

N.D.A.G. Letter to Lamb (May 16, 1988)

May 16, 1988

Mr. Joe Lamb
Bank of North Dakota
P.O. Box 5509
Bismarck, ND 58502

Dear Mr. Lamb:

I am responding to the questions raised in a February 23, 1988, letter from Al Wahl to me regarding the Bank of North Dakota's indemnification policy for members of the Bank's Advisory Board. Attached to the letter is a February 16, 1988, memorandum from Mr. Wahl to members of the Bank's Advisory Board in which the following questions are raised:

1. Whether the Bank of North Dakota may lawfully indemnify members of the Industrial Commission, the Bank Advisory Board, and its officers and employees in accordance with the provisions of its present operating policy.
2. Whether members of the Bank of North Dakota Advisory Board are "state officers" and therefore entitled to representation by the Attorney General for the defense of all actions and proceedings brought against them in their official capacity.

I will respond to these questions in order.

N.D.C.C. § 6-09-02 authorizes the Bank of North Dakota to do "anything that any bank lawfully may do, except as it is restricted by the provisions of this chapter." North Dakota banking associations are authorized to

indemnify any employee, director, or officer, or former employee, director or officer of the bank against expenses actually and necessarily incurred by him in connection with the defense of any action, suit, or proceeding in which he is made a party by reason of being or having been such an employee, director, or officer, except in relation to matters as to which he is adjudged in such action, suit, or proceeding to be liable for negligence or misconduct in the performance of duty.

N.D.C.C. 6-03-02.1.

In a February 9, 1984, letter to Advisory Board chairman Dan O'Day, then Attorney General Wefald stated that he could not approve of the Bank of North Dakota's

indemnification policy for its directors, officers, and employees. In that letter Attorney General Wefald concluded as follows:

There is no legal authority to support such a policy. Such indemnification would require a specific legislative enactment such as the one codified at section 32-12.1-04, N.D.C.C., which provides for the indemnification of employees of political subdivisions when a judgment is obtained against them for acts or omissions occurring within the scope of their employment or office. Consideration should be given to approaching the Legislature in 1985 for similar protection relative to Bank of North Dakota personnel and Possibly other state employees.

The indemnification policy in question had been unanimously adopted by the Industrial Commission on December 22, 1983, per Attorney General Wefald's motion. The indemnification policy has not been revoked or modified since its adoption on December 22, 1983.

As discussed above, however, the Bank of North Dakota is specifically permitted to do "anything that any bank lawfully may do". Inasmuch as commercial banks have the authority to indemnify its officers, directors, and employees, it is my opinion that the Bank of North Dakota is likewise authorized to do so. Therefore, to the extent that the conclusions of Attorney General Wefald's February 9, 1984, letter conflict with this interpretation, those conclusions are expressly overruled.

Your second question concerns whether members of the Bank of North Dakota Advisory Board are entitled to representation by the Attorney General in defense of all actions and proceedings brought against them in their official capacity. The 1987 Legislative Assembly enacted legislation that affords protection to state employees from civil litigation claims. I will discuss the applicability of N.D.C.C. § 26.1-21-10.1 (providing that the Attorney General shall defend employees of the State) and N.D.C.C. § 32-12.1-15(2) (limiting the liability of state employees) to members of the Bank's Advisory Board.

N.D.C.C. § 26.1-21-10.1(2) states, in part, as follows:

26.1-21-10.1 State employee -- Defense.

....

2. The state of North Dakota shall defend any employee of the state in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring heretofore or hereafter during the employee's period of employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand, and if the actions complained of were within the scope of the employee's employment.

N.D.C.C. § 26.1-21.10.1(1)(a) defines "employee of the state" as "all present or former officers or employees of the state or any of its agencies, departments, boards, or commissions, or persons acting on behalf of such agencies, departments, boards, or commissions in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor. "

Clearly, the members of the Advisory Board fall within the definition of "employee of the state" as set forth above. Therefore, it is my opinion that the members of the Advisory Board are entitled to legal representation in defending any litigation arising from their actions as Advisory Board members so long as such actions fall within the Advisory Board's scope of authority.

N.D.C.C. § 32-12.1-15(2) states as follows:

32-12.1-15. State agencies authorized to purchase insurance --
Approval by commissioner of insurance.

....

2. No employee of the state may be held liable in the employee's personal capacity for actions or omissions occurring within the scope of the employee's employment unless such action or omissions constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct.

N.D.C.C. ch. 32-12.1 does not define "employee of the state." However, inasmuch as N.D.C.C. § 26.1-21-10.1(1)(a) (defining "employee of the state") and N.D.C.C. § 32-12.1-15(2) (which uses the term "employee of the state") both originated in House Bill Number 1446 in the 1~87 Legislative Assembly, it is my opinion that the term "employee of the state" set forth in N.D.C.C. § 26.1-21-10.1(1)(a) is controlling for purposes of N.D.C.C. § 32-12.1-15(2). See December 24, 1987, letter to Kermit E. Bye. Therefore, it is my opinion that the limitation of liability for state employees set forth in N.D.C.C. § 32-12.1-15(2) is applicable to members of the Advisory Board.

If you have any further questions in this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

vkk

cc: Al Wahl