

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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DANA NESSEL
ATTORNEY GENERAL

October 18, 2022

Honorable Jeremy Moss
State Senator
P.O. Box 30036
Lansing, MI 48909-7536

Dear Senator Moss:

Attorney General Nessel has asked me to respond to your letter asking two questions that were prompted by the Michigan Supreme Court's September 8, 2022, orders in *Promote the Vote 2022 v Board of State Canvassers*, Docket No. 164755 and *Reproductive Freedom for All v Board of State Canvassers*, Docket No. 164760. In each case a majority of the Supreme Court concluded that the Board of State Canvassers failed to perform a "clear legal duty" when the Board deadlocked, with two members voting to certify the petitions for placement on the November 8th general election ballot, and two members voting against certification of the petitions. The Court concluded that both petitions should have been certified for placement on the ballot.

In light of that conclusion, you first ask, "[i]f a member of a state board, council, commission, or task force has a clear legal duty to perform a function under state law, is advised of that duty, and fails or refuses to perform that duty, is the member immune from any tort liability resulting from the failure or refusal to perform his or her duty?"

Relatedly, your second question asks, "[i]f a member of a state board, council, commission, or task force receives advice from their legal counsel at the Department of Attorney General (Department) regarding the member's [clear] legal duty and does not act in conformity with the advice, is the member entitled to taxpayer-funded representation by the Department in any civil litigation resulting from the member's non-performance of that legal duty, or may the Department refuse to represent the member in that litigation?"

For analytical purposes, your questions will be addressed together.

Michigan has long recognized that “[a] public office is a public trust and public officers are trustees for the public.” OAG 1965—1966, No. 4472, p 140, 142 (September 22, 1965). As a public trustee, the holder of a public office has a “fiduciary relationship to the people whom they have been elected or appointed to serve,” and therefore “are under an inescapable obligation to serve the public with the highest fidelity, . . . to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity.” *Id.* at 143 (cleaned up). Because a public office is a public trust, “courts have imposed a fiduciary standard upon public officials that requires disinterested conduct.” OAG 1997—1998, No. 6931, p 5, 7 (February 3, 1997). This means that a fiduciary may not act for the benefit of themselves at the expense of those they serve. See generally, *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 49 (2005).

These fiduciary obligations are relevant to your questions in a couple ways.

First of all, “a member of a state board, council, commission or task force” is a holder of a public office and is therefore obligated to act as a fiduciary. And since a public officer’s fiduciary obligation is to exercise discretion reasonably and in good faith, failing to carry out a clear legal duty, particularly one that is akin to a ministerial act, could be seen as a violation of the public trust. This would be particularly true in a situation where a public officer has been advised by this Department of the duty and the attendant level of discretion, yet still fails to fulfill it.

And when a public officer has been advised of a clear legal duty to act, yet still fails to do so, one, but certainly not the only, implication is that the public officer’s conduct is not disinterested but is motivated by something other than a desire to faithfully discharge the duties of their office—perhaps something personal, such as political affiliation or philosophical beliefs. And if that were indeed the case and a public officer ignored his or her clear legal duty and instead acted in furtherance of personal motives, depending on the function and nature of the state board, council, commission, or task force at issue, it could very well result in action that is clearly required by law to not be taken, or to be significantly impeded. Such conduct is the very definition of a public official violating their fiduciary obligation by acting for their own benefit at the public’s expense.

Second, as a holder of a public office, the Attorney General is also a fiduciary and must consider each request for representation on a case-by-case basis, not only considering the specific circumstances of each, but also recognizing that she has an obligation to act in furtherance of her public trust and that the Department’s legal representation is a taxpayer-funded service. If a public officer receives advice from this Department that they have a clear legal duty to act, yet they intentionally fail

to do so, the Attorney General is well within her authority to deny Department representation for that individual.¹

In addition to these common-law fiduciary obligations, there are two statutes that are relevant to your questions.

Under MCL 691.1408(1), legal representation of a state officer or employee in defending a claim or civil action – as well as indemnification of a state officer or employee for a judgment entered against them – “may” be provided if, among other things, the officer or employee was “acting within the scope of his or her authority.” This language is significant for two reasons. First, as evidenced by the word “may,” both representation and indemnification are entirely discretionary; neither is required. Second, generally speaking, “scope of authority” means “[t]he reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal’s business.” *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 409 (1999), quoting Black’s Law Dictionary (7th ed), p 1348. A public officer who has been delegated a clear legal duty to act in a particular manner has no authority to do anything but fulfill that duty. In other words, that public officer’s “scope of authority” is limited to taking only the action required. Accordingly, when a public officer is advised that they have a clear legal duty to act in a particular manner and they take some other action, they are not “acting within the scope of his or her authority.” Such unauthorized action on the part of a public officer calls the availability of legal representation and indemnification into question under MCL 691.1408.

Further, such unauthorized action could also call into question the availability of immunity from tort liability under MCL 691.1407. I must acknowledge, however, that the availability of immunity from tort liability is ultimately a question that would be answered by the court in any litigation, and is, therefore, not an issue within the control of the Attorney General. That said, under MCL 691.1407, immunity from tort liability is available to a state officer or employee for injury caused by that officer or employee while in the course of their government service, so long as the state officer or employee is, among other things, “acting or reasonably believes he or she is acting within the scope of his or her authority.” MCL 691.1407(2)(a). For the reasons discussed, a court may conclude that when a state officer or employee receives advice from this Department that

¹ This is consistent with the policy of prior Attorneys General. For example, Attorney General Frank Kelley’s long-standing policy was that “[i]f the state officer or employee did not act in good faith to protect the public interest, no state-paid legal representation shall be provided to the state officer or employee even if the conduct complained of arose during the course of employment and within the scope of authority.” OAG 1979—1980, No. 5572, p 421, 423 (October 4, 1979).

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they have a clear legal duty to act in a particular manner, yet they intentionally take some other action, that state officer or employee is not acting, and could not have reasonably believed they were acting, within the scope of his or her authority and is therefore not entitled to immunity from tort liability resulting from that unauthorized action.

In addition, another potential issue that is not within the control of the Attorney General but warrants a mention here for awareness purposes is removal or suspension from office. In particular, the governor has the constitutional authority to “remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature.” Const 1963, art 5, § 10. While the decision to remove or suspend a state officer is solely that of the governor, and could potentially be reviewed by a court, I would point out that when it comes to corrupt conduct in office, “it is corrupt for an officer purposely to violate the duties of his office.” *People v Coutu*, 235 Mich App 695, 706–707 (1999) (cleaned up). As a result, a state officer holding an elective or appointive position who intentionally takes action other than the action required by a clear legal duty, may also need to be concerned with potential suspension or removal from office.

Therefore, in response to your questions, a member of a state board, council, commission, or task force, who receives advice from the Department regarding his or her clear legal duty and does not act in conformity with that advice may be refused representation by the Department in civil litigation related to that duty and could potentially lose their statutory immunity from tort liability. In addition, although not part of your questions, it is important to note that the member could also be denied indemnification if a judgment is entered against them and may face suspension or removal from office by the governor.

Thank you for bringing these questions to our attention. I hope that this information is helpful to you.

Sincerely,

Christina Grossi

Christina M. Grossi
Chief Deputy