

Date: March 12, 2001

To: Public Hospital District Administrators and CEOs

From: Taya Briley, Director, Legal Services

Re: Model Resolution and Procedure for Indemnification of Hospital District Officers, Employees and Volunteers

Please find attached a model board resolution and procedure addressing the indemnification of past and present public hospital district officers, employees and volunteers. AWPHD asked the law firm Foster Pepper and Shefelman to draft this model procedure in response to a trend which indicates an increased likelihood of suit against officers, employees and volunteers.

Brown v. Scott Paper Worldwide Co., 98 Wn. App. 349 (1999) is an example of that trend. Brown held that individual managers could be personally liable for sexual discrimination under the Washington Law Against Discrimination. The ruling suggests a willingness on the part of the court to find an individual employee personally liable, even where the employer itself escapes liability.

Hospital districts may wish to acknowledge this trend and show support to their officers, employees and volunteers by adopting an indemnification procedure such as this one. State law requires local governments, including hospital districts, to follow certain minimum procedures for indemnification of officers, employees and volunteers. [See RCW 4.96.041] Foster Pepper has developed the model procedure based on that provision.

The model procedure DOES NOT create any legal requirements for indemnification beyond the minimum provisions of RCW 4.96.041. It does provide more specificity regarding how indemnification of employees, officers and volunteers is handled.

Finally, please note that adoption of this procedure does not in any way lessen the need for the hospital district to secure adequate insurance coverage.

If you have any questions or comments, please contact me at (206) 216-2554 or tayab@awphd.org.

PUBLIC HOSPITAL DISTRICT NO. ____

_____ COUNTY, WASHINGTON

RESOLUTION NO. _____

A RESOLUTION of the Board of Commissioners of Public Hospital District No. _____, _____ County, Washington, establishing a procedure regarding the indemnification of officers, employees and volunteers.

WHEREAS, RCW 4.96.041 provides that whenever an action or proceeding for damages is brought against any past or present officer, employee or volunteer of a local governmental entity and such action or proceeding arises from acts or omissions of such officer, employee or volunteer while performing or in good faith purporting to perform his or her official duties, such officer, employee or volunteer may request the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity;

WHEREAS, RCW 4.96.041 further provides that if the legislative authority of the local governmental entity, or the local governmental entity using a procedure created by ordinance or resolution, finds that the acts or omissions of the officer, employee or volunteer were, or in good faith purported to be, within the scope of his or her official duties, the request shall be granted; and

WHEREAS, RCW 4.96.041 further provides that if the request is granted, the necessary expenses of defending the action or proceeding shall be paid by the local governmental entity and any monetary judgment against the officer, employee or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution; and

WHEREAS, the commissioners of the district wish to establish a procedure to implement the provisions of RCW 4.96.041; NOW, THEREFORE,

BE IT RESOLVED BY the Board of Commissioners of Public Hospital District No. _____, _____ County, Washington, as follows:

Section 1. Definitions. Unless the context clearly indicates otherwise, the words and phrases used in this resolution shall have the following meanings:

“Board” means the board of commissioners of the District.

“District” means the public hospital district.

“Employee” means any person who is or has been employed by the District.

“Officer” means all elected and appointed officers of the District and all persons exercising or undertaking to exercise any of the powers or functions of an officer of the District.

“Official Duty” means those duties within the specific Scope of Service or Employment of the Employee, Officer or Volunteer as defined by the Board or by statute.

“Proceeding” means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

“Scope of Service or Employment” shall be determined by the Board with reference to the relevant job description and/or employee or volunteer manual and or the usual and accustomed duties assigned or performed by others in a similar situation.

“Volunteer” means a person who performs any assigned or authorized duties for the District brought about by one's own free choice, receives no wages and is registered and accepted as a Volunteer by the District for the purpose of engaging in authorized Volunteer service at the time of the act or omission giving rise to a Proceeding for which representation or indemnification is claimed under this resolution; PROVIDED, that such person shall be deemed to be a Volunteer although he or she may be granted maintenance and reimbursement for actual expenses necessarily incurred in performing his or her assigned or authorized duties.

Section 2. Request for Representation and Indemnification; Conditions. The provisions of this resolution shall be subject to the following conditions:

(a) Any past or present Employee, Officer, or Volunteer may submit a request to the Board for representation and indemnification in any Proceeding resulting from the acts or omissions of such Employee, Officer or Volunteer that meet the criteria of this resolution by presenting a written request to the superintendent of the District or his or her designee at the administrative offices of the District during regular business hours.

(b) A request for representation and indemnification shall be submitted as soon as is practicable and in no event later than ____ days after notice of the commencement of any Proceeding, or ____ days after any incident or course of conduct potentially resulting in any Proceeding, and shall include:

(i) the name and current contact information of the Employee, Officer, or Volunteer requesting representation;

(ii) all information known to the Employee, Officer or Volunteer regarding the relevant acts or omissions, including the dates, times, places, and surrounding circumstances;

(iii) the names and addresses of all persons claiming injury or damage in the Proceeding; and

(iv) the names, addresses, and current contact information, if known, of all witnesses or persons having knowledge of the circumstances involved in the Proceeding.

(c) The Employee, Officer or Volunteer shall respond to all reasonable requests for information from the District's legal counsel and shall otherwise cooperate with the District's legal counsel, including but not limited to:

(i) delivering any claim, demand, notice, summons or other process relating to the Proceeding;

(ii) attending interviews, depositions, hearings and trials as required and shall assist in securing and giving evidence and obtaining attendance of witnesses, assisting in making settlements of any suits; and

(iii) enforcing any claims for any right of subrogation against any persons or organizations that may be liable to the District because of any damage or claim of loss arising from such incident or course of conduct.

(d) The Employee, Officer or Volunteer shall not receive any additional compensation for any activities related to the Proceedings, and if the Employee, Officer or Volunteer has left the employment or service of the District, no fee or compensation shall be provided. Failure of the Employee, Officer or Volunteer to cooperate with the defense as required shall constitute a withdrawal of the request for representation and indemnification and relieves the District of further liability.

(e) The Employee, Officer or Volunteer shall not accept or voluntarily make any payment, assume any obligation, or incur any expense related to the Proceedings or the acts or omissions giving rise to the Proceedings, other than to administer first-aid to others at the time of any incident or engage in a reasonable attempt to avoid or mitigate injury or damage to persons or property.

(f) Prior to undertaking any representation or agreeing to any indemnification, the District may require the Employee, Officer or Volunteer to sign an agreement indicating that he or she will reimburse the District, consistent with the agreement, for defense costs including attorney's fees, should the trier of fact determine that the Employee, Officer or Volunteer committed a willful, wanton or intentionally wrongful act or acted outside his or her Official Duty.

(g) The provisions of this resolution are intended to be secondary to any contract or policy of insurance owned or applicable to any Employee, Officer or Volunteer. The District shall have the right to require any Employee, Officer or Volunteer to use any such policy protection prior to requesting the protection afforded by this resolution.

Section 3. Availability of Legal Representation and Indemnification.

(a) Subject to the requirements of this resolution, the District shall provide to an Employee, Officer or Volunteer such legal representation as may be reasonably necessary to defend such Employee, Officer or Volunteer in a Proceeding resulting from any conduct, act or omission of such Employee, Officer, or Volunteer, when such conduct, act or omission was performed or omitted:

(i) on behalf of the District in his or her capacity as a District Employee, Officer or Volunteer, and

(ii) within the scope of his or her Official Duties.

The fact that an Employee, official, or Volunteer has concluded employment or service with the District shall not affect the availability of legal representation under this resolution.

(b) Except as may be provided in any applicable insurance policy, the legal representation described in this section shall be provided by an attorney designated by the Board or its designee.

(c) Notwithstanding any other provision of this resolution, no representation or indemnification shall be provided to any person if in the opinion of the District's legal counsel payment of such indemnification would cause the District to violate any applicable law or jeopardize any of its licenses, certifications or accreditations or its participation in the Medicare or Medicaid programs.

Section 4. Exclusions; Standard of Conduct. The District shall not assume any obligation under this resolution in defense of:

(a) any dishonest, fraudulent, criminal, willful, intentional, grossly negligent, or malicious act, omission, or course of conduct by an Employee, Officer, or Volunteer;

(b) any act, omission, or course of conduct of an Employee, Officer, or Volunteer that is not performed on behalf of the District;

(c) any act, omission, or course of conduct outside the scope of the Official Duties of the Employee, Officer or Volunteer; or

(d) any lawsuit brought against an Employee, Officer, or Volunteer by or on behalf of the District.

Section 5. Determination of Exclusions.

(a) The Board shall grant a request for representation or indemnification under this resolution only after a determination has been made that:

(i) representation or indemnification of the Employee, Officer or Volunteer is permissible in the circumstances because the Employee, Officer or Volunteer has met the standard of conduct set forth in Sections 3 and 4;

(ii) the acts or omissions giving rise to the Proceeding were done on behalf of the District and within, or in good faith purported to be within, the scope of the Official Duties of the Employee, Officer or Volunteer; and

(iii) all applicable conditions of this resolution have been met.

(b) The determination shall be made by the Board upon advice of legal counsel appointed by the Board to investigate the request for representation. In reaching a determination, the Board shall consider the opinion of legal counsel and any additional information that the Employee, Officer, or Volunteer wishes to submit to the Board. No commissioner who is a party to the Proceeding for which representation and indemnification is being requested shall take part in the determination. The determination of the Board pursuant to this section shall be a final legislative action, from which there shall be no appeal, except to superior court by means of a declaratory judgment action.

(c) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible.

Section 6. Effect of Compliance with Conditions. If all of the conditions of representation required by this resolution are met, legal representation of an Employee, Officer, or Volunteer is undertaken by the District, and a judgment is entered against the Employee, Officer or Volunteer, or a settlement made, then the District shall pay such judgment or settlement; PROVIDED, that the District may, at its discretion, appeal as necessary any judgment.

Section 7. Failure to Comply with Conditions. If an Employee, Officer, or Volunteer refuses to comply with any of the conditions set forth in this resolution with respect to any Proceeding, the District shall not be obligated to offer any representation or indemnification under this resolution and this resolution shall be inapplicable with respect to such Proceeding.

Section 8. Reimbursement of incurred expenses.

(a) If the Board determines that representation or indemnification is not available to the Employee, Officer or Volunteer under the terms of this resolution, and a court of competent jurisdiction later determines that a claim does come within the provisions of this resolution, then the District shall pay any judgment rendered against the Employee, Officer or Volunteer along with reasonable attorney's fees incurred in obtaining the determination that such claim is covered by this resolution.

(b) If the Board determines that representation or indemnification is available to the Employee, Officer or Volunteer under the terms of this resolution, and a court of competent jurisdiction later determines that a claim does not come within the provisions of this resolution, then the District shall be reimbursed by the Employee, Officer or Volunteer or his or her assigns for costs or expenses incurred in obtaining the determination that such claim is not covered by this resolution.

Section 9. Conflict with provisions of insurance policies.

(a) The intent of this resolution is to provide complete coverage outside and beyond any insurance policy that may be in effect while not compromising the terms and conditions of any such policy.

(b) Nothing contained in this resolution shall constitute an insurance policy. This resolution shall not be construed as creating a contract or a policy of insurance between the District and any Employee, Officer or Volunteer. This resolution is subject to amendment or repeal at the sole discretion of the Board without prior notice to the Employee, Officer or Volunteer.

(c) The provisions of this resolution shall have no force or effect with respect to any accident, occurrence or circumstance for which the District or any Employee, Officer or Volunteer is insured against loss or damages under the terms of any valid insurance policy, provided that this resolution shall provide protection, subject to its terms and limitations, above any loss limit of such policy.

(d) Nothing contained in this resolution shall be construed to modify or amend any provision of any policy of insurance where the District or any Employee, Officer or Volunteer is a named insured. In the event of any conflict between this resolution and the provisions of any such policy of insurance, the provisions of the policy of insurance shall control.

Section 10. Pending claims. This resolution shall apply to any Proceeding against an Employee, Officer or Volunteer now pending or hereafter filed regardless of the date of the events or circumstances giving rise to such Proceeding.

Section 11. Not a waiver. Nothing in this resolution shall be construed to waive or impair the right of the Board to institute suit or counterclaim against any Employee, Officer or Volunteer nor to limit its ability to discipline or terminate an Employee, Officer or Volunteer.

ADOPTED and APPROVED by the Commission of Public Hospital District No. _____,
_____ County, Washington, at a open public meeting thereof this ____ day of
_____, 2001, the following Commissioners being present and voting in favor of the
resolution.

President and Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Secretary and Commissioner