

Public Officers Law §§ 17, 17(1), 17(1)(a), 17(2)(a), 17(3)(a); Education Law §§ 1950(1), 1950(2), 1950(4)(a)(1), 2201, 2209, 2215, 2215(9), 2215(10), 2215(14)

A member of the staff of the BOCES district superintendent who is serving as integrity officer under the supervision of State Education Department is eligible for state-provided defense and indemnification.

June 27, 2013

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Formal Opinion
No. 2013-F1

Dear Mr. Trautwein:

You have requested an opinion as to whether certain employees of boards of cooperative educational services (BOCES) 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.

For educational administrative purposes, the state is divided into supervisory districts. Education Law § 2201. A district superintendent is the general supervising officer of a supervisory district, with responsibility for performing certain functions on behalf of the Commissioner of Education. Education Law § 2215. The district superintendent also serves a local function as the chief executive officer for the BOCES, the jurisdiction of which is the supervisory district. Education Law § 1950(1),(2).

You have explained that the Commissioner of Education has directed district superintendents to designate an integrity officer for their supervisory districts. The integrity officer assists the State with investigations into test security breaches. Under the supervision of the Department of Education's Test Security Unit, an integrity officer investigates alleged misconduct by school administrators or teachers in the administration and scoring of state assessments in his or her supervisory district. In some instances, the district supervisor has designated him- or herself the integrity officer; in others, the district supervisor has designated one of his or her staff. You have asked about the eligibility for state-provided defense and indemnification of an integrity officer designated from a district superintendent's staff when performing test security breach investigations on the State's behalf.

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 employees “hold[] a position by election, appointment or employment in the service of the state . . . whether or not compensated.” *Id.* § 17(1)(a).

As an initial matter, we previously have concluded that a district superintendent is eligible for state-provided defense and indemnification when sued in connection with his or her duties and responsibilities on behalf of the State. Op. Att'y Gen. No. 97-F10. We agree with your assessment that a district superintendent is eligible for defense and indemnification pursuant to Public Officers Law § 17 when he or she performs test security investigations at the direction of the Commissioner and under the supervision of the Department of Education. The statutory responsibilities of a district superintendent include conducting examinations at the direction of the Commissioner, examining charges affecting the moral character of teachers employed or residing in the supervisory district, and making such investigations and reports as the Commissioner requests. Education Law § 2215(9),(10),(14). Test security investigation falls within these responsibilities. The district superintendent thus is in the service of the State when conducting a test security breach investigation on the Commissioner's behalf.

We are of the opinion that an integrity officer who is a member of the district superintendent's staff also is in the service of the State when performing these duties. The integrity officer performs the same work on behalf of the Commissioner of Education whether he or she is the district superintendent or a member of his or her staff. He or she works closely with the Department of Education's Test Security Unit, performing investigations developed in consultation with and reporting tasks and findings to that Unit. An integrity officer who is a staff member has the additional supervision of the district superintendent, but the work performed on behalf of and under the supervision of the State is the same.

A district superintendent receives an annual salary from the State, in addition to any compensation the BOCES of his supervisory district establishes for him. Education Law §§ 1950(4)(a)(1), 2209. In contrast, the compensation of an investigator on the district superintendent's staff is paid only by the BOCES, with no portion of it coming from the State. But the absence of a state salary is not fatal to the conclusion that a staff investigator, when performing a test security investigation, is an employee of the State for purposes of Public Officers Law § 17. First, Public Officers Law § 17 specifically recognizes that a person can be an "employee" without being compensated by the State. Public Officers Law § 17(1) (term "employee" includes "any person holding a position by election, appointment or employment in the service of the state, . . . whether or not compensated"). Second, the staff investigator, when performing investigations into potential test security breaches, is subject to the direction and control of the State, via the officers and employees of the Department of Education, rather than that of the BOCES. The exercise of supervision, direction, or control over the means used to achieve results is a hallmark of an employer's relationship with an employee. *See Matter of O'Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006); *In re 12 Cornelia Street, Inc.*, 56 N.Y.2d 895 (1982). For these reasons, we are of the opinion that the staff investigators are eligible for defense and indemnification pursuant to Public Officers Law § 17 when investigating test security breaches on behalf of the State.

Very truly yours,

ERIC T. SCHNEIDERMAN
Attorney General