

ORDINANCE 4-2017

ORDINANCE OF THE BOROUGH OF MADISON AMENDING CHAPTER 14 OF THE BOROUGH CODE REGARDING INDEMNIFICATION OF MUNICIPAL OFFICIALS AND EMPLOYEES

WHEREAS, the Borough of Madison adopted § 14-1 and § 14-2 of the Code of the Borough of Madison which provides for reimbursement of legal fees, in limited circumstances, to officials and employees of the Borough who incur these expenses arising out of their employment with the Borough; and

WHEREAS, it is in the best interest of the Borough to amend Chapter 14 of the Code in order to clarify the limitations and to update the chapter in order to be similar to the MEL's model Indemnification Ordinance and other Joint Insurance fund policies.

NOW, THEREFORE, BE IT ORDAINED by the Borough Council of the Borough of Madison, in the County of Morris and State of New Jersey that Chapter 14 of the Borough Code be amended as follows:

§ 14-1 General conditions; civil actions.

[Amended 3-14-1977 by Ord. No. 6-77; 9-10-2007 by Ord. No. 61-2007; 2017 by Ord. No. 2]

Subject to the limitations set forth in the subsequent sections of this chapter, whenever any civil action has been or shall be brought against any person (hereinafter referred to as "employee" or "official") holding or formerly holding any office, position or employment with the Borough of Madison for any action or omission arising out of or in the course of the performance of the duties of such office, position or employment, the Borough shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such persons from any financial loss resulting from the litigation. The Borough shall provide for defense of and indemnify any present or former employee or official of the Borough who becomes a defendant in a civil action if the person or persons involved:

- A. Acted or failed to act in a matter in which the Borough has or had an interest;
- B. Acted or failed to act in the discharge of a duty imposed or authorized by law; and
- C. Acted or failed to take action in good faith.

However, the Borough shall not indemnify any employee or official against the payment of punitive damages, penalties, or fines, but may provide for the legal defense of such claims in accordance with the standards set forth in this chapter. The Borough may refuse to provide for the defense and indemnification of any civil action referred to in this chapter if the Borough Council determines that:

- A. The act or omission did not occur within the scope of a duty authorized or imposed by law;
- B. The act or omission was the result of actual fraud, willful misconduct, or actual malice; or
- C. The defense of the action or proceeding by the Borough would create a conflict of interest between the Borough and the employee(s) or official(s) involved.

In any other action or proceeding, including criminal proceedings, the Borough may provide for the defense of a present or former employee or official if the Borough Council concludes that such representation is in the best interest of the Borough and that the person to be defended acted or failed to act in accordance with the standards set forth in this ordinance.

Whenever the Borough provides for the defense of any action set forth herein and as a condition of such defense, the Borough may assume exclusive control over the representation of such persons defended and such person shall fully cooperate with the Borough. The Borough may provide for the defense pursuant to this ordinance by authorizing its attorney to act on behalf of the person being defended or by employing other counsel for this purpose or by asserting the right of the Borough under any appropriate insurance policy that requires the insurer to provide the defense. The Borough Attorney or other attorney selected by the Borough Council shall represent the Borough official or employee, at a cost not to exceed the hourly rate which the Borough compensates its Borough Attorney.

§ 14-2 Criminal actions.

[Amended 9-10-2007 by Ord. No. 61-2007]

The Borough shall not defray the costs of defending any criminal action against any Borough employee or official except as may be authorized by state statute or other municipal ordinance or resolution of the Borough of Madison, and in those circumstances, the responsibility for defraying the costs of defending such employee or official shall be applicable only when such criminal proceedings shall have been dismissed or result in a final disposition in favor of the employee or official. Further, in the event that the Borough indemnifies the employee or official, the cost of that indemnification shall not exceed the hourly rate paid to the Borough Attorney. Nonetheless, should the Borough Council determine that there is good cause to dismiss the employee or official arising out of the incident or related incidents of the criminal prosecution, the Borough will not reimburse the employee or official for legal defense and costs of defending the suit, even though criminal proceedings against the employee or official may be dismissed or the employee or official found not guilty.

§ 14-3 Ethics Proceedings

[Added 2017 by Ord. No. 2]

The Borough will not provide a defense for employees or officials who are charged with ethical offenses or violations. The Borough Council may, however, authorize the Borough to reimburse the employee or official for the reasonable cost of the defense of ethics proceeding, including investigation, costs and reasonable legal fees, as further defined in this chapter, provided that the ethics proceeding is dismissed or is finally determined in favor of the employee or official. In addition, the Borough may indemnify an employee or official if the Mayor and Council, by a majority vote, finds that a Borough employee or official who is found to have committed an ethical offense acted in a manner that was reasonably debatable at

the time that the violation occurred and that the employee or official's actions or omissions did not constitute willful misconduct or an intentional wrong.

§ 14-4 Limitations.

[Amended 3-14-1977 by Ord. No. 6-77; 2017 by Ord. No. 2]

The Borough shall not be obligated to defend and indemnify its employees or officials if:

- A. The alleged act or omission was not within the scope of employment or authority, or the act or omission does not arise out of and is not directly related to the employee or official's lawful exercise of his or her authority or duty in furtherance of the employee or official's authority or duty;
- B. The claim arises from circumstances under which the Borough itself would not be liable for the acts of its employees or officials under the doctrine of respondent superior;
- C. The act or omission constitutes a criminal offense, ethical offense, actual fraud, intentional or willful misconduct, actual malice, or an intentional or wrongful act or omission;
- D. There exist policies of insurance, either obtained by the Borough or by any other, by virtue of which the employee or official is entitled to a defense in question from any insurer, including coverage pursuant to the Joint Insurance Fund or Municipal Express Liability Policies;
- E. If the action or proceeding was brought by the Borough itself against the employee or official;
- F. If the Borough employee or official has failed to substantially cooperate with the Borough and its agents, servants, attorneys, and employees in connection with the matter; or
- G. If it is not deemed appropriate by the Borough Council pursuant to the provisions of the New Jersey Tort Claims Act, N.J.S.A. 59:10-1 et seq., or any other statute or applicable law.

Specifically excluded from the provisions of this chapter are the following classes of employees, officials, or former employees or officials:

- A. Any municipal employee or official providing any form of professional medical services, such as doctors and nurses, insofar as said civil action arises out of or concerns those professional medical services.
- B. Any part-time professional municipal employee or official, such as the Borough Attorney, Assistant Attorney, Auditor and Engineer, insofar as said civil action arises out of or concerns those professional services. This exclusion does not pertain to full-time professional employees such as the Borough Engineering Administrator and Finance Officer.

§ 14-5 Counterclaims or affirmative actions.

[Added 2017 by Ord. No. 2]

If the Borough employee or official files any counteraction, counterclaim, or asserts any affirmative claims in the legal proceedings, the Borough shall not be obligated to reimburse the employee or official for any attorney's fees or costs attributed to such counteraction, counterclaim, or affirmative claim.

§ 14-6 Notice of claims to be provided to the Borough.

[Added 2017 by Ord. No. 2]

A Borough employee or official shall not be entitled to indemnification or reimbursement pursuant to this chapter unless, within fifteen (15) calendar days of

the time he or she is served with any summons, complaint, process, notice, demand or pleading, he or she delivers the original or a copy thereof to the Borough. Any Borough employee or official who receives notice of a claim or is named as a party in any civil suit, ethics proceeding, or criminal proceeding either in his or her official capacity or in an individual capacity for events arising out of or connected directly or indirectly with the performance of his or her duty as a Borough employee or official shall promptly advise the Borough Administrator and the Borough Attorney of the claim or that the civil suit or criminal proceeding has been commenced and shall supply a copy of any and all notices and pleadings pertaining to the matter. The Borough employee or official shall thereafter cooperate with the appropriate Borough agents, attorneys, servants and employees in effectuating the provisions of this chapter.

§ 14-7Definitions.

[Added 3-14-1977 by Ord. No. 6-77; amended 9-10-2007 by Ord. No. 61-2007; 2017 by Ord. No. 2]

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

OFFICIAL or EMPLOYEE

Any person elected, appointed or employed by the Borough, paid or unpaid, in any way connected with the municipal government of the Borough of Madison, except for persons appointed to committees having no powers other than to advise. "Employee" shall include all persons on the municipal payroll. These terms shall not mean:

- A. Any person who is not a natural person;
- B. Any person while providing goods or services of any kind under any contract with the Borough except an employment contract;
- C. Any person while providing legal or engineering services for compensation unless said person is a full-time employee of the Borough; or
- D. Any person who as a condition of his or her appointment or contract is required to indemnify and defend the Borough and or/secure insurance.

ADOPTED AND APPROVED

Attest:

ROBERT H. CONLEY, Mayor

ELIZABETH OSBORNE, Borough Clerk