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David C. Mills  
Executive Director  
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Dear Secretary Stanchfield and Director Mills:

You have asked for my opinion as to whether members of the State of Wisconsin Investment Board (SWIB) and of the Employee Trust Fund Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board and the Deferred Compensation Board (collectively the “Employee Benefits Boards”) are (a) subject to the limitations on damages set forth in Wis. Stat. § 893.82 and (b) entitled to the state’s indemnification for liability pursuant to Wis. Stat. § 895.46.

In my opinion, individual members of SWIB and the Employee Benefits Boards are entitled to damage limitations, notice of claim, indemnity, and legal representation for actions taken within the scope of their board duties because they are state officers. I also respond to your specific questions below.

Statutes Applicable

**893.82 Claims against state employees; notice of claim; limitation of damages.** . . . (3) Except as provided in sub. (5m) [medical malpractice], no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer’s, employee’s or agent’s duties, . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim . . . .

. . .

(6) The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employee or agent . . . , including any such action or proceeding based on contribution or indemnification, shall not exceed \$250,000. No punitive damages may be allowed or recoverable in any such action.

**895.46 State and political subdivisions thereof to pay judgments taken against officers.** (1)(a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting in the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. . . . Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. . . .

### Discussion

The statutes cited above operate *in pari materia* as a complementary whole. 81 Op. Att’y Gen. 17, 19 (1993). If members of SWIB and the Employee Benefits Boards are “state officers” – a subclass of “public officers” – within the meaning of Wis. Stat. § 895.46(1)(a), they are entitled to notice of claims and damage limitations under Wis. Stat. § 893.82(3) and (6). 81 Op. Att’y Gen. at 18-19. The essential characteristics of a public officer are that an officer exercises some portion of the sovereign power of the state by law, *Burton v. State Appeal Board*, 38 Wis. 2d 294, 300-01, 156 N.W.2d 386 (1968), and that an officer is not subordinate to any authority other than that of the law. *Martin v. Smith*, 239 Wis. 314, 332, 1 N.W.2d 163 (1941). *See also* 81 Op. Att’y Gen. at 19-20, and *Black’s Law Dictionary* 1115, 1117 (8th ed. 2004), defining “office” and “officer.” Longstanding and uninterrupted interpretation of Wisconsin law has accorded members of state boards the status of “state officer” even though they are traditionally uncompensated for their service. 81 Op. Att’y Gen. at 19.

SWIB is created by Wis. Stat. § 15.76. When the board is constituted, its members exercise the legislatively-delegated powers and duties described in Wis. Stats. §§ 25.01 through 25.187, subordinate only to the authority of law. SWIB’s members are therefore state officers. In *Bahr v. State Inv. Board*, 186 Wis. 2d 379, 521 N.W.2d 152 (Ct. App. 1994), the Wisconsin Court of Appeals held that SWIB was an “independent going concern” not protected by state sovereign immunity because the state had waived SWIB’s sovereign immunity by granting it

independent status with broad and independent propriety powers. *See Bahr*, 186 Wis. 2d 394. That decision, however, did not alter plaintiff Bahr's status as a state employee, and the chief holding of the decision was that Bahr retained his state employee civil service rights notwithstanding the Legislature's attempt to alter his status by statute. As such, *Bahr* cannot be read to alter SWIB members' status as state officers.

The Public Employee Trust Fund is created by Wis. Stat. § 40.01. When the Employee Benefits Boards are constituted, the members of each board exercise the powers legislatively delegated to them in Wis. Stat. § 40.03. In exercising those powers and duties, the members of each board are subordinate only to the authority of law. The members of the Employee Benefits Boards are therefore state officers. I am unaware of any limitations on the Employee Benefits Boards' sovereign immunity.

The members of SWIB and the Employee Benefits Boards are also required to comply with the Code of Ethics for State Public Officials. Wis. Stats. §§ 15.07(1), 15.16(1), 15.76(3), 19.42(13) and (14). As they are required to comply with the state code of ethics when performing acts in the course of their board duties, it follows that they are also entitled to state protections as state officers.

It must be noted that Wis. Stat. § 895.46 is an excess indemnity statute. That is to say that the State of Wisconsin provides for indemnification of employees, officers, and agents for judgments "in excess of any insurance applicable." Some board members may be covered by separate insurance. For example, one SWIB member must be a non-elected, representative of local government, Wis. Stat. § 15.76(1r), and it is probable that individual's liability would first be covered by the insurance coverage maintained by his or her employer.

You have expressed a concern that Wis. Stats. §§ 895.46 and 893.82 specify indemnity coverage for certain boards of the state, but that neither lists SWIB or the Employee Benefits Boards. I assume that you are concerned because a principle of statutory construction holds that the express mention of one matter excludes other similar matters (*expressio unius est exclusio alterius*). *See C.A.K. v. State*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990). I do not share that concern in this instance. The principle applies only where there is some evidence that the Legislature intended it to apply. *See, e.g., State v. James P.*, 2005 WI 80, ¶ 26, 281 Wis. 2d 685, 698 N.W.2d 95.

Section 895.46 clearly indemnifies "public officers or employee[s]" acting in the scope of their duties. In neither § Wis. Stat. 895.46 nor § 893.82 is there an indication that the Legislature intended to provide an exclusive and exhaustive list by listing some examples. In subsections (4), (5), and (8) the statute states that it "applies" to various persons or entities, but these appear to be individuals or groups that may not traditionally or under agency principles be considered to be state officers or employees such as certain volunteer health care providers or members of the board

of governors on health care liability risk-sharing plans thus rendering it necessary that they be specifically included within the statutory protection. To construe the statute so as to exclude liability coverage for any state officer, employee or agent not specifically mentioned would lead to absurd results leaving virtually all state officers or employees without indemnification. Statutes are to be construed to avoid such absurdities. *See Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 376-77, 597 N.W.2d 687 (1999). This conclusion would also apply to an analysis of Wis. Stat. § 893.82.

Additionally, and as you have noted in your opinion request, my predecessors have previously opined that members of certain other public boards not expressly mentioned in the statutes are nevertheless covered by the statutory indemnification. *See*, 81 Op. Att’y Gen. 17 (1993) (State Emergency Response Board); 74 Op. Att’y Gen. 54 (1985) (Board of Curators of the Wisconsin Historical Society); and OAG 36-82 (unpublished opinions) (Higher Educational Arts Board). My opinion here is consistent with that rendered by my predecessors.

#### Responses to Specific Questions

I turn now to the specific questions you have set forth in your opinion request.

1. Is each Member of the Investment Board, the Employee Trust Funds Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board, and the Deferred Compensation Board a “state officer” who is entitled to the limitation on liability provided by Wis. Stat. § 893.82(6)?

Answer: Yes. Assuming that the member in question is sued in his or her official capacity or for an act undertaken in the scope of his or her Board membership, each member is entitled to the limitation on liability provided by Wis. Stat. § 893.82(6).

2. Is each Member of the Investment Board, the Employee Trust Funds Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board, and the Deferred Compensation Board a “public officer” who is entitled to the benefits provided by Wis. Stat. § 895.46?

Answer: Yes.

3. If a Member is a “public officer,” as referred to in Wis. Stat. § 895.46, does the indemnity include a Member’s breach of his or her fiduciary duty as a board member? That is, under what circumstances could a court find that a Member’s breach of fiduciary duty was not “acting within the scope of employment” and, thus, the Member would not be subject to the benefits of Wis. Stat. § 895.46?

Answer: A board member is entitled to indemnification under Wis. Stat. § 895.46(1)(a) if the board member is “proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer . . . and the jury of the court finds that the [board member] was acting in the scope of employment.” Agents of any department of the state also are covered by Wis. Stat. § 895.45(1)(a) while acting within the scope of their agency. There is no express exception for a board member’s breach of his or her fiduciary duty as a board member. Although there may be circumstances when the breach of a board member’s fiduciary duty might be sufficient to take the acts of the board member outside the scope of his or her employment or agency, and therefore any damages or costs against the board member would not be subject to indemnification under the statute, not every breach of the fiduciary duty will take the acts of the board member outside the scope of his or her employment or agency. Since indemnification will depend upon the particular circumstances of each case, I decline to address under what circumstances generally a court could find that a board member’s breach of his or her fiduciary duty would be outside the scope of the board member’s employment or agency.

4. Would the benefits under Wis. Stat. § 895.46 apply where the action or special proceeding was brought by the federal government, other than the actions identified in Wis. Stat. § 895.46(6)?

Answer: Because Wisconsin has traditionally indemnified state employees, officers, and agents for settlements or judgments in civil enforcement actions brought by the federal government, that indemnity would extend to the members described in this opinion. You correctly note that a different approach may be taken if the federal or state government brings certain criminal proceedings against a board or member. Wis. Stat. § 895.46(6). It should also be noted that state law limitations such as those applicable to damages and notice, do not apply to federal civil proceedings. *See Felder v. Casey*, 487 U.S. 131, 146-47 (1988) and *Casteel v. Vaade*, 167 Wis. 2d 1, 10-11, 481 N.W.2d 476 (1992).

5. If a Member is entitled to the benefits of Wis. Stat. § 895.46, under what circumstances, and under what authority will legal representation of the Member be provided by the Department of Justice?

Answer: If a member is a defendant in a proceeding because of acts committed while carrying out duties as an officer on the board, then he or she will be provided with legal representation as set forth in Wis. Stat. § 895.46. Generally, that representation is provided by the Attorney General pursuant to Wis. Stat. § 165.25(6) which states that,

At the request of the head of any department of state government, the attorney general may appear for and defend any . . . state officer . . . in any civil action or other matter brought before a court or an administrative agency which is

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brought against the state . . . officer . . . for or on account of any act growing out of or committed in the lawful course of an officer's . . . duties.

6. Under Wis. Stat. § 895.46, is a Member entitled to elect to be represented by outside counsel of the Member's choice and to have the reasonable expenses and costs of that counsel paid by the state?

Answer: No. "The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer . . . legal counsel and the offer is refused by the defendant officer . . ." Wis. Stat. § 895.46(1)(a).

7. If the jury or the court finds that the Member was not acting within the scope of his or her employment duty, could the Member be required to pay or reimburse the state for any portion of the costs of legal representation in the proceeding?

Answer: Wis. Stat. § 895.46(1)(a) does not specifically address the question you pose. In theory, the attorney general could seek reimbursement for fees and costs expended in representing a member who is subsequently found to have acted outside the scope of his or her employment. In practice, this situation is unlikely to arise because the attorney general makes the determination as to scope early in the defense of the matter, and would have to demonstrate a significant change in circumstances to justify a suit for reimbursement. As such, and given that there is no particular fact scenario presented by your question, we are unable to provide a specific response.

For the reasons set forth, it is my opinion that, where the requirements of the statutes have been satisfied, the state would pay the judgment entered, in the course of their duties as officers, against a member of SWIB or the Employee Benefits Boards.

Very truly yours,

Peggy A. Lautenschlager  
Attorney General

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CAPTION: Individual members of the State of Wisconsin Investment Board and of the Employee Benefits Boards are entitled to damage limitations, notice of claim, indemnity, and legal representation for actions taken within the scope of their board duties because they are state officers.