

Public Officers Law §§ 17, 17(1)(a), 17(2)(a), 17(3)(a); Executive Law §§ 841-a(1), 841-a(1)(a), 841-a(1)(f), 841-a(6), 841-b(1), 841-b(2)(c); General Business Law §§ 89-g, 89-h(2), 89-m(1), 89-n, N.Y.C.R.R. §§ 9, 6028.5, 9, 6029.7

The members of the Security Guard Advisory Council are eligible for defense and indemnification pursuant to Public Officers Law § 17.

December 4, 2012

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Division of Criminal Justice Services  
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Formal Opinion  
No. 2012-F2

Dear Ms. Bianchi:

You have requested an opinion regarding whether the members of the Security Guard Advisory Council are eligible for defense and indemnification pursuant to section 17 of the Public Officers Law. For reasons that follow, we answer that question in the affirmative.

The Security Guard Advisory Council (hereinafter "Council") is established within the Division of Criminal Justice Services (DCJS), a part of the Executive Department. Executive Law § 841-a(1). The Council has 17 members, all of whom are appointed by the Governor, some upon the recommendation of state legislative leaders. *Id.* At least five of the members must be drawn from the security field; all must be residents of the State. *Id.* § 841-a(1)(a),(f). The Secretary of State and the Commissioner of DCJS or their designees are *ex officio* members. *Id.* § 841-a(1). The members of the Council are not compensated but are entitled to their actual and necessary expenses incurred in the performance of their Council functions. *Id.* § 841-a(6).

Security guards in New York must register with the State. General Business Law § 89-g. Registration requires compliance with certain training requirements. *Id.* §§ 89-h(2), 89-m(1), 89-n. The Council's function is to recommend to the Commissioner of DCJS rules and regulations pertaining to the training of security guards. Executive Law § 841-b(1). The Council also may perform other functions, including visiting and inspecting any security guard training schools subject to approval by the Commissioner. Executive Law § 841-b(2)(c). Additionally, if the Commissioner revokes the approval granted to a security guard training school or the certification of an instructor, the school or instructor may request a hearing before the Council to determine the revocation. 9 N.Y.C.R.R. 6028.5, 6029.7. After the hearing, the Council

submits its recommendation to the Commissioner, who decides whether to revoke the approval. *Id.*

Public Officers Law § 17 provides authority for the defense and indemnification of an employee of the State. *Matter of O'Brien v. Spitzer*, 7 N.Y.3d 239 (2006). “Employee” is a term of art defined in subdivision (1)(a) of section 17 as any person “holding a position by election, appointment or employment in the service of the state, . . . whether or not compensated, or a volunteer expressly authorized to participate in a state-sponsored volunteer program, but shall not include an independent contractor.” Public Officers Law § 17(1)(a). Under section 17, upon compliance by the employee with certain specified procedural requirements,

the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties . . . . This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or on behalf of the [S]tate.

*Id.* § 17(2)(a). The statute provides for indemnification in the amount of any judgment obtained against the employee in any state or federal court or in the amount of any settlement of a claim, if the act or omission from which the judgment or settlement arose occurred while the employee was acting within the scope of his or her employment and not from intentional wrongdoing. *Id.* § 17(3)(a).

Thus, the crucial question is whether the individual is an “employee” of the State within the meaning of section 17. If so, then such individual is eligible for defense and indemnification by the State. And that question distills to whether the members “hold[ ] a position by election, appointment or employment in the service of the state . . . whether or not compensated.” *Id.* § 17(1)(a).

In our opinion, the members of the Security Guard Advisory Council are in “the service of the state” and thus are “employees” for purposes of section 17. First, each and every member is appointed by a state officer, the Governor, a factor that we have found relevant to section 17 determinations in the past. *See* Op. Att’y Gen. No. 96-F9 (members of regional service councils who were designated by Commissioner of Health covered by section 17); Op. Att’y Gen. No. 89-F2 (members of local emergency committees appointed by Executive Department covered by section 17); Op. Att’y Gen. No. 88-F10 (members of Lake George Park Commission appointed by Governor with Senate consent covered by section 17). Second, the Council was established as an entity within an administrative department of the State, another factor indicating that its members are in the service of the State. Op. Att’y Gen. (Inf.) No. 88-F10 (Lake George Park Commission created within Department of Environmental Conservation).

The Council has no status independent of the State. *Compare* Op. Att'y Gen. No. 99-F4 (members of Deferred Compensation Board eligible for section 17 coverage) *with* Op. Att'y Gen. No. 91-F3 (members of Harlem International Trade Center Corporation not eligible for section 17 coverage). Third, the Council is an integral component of the State's program of security guard registration and training: the State, through DCJS, uses the expertise and experience of the Council's members, who include representatives of the security guard industry, to develop regulations and standards for security guard training. For these reasons, we are of the opinion that the members of the Security Guard Advisory Council are eligible for defense and indemnification pursuant to Public Officers Law § 17.

Very truly yours,

ERIC T. SCHNEIDERMAN  
Attorney General