

LETTER OPINION
2001-L-26

July 13, 2001

Mr. Terence P. Devine
Nelson County State's Attorney
PO Box 428
Lakota, ND 58344-0428

Dear Mr. Devine:

Thank you for your letter asking about a school district's obligation to pay for the personal legal defense fees of one of its employees who was charged with a crime for conduct undertaken while on the job and acquitted by a jury's decision. You also ask about paying for the employee's co-employee/spouse's lost wages caused by attending the trial.

School boards have only the powers expressly or impliedly granted by statute. Fargo Educ. Ass'n v. Fargo Public School Dist. No. 1, 291 N.W.2d 267 (N.D. 1980). In defining the powers of school boards, the rule of strict construction applies. Myhre v. School Board of North Central Public School Dist. No. 10, 122 N.W.2d 816 (N.D. 1963). Though the statutes of some states do authorize reimbursement of government employees for the costs of their successful defense of criminal actions brought against them for conduct related to their employment, a search of North Dakota statutes discloses that no statute authorizes a school board to pay for or reimburse one of its employees for such costs and fees.¹

¹ The state of New Jersey, as an example, provides for reimbursement of school district employees for criminal charges as follows:

Indemnity of officers and employees in certain criminal actions. Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

N.J. Stat. Ann. § 18A:16-6.1 (West 1999).

The Legislature has provided for defense and indemnity of political subdivision employees in N.D.C.C. §§ 32-12.1-04 and 44-08-11. Section 32-12.1-04 requires defense and indemnity of political subdivision employees for tort claims authorized to be brought under N.D.C.C. ch. 32-12.1, and N.D.C.C. § 44-08-11 requires the state or a political subdivision to furnish legal counsel to defend a law enforcement officer in a civil action for damages arising out of good faith performance of official duties. See 1997 N.D. Op. Att'y Gen. L-53.

While the Legislature has clearly expressed its intent in civil matters, I can find no support in the statutes for such a requirement in criminal cases. If the Legislature had intended to require reimbursement for costs incurred by employees arising from criminal cases, certainly it would have expressed its intent to do so.

The above-cited 1997 opinion of this office dealt with reimbursing a state's attorney for attorney's fees expended by that state's attorney on his own behalf. That opinion discussed N.D.C.C. § 34-02-01 which provides as follows:

An employer shall indemnify his employee, except as prescribed in section 34-02-02, for all that he necessarily expends or losses in direct consequence of the discharge of his duties as such or of his obedience to the directions of the employer even though such directions were unlawful, unless the employee at the time of obeying such directions believed them to be unlawful.

Section 34-02-01 requires an employer to indemnify an employee for the employee's necessary expenditures or losses incurred "in direct consequence of" discharging duties or obedience to directions of the employer. The term "direct consequence" is not defined for purposes of the section, so it is to be understood in its ordinary sense. N.D.C.C. § 1-02-02. "Direct" means "without intervening persons, conditions, or agencies; immediate." The American Heritage Dictionary, p. 400 (2d coll. ed. 1991). The word "consequence" means "something that logically or naturally follows from an action or condition; effect." The American Heritage Dictionary, p. 312 (2d coll. ed. 1991).

In the context of post-conviction relief and whether a defendant pleading guilty was advised of the "direct consequences" of a guilty plea, the Minnesota Supreme Court has described "direct consequences" as those which flow definitely, immediately, and automatically from the guilty plea. The court explained that a resident alien from Mexico was not entitled to relief when he was not informed of the potential to be deported as a result of his guilty plea. Deportation was not a "direct consequence" of the guilty plea because the Immigration and Naturalization Service must exercise discretion to commence deportation proceedings based on a guilty plea and administrative procedures must be followed prior to the actual

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deportation. The court therefore described deportation resulting from the guilty plea as a collateral consequence as opposed to a direct consequence of the guilty plea. Alanis v. State, 583 N.W.2d 573, 578-579 (Minn. 1998).

In the employment context, the discharge of job duties or obedience to directions of an employer cannot definitely, immediately, or automatically result in a criminal charge and potential for conviction. Before one is charged and convicted of a crime, prosecutorial discretion must be exercised, an information must be filed, and a court or jury must determine that the criminal offense has been established by proof beyond a reasonable doubt. These intervening factors make a criminal charge for performing one's job a collateral consequence rather than a direct consequence.

Because the Legislature has not authorized indemnity of employees who successfully defend against a criminal charge based on conduct committed while on the job, it is my opinion that a school district is not authorized to pay for those legal defense fees.

Part of your query related to a school district employee's claim for lost pay caused by that employee's attendance at the criminal trial of a co-employee/spouse. Whether an employee is paid for such an absence from work is a determination reserved to the employing school board or its administrators based on the official personnel policies of the school district in effect at the time of the absence. See N.D.C.C. § 15.1-09-33(20).

Sincerely,

Wayne Stenehjem
Attorney General

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