

DEPARTMENT OF HUMAN SERVICES

EFFECTIVE DATE: March 1, 1991

DATE ISSUED: March 1, 1991

SUPERCEDES: Administrative Order 3:00, Representation and Indemnification of Employees and Expungement of Arrest Records and Administrative Order 3:06, Timely Forwarding of Legal Papers and Requests for Representation

SUBJECT: Representation and Indemnification of Employees, Expungement of Arrest Records, and Timely Forwarding of Legal Papers

I. PURPOSE

The purpose of this Administrative Order is to establish policies and procedures regarding: (1) representation by the Office of the Attorney General for Department of Human Services' employees named as defendants in civil or criminal actions and indemnification of such employees by the State of New Jersey; (2) expungement of employee arrest records; and (3) timely forwarding of legal papers within the Department.

II. SCOPE

This order has Department-wide applicability.

III. POLICIES AND PROCEDURES

A. Notice of Claims Against the State

Notice of Claims Against the State are not processed as requests for representation and indemnification. The Notice of Claims are presented to the State in accord with the Tort Claims Act, N.J.S.A. 59:10A-1 et seq.. In the Department of Human Services the claims are to be submitted to the Office of Legal and Regulatory Liaison for forwarding to the Department of the Treasury, Bureau of Risk Management (copy to the Office of the Attorney General) for requested appropriate action. The claimant must wait a period of six months after filing the Notice of Claim prior to initiating litigation; during this period the Bureau of Risk Management is able to investigate, prepare a defense and seek resolution and settlement on behalf of the Department of Human Services.

B. Representation and Indemnification of Employees

The Department of Human Services will request representation and indemnification, under certain conditions, for employees who are named as defendants in civil and criminal actions. (See Administrative Order 3:03, Processing of Discrimination Complaints.)

1. Civil Actions

A civil action is usually brought by a private citizen seeking money or "damages" as compensation for injury or loss resulting from an intentional or negligent act or omission on the part of a Department employee.

a. Representation

Under the Tort Claims Act, N.J.S.A. 59:10A-1 et seq., the Attorney General shall provide representation, upon request, for an employee or former employee who is a defendant in a civil action, unless the Attorney General determines that any one of the following circumstances exists:

- (1) the act or omission was not within the scope of employment; or
- (2) the act or omission was because of actual fraud, willful misconduct, or actual malice; or
- (3) the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee.

b. Indemnification (Payment of Damages)

- (1) Where the Attorney General provides representation for an employee in a civil action, the State will also provide indemnification on behalf of the employee, except where the court determines that either of the following circumstances exists:

- (a) the act or omission was not within the scope of employment; or
 - (b) the act or omission was because of actual fraud, willful misconduct, or actual malice.
- (2) Additionally, the State may indemnify a State employee for punitive or exemplary damages resulting from the employee's civil violation of State or federal law if in the opinion of the Attorney General, the acts committed by the State employee upon which the damages are based did not constitute actual fraud, actual malice, willful misconduct, or an intentional wrong.
- (3) The employee's entitlement to indemnification is lost unless within ten calendar days of the time s/he is served with any summons, complaint, process, notice, demand or pleading, s/he processes the original or a copy of these papers to the Attorney General or his/her designee, with a request for representation in accordance with this Administrative Order.
- (4) Whenever the Attorney General has refused to provide for the defense of a civil action, the employee may later receive reimbursement of the costs of defending the action and the amount of any bona fide settlement, agreement or award of damages that s/he has paid if the employee established that s/he was entitled to a defense. This will occur if:
- (a) the employee establishes that the incident in question occurred within the scope of his/her employment; and,
 - (b) the employee establishes that his/her action or failure to act was not because of actual fraud, malice, or willful misconduct.

c. Acceptance of Service

- (1) Whenever an attempt is made to serve a Summons and Complaint upon an employee, the employee should look at the caption or portion of the papers that identifies the parties who are being sued or "named" in the action. Only if the employee is specifically named (singly or with other defendants, such as the State, the Department, or one of the Divisions) should s/he accept service of process. No employee is authorized to accept service on behalf of another employee, a Division, the Department, or the State. The only exceptions to this prohibition are:
 - (a) Commissioner's Office authorized personnel when the legal papers are to be served upon the Commissioner, Department and/or State;
 - (b) The Division Director's Office authorized personnel when the legal papers are to be served upon the Director and/or Division; and,
 - (c) Human Services Police authorized personnel when the person to be served is an employee at a Department facility which has a Human Services Police Unit component.
- (2) If there is confusion as to the nature of the action (civil or criminal), or the employee has mistakenly accepted service or is uncertain as to whether service should be accepted, the employee should contact the Office of Legal and Regulatory Liaison for clarification.

d. Acknowledgement of Service

Where the manner of service is by mail with an Acknowledgement of Service form to be completed and returned, the Office of the Attorney General has

requested that the Acknowledgement not be completed but instead left blank and submitted for action which is acknowledgement by the Office of the Attorney General as part of the request for representation of the suit, including the names and addresses of

e. Procedure for Requesting Representation and other Indemnification appropriate documents, if available.

- (1) All requests should be processed through the new Office of Legal and Regulatory Liaison to the Office of the Attorney General.
The Division Director or the Department
- (2) Upon receipt of a Summons and Complaint, a Notice of Claim or other legal papers, the employee must immediately notify his/her immediate supervisor and the office of the Division Director or Office of Legal and Regulatory Liaison, as applicable, or their designee. In addition, the following materials should be forwarded in a timely manner (note Section III 3) to the applicable office: to discuss
If the employee continues to believe
 - (a) a request from the employee for representation and indemnification, signed by the Division Director or, for a Department-level employee, by the immediate supervisor, commutation on made. The Attorney General will
 - (b) a copy of all documents served on the employee;
The employee will be informed of the Attorney
 - (c) a full description of the events involved in the complaint, through the Division Director or Department supervisor, as
 - (d) a recommendation by the Division Director or Department supervisor either supporting or not supporting the employee's request, stating a belief that the employee's actions either meet the statutory qualifications or do not (note section III A 1 a) and explaining the relationship of the charges and the operation of the agency; and,

2. Criminal Act

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- (e) Where other special reasons or circumstances exist to warrant representation." (Attorney General Memorandum of August 3, 1981)

b. Indemnification

The indemnification available in civil actions (i.e., payment of damages) is not available in any criminal case. Thus, any employee convicted of a crime is solely responsible for the payment of any fine or penalty imposed.

c. Procedure for Requesting Representation

- (1) The procedure for requesting representation in criminal matters is the same as that outlined for civil action. (See section III B 1 e above.)
- (2) However, the provision of representation in criminal matters is discretionary with the Commissioner, in consultation with the Office of Legal and Regulatory Liaison, and the Attorney General. The employee's request for representation shall be reviewed with emphasis upon ascertaining whether the matter arose outside of or within the scope of the employee's duties, and the relationship of the charges to the operation of the Department. If the Commissioner, in consultation with the Office of Legal and Regulatory Liaison, endorses the request for representation, the Office of Legal and Regulatory Liaison shall forward a written request to that effect to the Office of the Attorney General.
- (3) The employee will be informed of the decisions of the Department and the Attorney General by the Office of Legal and Regulatory Liaison through the Division Director or the Department supervisor, as applicable.

- (4) Representation may be provided either by a Deputy Attorney General or by outside counsel designated by the Attorney General.
3. Timely Forwarding of Legal Papers i.e., Summonses, Complaints, Appeals and Orders to Show Cause (civil and criminal actions)
 - a. When legal papers naming the State in a matter are served on any administrative or operating unit within the Department of Human Services, such service shall be accepted by the appropriate chief administrator (e.g., Division Director, Superintendent, Chief Executive Officer) and the originals of the papers forwarded to the Office of Legal and Regulatory Liaison within 24 hours following receipt. The unit on which service was made shall retain copies of all materials.
 - b. When a Department employee is named in his or her individual capacity as a defendant in a civil or criminal action and the employee seeks representation by the Office of the Attorney General (refer to Administrative Order 3:00), the request for representation, along with copies of the legal papers and available back-up material, shall be forwarded to the Office of Legal and Regulatory Liaison within 72 hours following the employee's receipt of the papers.
 - c. The Office of Legal and Regulatory Liaison shall forward legal papers and other relevant and necessary materials directly to the Office of the Attorney General as deemed appropriate.
 - d. Should complying with the time frames established in this order prove unfeasible in a particular case, or should specific questions or problems arise, immediate contact should be made with the Office of Legal and Regulatory Liaison at (609) 984-5486.
4. After-hours Coverage
 - a. The Attorney General's Office does not provide representation on any type of emergency basis for employees who are arrested or threatened with arrest

after regular business hours. This is because representation in criminal matters is discretionary on the part of the Attorney General, and certain threshold questions regarding the case (outlined in section III B 2 c (2) at page 8) must be answered prior to any determination to defend the employee. In emergencies, therefore, employees are advised to make any necessary private arrangements with lawyers or bail bondsmen and to contact their Division Director or Department supervisor, as applicable, on the next working day.

- b. State statutes and policies do not guarantee the reimbursement of the costs of such private arrangements. However, the Attorney General has issued the following statement:

"A public employee who has himself retained private counsel in a criminal matter where an acquittal or dismissal has occurred may request the State to pay for all or a part of the cost of his private counsel."
(Attorney General Memorandum of August 3, 1981)

Such a request must be approved by the Attorney General personally and by the head of the employing agency before payment will be made.

5. Cooperation with the Attorney General

- a. Whenever the Attorney General provides for the defense of a civil or criminal matter on behalf of an employee, the Attorney General has the right to control the defense.
- b. The employee requesting representation has a statutory obligation to permit the Attorney General to control the conduct of the litigation and to cooperate fully with the Attorney General in the preparation of the defense and presentation of the case (N.J.S.A. 59:10-3 and 59:10A-4).
- c. The State does not protect employees from the consequences of actions or omissions that involve

intentional wrongdoing, actual fraud or malice, or the commission of a crime.

6. Representation of State Employees who are Assaulted or Threatened in the Course of their Official Duties

An employee who is assaulted in the course of his/her official duties may request the assistance of the Attorney General's Office in bringing charges against the perpetrator. The employee should inform the Division Director or Department supervisor, as applicable, who then will first seek the assistance of the local municipal or county prosecutor in pursuing the action. Where such assistance is not obtained, the Division Director or Department supervisor will request assistance from the Division of Criminal Justice through the Office of Legal and Regulatory Liaison. (Attorney General Memorandum of January 19, 1981)

C. Expungement of Arrest Records

The Attorney General will provide counsel to represent employees or former employees of the State in connection with the expungement of arrest records pursuant to the following procedures.

1. An employee or former employee of the State who has been arrested or charged with a crime and was successfully defended (i.e., acquitted or charges dismissed) by the Attorney General or his/her representative, pursuant to N.J.S.A. 59:10A-1 et seq., may make a written request to the Office of Legal and Regulatory Liaison through the office of the Division Director or Department supervisor, as applicable, asking for the Attorney General to provide counsel to process an application for an expungement of such record.
2. The employing Division and Department shall review the request and shall ascertain that the employee was acquitted of the charge or that it was finally dismissed in favor of the employee.
3. When the Division Director or Department supervisor believes that representation should be furnished, a request on the Office of the Attorney General Form, "Agency Request For Appointment of Counsel to Expunge Criminal Record of Employee" (Attachment A) shall be forwarded to the Office of

Legal and Regulatory Liaison. The request includes an authorization to the Attorney General to obtain a criminal history record of such employee from the appropriate official sources of such information. The request may be denied if the Director or supervisor feels that it is prudent to preserve documentation of the charges in the employee's criminal record.

4. Upon review and approval by the Office of Legal and Regulatory Liaison, the request will be forwarded to the Office of the Attorney General, Director of Administration. The Attorney General or his/her designee shall obtain a criminal history record of the employee.
5. In the event that the employee's criminal history record reveals other objectionable matters, the Office of the Attorney General may deny the request and so inform the Commissioner, by means of the Office of Legal and Regulatory Liaison. The employee may, nevertheless, proceed with an application for expungement through his/her own attorney and at his/her own sole cost and expense.
6. The Office of the Attorney General may employ and refer to private counsel the request for an application for expungement, together with the appropriate form of Petition and Order. Whenever possible, the Office of the Attorney General shall refer the application to the attorney who represented the employee in conjunction with the arrest or charge which is to be expunged.
7. The attorney designated by the Office of the Attorney General shall file a Petition and proposed Order for Expungement with the court and serve notice upon such law enforcement agencies as are appropriate. When filing the Petition, the attorney shall inform the court that the Petition has been filed on behalf of a State employee at the request of the Attorney General and, unless another law enforcement agency shall object to the granting of the Petition, request that no court hearing shall be required.
8. Upon entry of the Order for Expungement, the attorney shall forward a conformed copy of the Order to the Office of the Attorney General, together with an invoice for payment for services. Unless a court hearing was required, the fee for

these services shall be \$75.00 plus disbursements, which shall be paid by the employing Division, or by the Department for its direct staff.

9. In the event that a hearing is ordered by the court, the attorney shall notify the Office of the Attorney General in advance of the hearing. Any additional fee shall be paid to the attorney only under such circumstances and shall be in an amount as shall be mutually agreed upon at that time.



Alan J. Gibbs
Commissioner

9. This agency has reviewed the facts surrounding the charge(s) described above against this employee and has determined that the employee was at the time of said charge(s) in the proper performance of his/her official duties. There are no pending disciplinary matters against this employee relating to the charge(s) sought to be expunged and it has been determined that no disciplinary action is warranted in the future regarding the charge(s).* I request that the Attorney General provide counsel to represent this State employee to obtain an expungement of this record.

DEPARTMENT HEAD

For Use by Office of the Attorney General

This request for the appointment of legal counsel for this employee is:

_____ Approved

_____ Disapproved

DATE

The below designated has been retained to represent the employee in the securing of the expungement of the records regarding the charge(s) set forth in item 3; kindly notify the concerned employee by copy of this form.

Name of Attorney: _____

Address and Phone: _____

*If disciplinary action on facts surrounding any of the charges sought to be expunged are pending or anticipated, expungement should not be sought inasmuch as a final expungement may preclude use of materials and information developed by law enforcement and judicial activity for disciplinary purposes.