

LETTER OPINION
96-L-69

April 16, 1996

Mr. Allen C. Hoberg
918 E Divide Ave, Suite 315
Bismarck, ND 58501-1959

Dear Mr. Hoberg:

Thank you for your letter asking the following questions concerning temporary administrative law judges:

1. Is the potential liability for legal actions against an Office of Administrative Hearings temporary, contract administrative law judge, who is duly designated to preside in an agency's hearings, to conduct the hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, for the agency, the same as against a full-time Office of Administrative Hearings administrative law judge who is designated for the same matter?
2. What immunity does a duly designated temporary, contract administrative law judge have from potential legal actions? Are they the same as for a full-time Office of Administrative Hearings administrative law judge?
3. If a duly designated temporary, contract administrative law judge is sued, in either an official capacity or in an individual capacity, as a result of presiding in an agency's hearings or issuing an agency's recommended decision, will the Attorney General represent the administrative law judge, and under what conditions and circumstances, if any?

N.D.C.C. § 54-57-01(1) establishes the Office of Administrative Hearings (OAH) as a state office. Temporary administrative law judges are appointed under N.D.C.C. § 54-57-02. A temporary

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administrative law judge must comply with the same duties as a full-time administrative law judge. See N.D.C.C. § 54-57-04. Generally, the duties of administrative law judges in administrative proceedings are to assure that proper notice has been given, that hearings are conducted in a fair and impartial manner, to make recommended or final findings of fact and conclusions of law depending on the type of assignment, and to perform any other function required by law or delegated to the administrative law judge by the agency. N.D.C.C. § 28-32-08.5. Because there are no differences in duties performed, I cannot discern a legal basis to distinguish the potential liability of a temporary administrative law judge from that of a full-time administrative law judge. Thus, it is my opinion that the potential liability is the same for each administrative law judge classification.

The North Dakota Supreme Court examined the issue of immunity for administrative law judges in Loran v. Iszler, 373 N.W.2d 870 (N.D. 1985). Concluding that state administrative proceedings were sufficiently comparable to judicial proceedings to warrant the extension of immunity to an administrative hearing officer, the Court held "that an administrative hearing officer is immune from suit for damages for his discretionary acts not done in the clear absence of all jurisdiction." Loran, 373 N.W.2d at 876. In so holding, the Court found Justice Byron White's comments in Butz v. Economou, 438 U.S. 478 (1978), persuasive. Justice White concluded that "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge." Butz, 438 U.S. at 513.

The North Dakota Supreme Court in Loran based its decision on the functional comparability of the administrative law judge and anchored its decision on the importance of preserving the independent judgment of administrative law judges. 373 N.W.2d at 876. Because the functional comparability is the same for both temporary contract and full-time administrative law judges, it is my opinion that the immunity discussed in Loran applies to both classifications. See Forrester v. White, 484 U.S. 219, 227 (1988). (In the judicial context, "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.") See also Austern v. Chicago Board Options Exchange, Inc., 898 F.2d 882 (2d Cir. 1990) (contractually agreed upon arbitrators); Corey v. New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982) (arbitrators); and Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926) (special assistant attorney general), aff'd. 273 U.S. 503 (1927) (per curiam).

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However, the issue of statutory immunity varies depending on the classification of the employment relationship. A state employee is provided statutory immunity under N.D.C.C. ch. 32-12.2¹. N.D.C.C. § 32-12.2-02(1) provides that "[n]o claim may be brought against a state employee acting within the employee's scope of employment except a claim authorized under [N.D.C.C. ch. 32-12.2] or otherwise authorized by the legislative assembly." Under N.D.C.C. § 32-12.2-03(3), "[a] state employee may not be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment." However, N.D.C.C. § 32-12.2-03(3) provides that "[a] state employee may [be] personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment."

For the purposes of interpreting N.D.C.C. ch. 32-12.2, N.D.C.C. § 32-12.2-01(8) uses the definition of state employee under N.D.C.C. § 26.1-21-10.1. N.D.C.C. § 26.1-21-10.1(1)(a) defines a state employee 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." Independent contractors are excluded from the definition of a state employee. Id.

A temporary administrative law judge is hired under a Professional Services Agreement. The agreement provides that the judge is hired as an independent contractor. Under this agreement, the temporary administrative law judge is required to "save and hold harmless the State and its officers and employees from all claims, suits, or actions arising out of the activities of the Temporary Administrative Law Judge during the term of [the] agreement where the activities do not relate to the actual conduct of the hearing or documents, correspondence, and the issuing of decisions concerning the hearing."

¹ Prior to 1995, statutory immunity was provided to state employees under N.D.C.C. § 32-12.1-15. With the enactment of S.B. 2080 by the 1995 Legislature, N.D.C.C. § 32-12.1-15 was suspended. 1995 N.D. Sess. Laws ch. 329, §13. If the constitutional measure as set forth in 1995 N.D. Sess. Laws ch. 648 [Senate Concurrent Resolution No. 4014] is approved by the voters in the general election, N.D.C.C. § 32-12.1-15 would be reinstated as it existed before S.B. 2080 was enacted. 1995 N.D. Sess. Laws ch. 329, § 13. However, if the constitutional measure is defeated, then N.D.C.C. § 32.12.1-15 would be repealed. N.D. Sess. Laws. ch. 329, §§ 14, 21.

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Additionally, N.D.C.C. § 54-57-02 provides that "[t]emporary administrative law judges are not employees of the state." Thus, it is my opinion, that a temporary administrative law judge as an independent contractor is not entitled to the statutory immunity provided to state employees under N.D.C.C. ch. 32-12.2.

Your third question asks under what conditions the Office of Attorney General will represent a temporary administrative law judge who is sued either in the judge's official or individual capacity.

Representation by the Office of Attorney General in defending suits against officials or employees either in their individual or official capacity is governed by N.D.C.C. ch. 26.1-21. N.D.C.C. § 26.1-21-10.1(2) provides that "[t]he state of North Dakota shall defend any state employee 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." Under this section, the determination of whether a state employee was acting within the scope of the employee's employment is made by the Attorney General. "If the attorney general determines that the employee was acting within the scope of the employee's employment, the state shall provide the employee with a defense by or under the control of the attorney general or the attorney general's assistants." Id.

A suit brought against a temporary administrative law judge in the judge's official capacity is, in essence, a suit brought against the state. See Schloesser v. Larson, 458 N.W.2d 257 (N.D. 1990). For this part of the suit, the Office of Attorney General would represent and defend the interests of the state.

However, as explained in my answer to your second question, the definition of state employee "does not include an independent contractor." N.D.C.C. § 26.1-21-10.1(1)(a). Because temporary administrative law judges are independent contractors and not state employees, it is my opinion that the Office of Attorney General may not provide the temporary administrative law judge with a defense in a suit brought against the judge in the judge's personal capacity.

Sincerely,

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