

ARTICLE XIX

Defense and Indemnification

[Added by the Mayor and Council of the Township of Montclair 4-12-2023 by Ord. No. O-23-14]

§ 3-67. Definitions.

As used in this article, the following terms shall have the meanings indicated:

EMPLOYEE — Any officer or employee of the Township of Montclair, whether elected or appointed, except employees of the Township Police Department or Fire Department entitled to a defense or indemnification under N.J.S.A. 40A:14-28 and 40A:14-155.

LEGAL ACTION OR PROCEEDING — Any pending, threatened or completed civil, criminal, administrative or arbitral action, suit or proceeding, and any appeal therein and any inquiry or investigation which could lead to the action, suit or proceeding.

§ 3-68. Township Attorney's duty to defend.

Except as provided below in § 3-69, the Township Attorney shall provide for the defense of any legal action or proceeding against an employee arising out of an act or omission within the scope of employment or authority, provided the employee:

- A. Requests a legal defense, in writing, and provides to the Township Attorney any summons, complaint, process, notice, demand, or pleading; and
- B. Cooperates with the Township Attorney in his or her defense.

§ 3-69. Grounds for refusal to provide defense.

- A. The Township Attorney may refuse to provide for the defense of a legal action or proceeding against an employee if he or she determines that:
 - (1) The act or omission was not within the scope of employment or authority;
 - (2) The act or omission was one of fraud, actual malice, willful misconduct or bad faith;
 - (3) The employee has been charged or indicted in connection with an act or omission that would constitute a crime or offense under N.J.S.A. 2C, federal criminal law or an act committed in another state that would constitute a crime or offense under N.J.S.A. 2C, except that an employee may be entitled to reimbursement of the costs of defending any such criminal action against the employee, provided that the criminal proceeding has been dismissed or results in a final disposition in favor of the employee;
 - (4) The defense would create a conflict of interest between the Township and the employee;
 - (5) The employee has failed to cooperate fully with the defense;
 - (6) The employee failed to request a legal defense; or
 - (7) The legal action or proceeding was brought by the Township against the employee,

including any disciplinary proceeding.

- B. Under circumstances where the factual predicate for a legal action or proceeding against an employee cannot be ascertained with certainty, the Township Attorney may, in the exercise of his or her discretion, provide for the defense of a legal action or proceeding against an employee under a reservation of rights. If the Township Attorney later determines that the employee is not entitled to a legal defense at the Township's expense, he or she shall so notify the employee, in writing, at which point the Township's obligation to provide a defense for the employee shall cease.

§ 3-70. Methods of providing defense.

- A. The Township Attorney may at his or her option provide for legal defense of an employee by:
- (1) Assigning the defense to an attorney on his or her staff;
 - (2) Engaging an independent attorney selected by the Township Attorney;
 - (3) Reimbursing the employee for reasonable attorney's fees expended or obligated to be expended by such employee in the defense of the action; or
 - (4) Asserting the Township's right to a defense under any appropriate insurance policy which requires the insurer to provide the defense.
- B. No employee shall be reimbursed for the expenses of a legal defense unless the Township Attorney has agreed, in writing, to the amount of reimbursement, which includes hourly rates and expenses, before the employee incurs any expenses in his or her defense.
- C. All costs of defense and legal fees to be provided herein shall be calculated at the Township reasonable prevailing fees.

§ 3-71. Indemnification of employee.

- A. Whenever the Township Attorney is required to provide for the defense of any legal action or proceeding against an employee, the Township shall pay or reimburse the employee for:
- (1) Any bona fide settlement of the action approved by the Township Attorney and the Township Council.
 - (2) Any judgment against the employee.
- B. In addition, in any case where the Township would be required to provide a defense under this article, the Township shall indemnify the employee against any judgment or settlement to the extent not provided by such insurance.
- C. Nothing in this article shall authorize the Township to pay punitive or exemplary damages assessed against an employee or any damages resulting from the commission of a crime, actual malice, actual fraud or willful misconduct.

§ 3-72. Additional provisions.

In addition to the provisions hereof, all employees shall be entitled to defense and indemnification as provided in N.J.S.A. 59:10-1 et seq. and N.J.S.A. 59:10A-1 et seq.