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September 12, 1984

Mr. Juan Martin, Jr.
Division Director
Motor Vehicle Division
1801 West Jefferson Street
Phoenix, Arizona 85001

Re: I84-123 (R84-107)

Dear Mr. Martin:

This letter is in response to your inquiry concerning the scope of immunity and benefits granted to members of the Medical Advisory Board ("the Board") established pursuant to A.R.S. § 28-431 et seq. Specifically, you have asked these questions:

1. Would Board members have absolute or qualified immunity under A.R.S. § 12-820 et seq.?
2. Would the Board members be considered employees under A.R.S. § 12-820 et seq. and, if so, what rights and benefits would these members have as employees?

The Medical Advisory Board established by A.R.S. § 28-431 is defined as "a professional unit composed of qualified personnel to advise the department [of Transportation] on medical criteria and vision standards for driver licensing." A.R.S. § 28-431.2. The seven Board members are appointed by the Director of the Arizona Department of Health Services. A.R.S. § 28-432.A.

A.R.S. § 12-820 et seq. was recently amended by Ch. 285, 1984 Ariz.Sess.Laws (2nd Reg. Sess.) ("Chapter 285") to prescribe the conditions under which public entities and public

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employees have absolute immunity and qualified immunity from tort liability. A.R.S. § 12-820 as amended by Chapter 285 provides these pertinent definitions:

1. "Employee" includes an officer, employee or servant, whether or not compensated or part time, who is authorized to perform any act or service, except that employee does not include an independent contractor. Employee includes noncompensated members of advisory boards appointed as provided by law.

* * *

5. "Public employee" means an employee of a public entity.

6. "Public entity" includes this state and any political subdivision of this state.

7. "State" means this state and any state agency, board, commission or department.

[Emphasis added]. Thus, for purposes of determining the applicability of the immunities granted by A.R.S. § 12-820 et seq., the Board falls within the definition of "public entity" and each Board member is an "employee," regardless of whether that member receives compensation.

A.R.S. § 12-820.01 provides for absolute immunity in the following circumstances:

1. The exercise of a judicial or legislative function; or
2. the exercise of an administrative function involving the determination of fundamental governmental policy.

B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for:

- (a) the purchase of equipment,
- (b) the construction or maintenance of facilities,
- (c) the hiring of personnel, or
- (d) the provision of government services.

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

3. The licensing and regulation of any profession or occupation.

A.R.S. § 12-820.02 provides for qualified immunity under the following circumstances:

Unless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for:

1. The failure to make an arrest or the failure to retain an arrested person in custody.

2. An injury caused by an escaping or escaped prisoner.

3. An injury resulting from the probation, parole, furlough or release from confinement of a prisoner or from the terms and conditions of his probation, parole, furlough or release from confinement or from the revocation of his probation, parole, furlough or release from confinement.

4. An injury caused by a prisoner to any other prisoner.

5. The issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization for which absolute immunity is not provided pursuant to Section 12-820.01.

6. The failure to discover violations of any provision of law requiring inspections of property other than property owned by the public entity in question.

In addition, neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages. A.R.S. § 12-820.04. Moreover, the provisions of A.R.S. § 12-820 et seq. do not "affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and constitution of this state." A.R.S. § 12-820.05.

The determination of whether the actions of Board and its members are subject to the absolute immunity granted by A.R.S. § 12-820.01 or the qualified immunity granted by A.R.S. § 12-820.02 depends upon the specific fact situations giving rise to potential liability. While we are unable to give you a definitive answer as to the applicability of absolute and qualified immunities to specific fact situations, we can, by example, analyze the powers of the Board in view of the guidelines established by the legislature for each particular type of immunity. A.R.S. § 28-433 outlines the authority of the Board and specifically sets forth these activities:

1. Make recommendations to the superintendent consistent with the provisions of this article.
2. Make studies, including recommendations, for the purpose of suggesting:
 - (a) Medical and vision standards for driver license applicants.
 - (b) Medical and vision standards for driver license examinations.
 - (c) Courses of training, training facilities and qualifications and methods of training for driver license examining personnel.
 - (d) Procedures for the certification of driver licensing personnel and the certification of driver licensing personnel instructions.
3. Direct research in the field of driver licensing and accept public or private grants for such purpose.
4. Conduct research in the field of examination or reexamination of individual driver licenses with medical or vision problems.

We note that, for instance, the Board's authority to determine whether to seek public or private grants for research would fall with the scope of a "fundamental governmental policy" as defined by A.R.S. § 12-820.01.B. For this activity, the Board would be granted absolute immunity. Board decisions regarding the standards for issuance or revocation of licenses would be also protected at a minimum by a qualified immunity pursuant to A.R.S. § 12-820.02(5). Moreover, insofar as those decisions may be considered part of a quasi legislative function, the board could be protected by the absolute immunity afforded by A.R.S. § 12-820.01.

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In addition, Board members are provided liability insurance coverage for their activities pursuant to A.R.S. § 41-621.A.3 and, by law, they are not personally liable for the following activities:

A state officer, agent or employee, except as otherwise provided by statute, is not personally liable for an injury or damage resulting from his act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in him if the exercise of the discretion was done in good faith without wanton disregard of his statutory duties.

A.R.S. § 41-621.G. Whether absolute or qualified immunity attaches to individual Board members is of no consequence as to their liability coverage so long as the Board members act within authorized governmental or proprietary capacities.

You have also asked what rights and other benefits accrue to Board members if they are, in fact, considered employees under A.R.S. § 12-820. The definition of employee set forth in A.R.S. § 12-820 only applies to Title 12, Ch. 7, Art. II. To determine whether a Board member is entitled to benefits such as retirement and insurance, we must look to the specific laws pertaining to the provision of those particular benefits. In the case of the State Retirement System, an individual must be a compensated employee or officer in order to be eligible. A.R.S. § 38-781.03.B.2. Since "no compensation [is] paid for serving on the medical advisory board," a member of Board is not eligible for the State Retirement System merely by virtue of his membership.¹ A.R.S. § 28-432.E. With respect to health insurance, A.R.S. § 38-651 provides that "the Department of Administration may expend public funds appropriated for such purpose to procure

1. We note that the director acts as chairman of the Medical Advisory Board. A.R.S. § 28-432.B. The director is compensated for his services as the director of the Department of Health Services and he, unlike other members of the Board, would be eligible for participation in the Retirement Fund.

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health and accident coverage for full-time officers and employees of the state, its departments and agencies." In order to be a full-time employee, one must work at least 20 hours per week. See A.C.R.R. R2-5-604. Since members of the Board neither receive compensation nor are they full-time employees, they are not entitled to health insurance benefits.

Even assuming that Board members were employees within the worker's compensation definition, members would not be covered by industrial insurance while traveling to and from meetings. The Arizona courts have uniformly held that an employer is not liable for the acts of an employee while the employee is going or returning from his place of employment - the "going and coming" rule. State v. Superior Court In and For Maricopa County, 111 Ariz. 130, 524 P.2d 951 (1974) (and cases cited therein); Scottsdale Jaycees v. Superior Court of Maricopa County, 17 Ariz.App. 571, 499 P.2d 185 (1972); Sendejaz v. Industrial Commission, 4 Ariz.App. 309, 420 P.2d 32 (1966). The "going and coming" rule has also been codified by A.C.R.R. R2-10-05.F which provides that an employee will not be considered within the course and scope of employment while driving a non-state-owned vehicle "to and from work." Therefore, the Board members would not be covered by industrial insurance while traveling to and from meetings.

Sincerely,

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