementioned actions, the employee may retain counsel upon the refusal of the public entity to provide a legal defense, and thereafter present a claim in the manner provided by law for the reasonable amount of attorney's fees and costs incurred. Although section 2001 does not expressly authorize this latter remedy, neither is the public entity authorized to refuse to provide for the legal defense of such actions upon the employee's request and, accordingly, it is concluded that due to the exigency of the situation, this remedy exists (see Tracy v. County of Fresno, supra, impliedly recognizing the existence of such a procedure; 35 Ops. Cal. Atty Gen. 103, 108.

EXHIBIT III

REDRAFT OF GOVERNMENT CODE SECTION 2001

2001. (1) As used in this section:

(a) "Action or proceeding" does not include an action or proceeding to remove an employee from his employment, a criminal action or proceeding against a public employee, or an action or proceeding brought by a public entity against a public employee as an individual and not in his official capacity.

(b) "Employee" includes an officer, agent or employee.

(c) "Public entity" includes the State, a county, city, district or other public agency or public corporation.

(2) Unless provision has been made by the public entity for the employment of other counsel in connection therewith, the attorney for the public entity, upon request of the employee, shall act as counsel in the defense of any action or proceeding brought against an employee of the public entity, in his official or individual capacity, or both, on account of [÷]

~~[(a)--The-death-or-physical injury-to-person-or-property-as-a result-of-the-dangerous-or-defective-condition-of-any-public-property; or]~~

~~[(b)---The-death-or-physical-injury-to-person-or-property as-a-result-of-the-negligence-of-such-employee-occurring-during-the course-of-his-service-or-employment;-or]~~

~~[(e)-Any-damages-caused-by-]~~ any negligent or wrongful act
or ~~[failure-to-act-by]~~ omission of such employee occurring during
the course of his service or employment.

(3) If after request a public entity fails to provide an employee
with a defense as required by subdivision (2), the employee may retain
his own counsel to defend the action or proceeding and is entitled to
recover from the public entity such reasonable attorney's fees, costs
and expenses as are incurred by him in defending the action or proceeding
if it arose out of a negligent or wrongful act or omission of the
employee occurring during the course of his service or employment for
the public entity, but the public employee is not entitled to such
reimbursement if it is established that he acted or failed to act
because of bad faith or malice. Nothing in this subdivision shall be
construed to deprive an employee of the right to resort to writ of
mandate to compel the public entity or the governing body or an officer
thereof to provide the employee with a defense as required by subdivision
(2).

~~[(3)]~~ (4) The attorney's fees, costs and expenses of defending
the action or proceeding pursuant to this section are a lawful charge
against the public entity. The public entity may recover from the
public employee any attorney's fees or the reasonable value of legal
services rendered, costs or expenses paid or incurred by it under
the provisions of this section if ~~[the-action-or-proceeding-is-one
described-in-subdivision-(2)-(e)-of-this-section-and]~~ it is established
that the public employee acted or failed to act because of bad faith
or malice.

[(4)] (5) The rights of a public employee under this section are in addition to and not in lieu of any rights the employee may have under any other law, charter, ordinance or regulation providing for the defense of a public employee.