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June 20, 2008

Michael J. Pineault, Esquire
Chief Deputy Legal Counsel
Commonwealth of Massachusetts
Executive Department
State House
Room 271
Boston, Massachusetts 02133

Re: Jason Davis Case

Mr. Pineault:

The within is responsive ("Response") to your letter ("Letter") dated June 11, 2008.

I would again like to thank you and Kate Cook for the time you expended on the Davis matter.

Through your Letter you indicated that State Indemnification Statute¹ cannot be used as a vehicle for paying the Davis judgment. I agree. In sum and substance, the central legal conclusion in the Letter was that since the Davis Defendants were found to have acted "maliciously or wantonly" the State Indemnification Statute² forecloses payment under its provisions. Davis has always readily conceded that this statute does not provide a vehicle for payment. Moreover, Davis never sought the assistance of the Governor predicated upon the dictate of the State Indemnification Statute and does not now. It is one thing to suggest that payment cannot be made under the State Indemnification Statute. It is quite another to suggest that this statute actually precludes the State from paying the Davis judgment from another source. It does not and never has.

I would like to continue to confer with the Governor's office on the issues raised in Davis since, it is respectfully submitted, the contentions set forth in the Letter are actually irrelevant to the

¹ M.G.L. c. 258, §9 precludes indemnification if the conduct of the culprit is found to have been "grossly negligent, willful or malicious..."

² M.G.L. c. 258, §9

disposition of this matter. A rhetorical question is worth asking at the outset: It is illegal for the State to pay a judgment entered against several State Mental Health Care Workers, acting under color of State law authority, who pin a mentally ill inpatient to the floor so that one of their own can beat him bloody in front of a Charge Nurse who, all the while, actually looks on and encourages the onslaught?

I. INTRODUCTION

This Response demonstrates that: (i) The Governor and Massachusetts Legislature possess the legal authority to pay the entire Davis judgment notwithstanding the provisions of the State Indemnification Statute; (ii) Two State Attorneys General in the Davis case were of the opinion that indemnification was permissible under State Law notwithstanding the provisions within the State Indemnification Statute; and (iii) the State previously made a payment of more than \$177,000 in the Davis case which payment was actually forbidden under the State Indemnification Statute. Any one of these grounds support the contention that payment of the Davis judgment may now be made.

II. THE LEGISLATURE AND THE GOVERNOR HAVE THE LEGAL AUTHORITY TO PAY JUDGMENTS WHICH CANNOT BE INDEMNIFIED UNDER THE STATE INDEMNIFICATION STATUTE

As recently as March, 2005 the Massachusetts Governor, Massachusetts Legislature and State Attorney General all agreed that judgments, which cannot be paid through the use of the State Indemnification Statute, may nonetheless still be paid by the State. All one need do to verify this contention is to read the 2005 Massachusetts Legislative Record concerning Dennis R. Smith, read the appended Boston Globe article and read the files maintained by the Suffolk Superior Court. See Bijan Mohammadipour v. Dennis R. Smith; (Suffolk Superior Court, 2005); Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1, B4. Simply put, the Governor, Massachusetts Legislature and the Attorney General all necessarily agreed in Mohammadipour that it is not "illegal" for the Commonwealth to pay a civil rights judgment even though it clearly cannot be paid under the State Indemnification Statute.

The appended Boston Globe article specifically notes that Dennis R. Smith "had deliberately violated [Plaintiff's] civil rights" as the verdict entered in that case also proves.³ Further, the jury in the Mohammadipour case found the Defendant to have acted "willfully, deliberately, maliciously or with reckless disregard..."⁴ in depriving Bijan Mohammadipour of his civil rights. These findings did not, however, preclude the Governor, Massachusetts Legislature or State Attorney General from joining together to introduce a special bill to pay the Mohammadipour judgment even though such judgment could not have been paid under the State Indemnification

³ See Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1; See Bijan Mohammadipour v. Dennis R. Smith; (Suffolk Superior Court 2005)

⁴ See Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1, B4; Massachusetts Legislative Record; Bijan Mohammadipour v. Dennis R. Smith; (Suffolk Superior Court, 2005).

Statute. From an indemnification standpoint the Mohammadipour and Davis cases are legally indistinguishable.

The Plaintiff in Mohammadipour was paid as a "result of a supplemental spending bill" approved by the Legislature which mentioned Dennis R. Smith by name.⁵ This "process" is certainly not part of M.G.L. c. 258, § 9 and it clearly demonstrates that the Massachusetts Governor, Legislature and Attorney General have plenary power to pay Court judgments even if M.G.L. c. 258, § 9 cannot be employed. To suggest that the Governor, Legislature and Attorney General do not have this right would be to underestimate the breadth and scope of powers which the branches of Government enjoy. Archived records from the Settlement and Judgment Fund and scores of legislative records augment the contentions in this section.

III. THE COMMONWEALTH'S ACTIONS IN THE DAVIS CASE ALONE PROVE THAT IT IS ENTITLED TO INDEMNIFY NOTWITHSTANDING THE PROVISIONS OF THE STATE INDEMNIFICATION STATUTE

In the context of the Davis case two Attorneys General made settlement offers both before and after judgment entered upon the jury verdict. These two offers were obviously extended by the two Attorneys General, in their respective capacities as the lead law enforcement officers for the Commonwealth of Massachusetts, notwithstanding any principal espoused within M.G.L. c. 258, § 9. Moreover, these offers were also extended notwithstanding the fact that all of Davis' claims were clearly not subject to indemnification under the State Indemnification Statute. These settlement offers themselves dictate that the State Indemnification Statute does not exert a preclusive effect upon the Commonwealth's ability to pay the Davis judgment. How could it if they State is to retain the ability to have a "moral compass" ? The ambit of Section 9 of c. 258 cannot be extended to encompass an arena over which it has no application.

IV. A PRIOR PAYMENT BY THE COMMONWEALTH IN THE DAVIS CASE EVIDENCES THE FACT THAT PAYMENTS CAN BE MADE BY THE STATE NOTWITHSTANDING ANY OSTENSIBLY INCONSISTENT PROVISION IN THE STATE INDEMNIFICATION STATUTE

Within the denial Letter you offhandedly suggested that a prior partial payment to Davis of more than \$177,000 was actually "permitted by Section 9..." of Chapter 258. If this contention were true it would, in turn, now dictate that this partial payment cannot be used as "precedent" to obtain additional payments still due under the Davis judgment. With all due respect, this contention is legally erroneous.

Payments under M.G.L. c. 258, § 9 are not "permitted" if the Defendant's conduct is found to have been "grossly negligent, willful or malicious" (emphasis added). The payment of more than \$177,000 to Davis was made in relation to that portion of the jury verdict/judgment which pertained to Nicholas L. Tassone. The jury expressly found that Tassone did not stop others from utilizing excessive force upon Davis notwithstanding the fact that Tassone was present, observed the excessive force, was in position to stop it and had the time to do so.

⁵ See Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1;

The claims asserted against Tassone obviously were intent based Federal Civil Rights claims. (See Fourth Amendment; 42 U.S.C. § 1983). Tassone unequivocally was found by the jury to have engaged in conduct which was at least "grossly negligent" and "willful" insofar as he intentionally failed to stop excessive force being committed in his presence even though he clearly had the time and ability to do so. This conduct was not, by any stretch of the imagination, "careless" conduct that unintentionally and mistakenly resulted in harm to Davis. Since Tassone's conduct was at least "grossly negligent" and "willful" it is beyond cavil that the State Indemnification Statute could not have been employed to pay the "Tassone" portion of the Davis judgment. This payment alone evidences the fact that the Commonwealth, within the context of the Davis matter itself, concluded that the State Indemnification Statute does not exert a preclusive effect on its ability to pay "intent" based civil rights verdicts. This "payment" is in accord with the payment in Mohammadipour.

V. INDEMNIFICATION ALTERNATIVES

The Commonwealth need not decide this matter on indemnification grounds or any ostensible hook in M.G.L. c. 258, § 9. The Commonwealth could unilaterally determine, in a money bill, that it is desirous of paying the Estate of Jason Davis a sum certain for his injuries. The legislative Bill, previously filed by Vincent Pedone, cast it as a "moral obligation". This Bill could be resurrected and amended to expressly state that it does not indemnify any person in relation to any claim or judgment. This language would take the Bill right out of the "indemnification" arena.

VI. ASSISTING THE EXECUTIVE BRANCH IN OTHER AREAS

I respect your decision regarding c. 258 but clearly do not agree with it. Our disagreement in this regard should not, however, foreclose my ability to assist the Commonwealth in other areas. I voted for the Governor and am an energetic supporter of his. I hope the Executive Branch lets me assist it because I have, it is humbly submitted, obtained specialized knowledge in a seemingly obscure area of Constitutional law which can clearly benefit all mentally ill inpatients housed in our DMH facilities. The Commonwealth needs much help in this area. I am willing to give it.

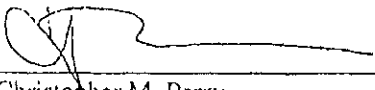
I would like to offer, on a pro bono basis, to assist the Commonwealth in eradicating the egregious conditions within the DMH which I learned about while litigating Davis and other cases. I talked about these egregious conditions during our conference on June 3, 2008. My offer in this regard is not an empty one. It is heartfelt. It must be recalled that supervisory claims were asserted in the Davis case stemming from continuous and systematic violence being exacted upon mentally ill inpatients at DMH facilities. There is much work to be done to help our most vulnerable citizens housed in DMH facilities. The issues which need to be rectified include those set forth in the two reported legal opinions which I provided to you in the Davis matter.

VII. CONCLUSION

If the State is desirous of paying the Davis' Judgment it is legally entitled to do so.

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Sincerely,
BRENDAN J. PERRY & ASSOCIATES, P.C.

By: 

Christopher M. Perry

CMP/pmc
Enclosure

Cc: Kate Cook, Esquire
Deputy Legal Counsel
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City & Region

THE BOSTON GLOBE SATURDAY, MARCH 26, 2005

Measure sheltered ex-state official

Was defendant in rights lawsuit

By Jonathan Saltzman
GLOBE STAFF

Governor Mitt Romney and state lawmakers quietly approved a budget amendment last fall that saved a politically connected former state employee from having to pay \$250,000 in damages for retaliating against a whistleblower.

A Suffolk County jury awarded \$750,000 last June to Bijan Mohammadipour, a high-ranking state engineer who said he was humiliated and stripped of job duties after he pointed out hazardous conditions at an asbestos-filled state office building.

The state was ordered to cover two-thirds of the award, but the rest was to be paid by his former boss, Dennis R. Smith, who, the jury concluded, had deliberately violated Mohammadipour's civil rights.

But Smith, a prominent Plymouth Republican who has made regular contributions to GOP candidates and who heads the New England office of the federal General Services Administration, won't have to pay a penny because of a special law passed in September.

In a little-noticed provision included in a supplemental spending bill and mentioning Smith by name, Romney and the overwhelmingly Democratic Legislature provided that the state cover Smith's portion of the damages and his legal expenses, up to \$1 million.

The Romney administration introduced the measure because it believed that Smith "acted in good faith in carrying out his job responsibilities and ... should not

face a potentially catastrophic financial loss," Harry Grossman, general counsel for the Executive Office of Administration and Finance, said in a statement. If the state had not come to Smith's aid, Grossman added, it would have difficulty attracting and retaining talented managers.

Asked whether Smith's political ties had anything to do with it, a Romney spokeswoman declined to comment.

But Mohammadipour and his lawyer said the special provision flies in the face of a 1994 Massachusetts law passed specifically to protect whistleblowers.

"On the one hand, the Commonwealth is saying, 'We don't like people who retaliate against whistleblowers,'" said his lawyer, Eric Maxwell, who said he only learned this month about the measure's passage. "On the other hand, it's now protecting the guy who went after the whistleblower."

Smith, who has served as regional administrator of the General Services Administration since 2001 and makes \$148,200 a year, did not return phone calls to his office yesterday.

Leslie Greer, a special assistant attorney general who defended Smith and the state in the civil lawsuit, said yesterday that the law was not intended to protect only Smith. She said state officials were worried about managers bolting from their jobs if they

feared being held personally liable in such suits.

From 1993 to 2001, Smith served as superintendent of the Bureau of State Office Buildings under Governors William F. Weld and Paul Cellucci and Acting Governor Jane Swift. Prior to that, he directed the Boston regional office of the US Department of Education.

A former math teacher, Smith has made several contributions to Republican politicians on the state and federal level in recent years, including \$1,000 to George W. Bush in his first run for president and then \$2,000 in his reelection bid.

Mohammadipour sued the state and Smith in Suffolk Superior Court, citing violations of the state's whistleblower-protection statute and federal and state civil rights laws.

He testified at trial that Smith orchestrated a campaign to discredit him, excluded him from meetings, downgraded his employee evaluations, and barred him from the State House after Mohammadipour drew attention to potentially dangerous asbestos at the Saltonstall State Office Building in 1994. The building was closed in 1999, then gutted and renovated at a cost of \$186 million.

A Newton psychologist hired by Mohammadipour testified that the Iranian-born Danvers engineer, now 52, suffered from panic attacks, depression, and symptoms similar to post-traumatic stress disorder as a result of the retaliation.

Greer countered at trial that Mohammadipour never proved he was punished for complaining about unsafe conditions or met legal standards required to prove that federal and state laws had been broken. Nonetheless, the jury sided with Mohammadipour.

One juror said afterward that she felt Mohammadipour had set an impressive example for other state employees. "I'm honored to have somebody like Bijan making sure that when we come into these buildings, we are safe," said juror Linda Nash.

Mohammadipour, the principal engineer for the Bureau of State Office Buildings, said this week that the special legislation covering Smith's damages could embolden other managers to retaliate against whistleblowers.

"How would you encourage

anybody who's been involved with the Big Dig and they've seen wrongdoing to come out and blow the whistle if the entire government rewards the person who retaliates against the whistleblower?" he said.

Under Massachusetts tort law, the state can typically protect the personal finances of an individual sued for violating civil rights statutes while carrying out his or her job. But the law specifically excludes defendants who "acted in a grossly negligent, willful, or malicious manner."

The jury in Mohammadipour's suit concluded that Smith acted "willfully, deliberately, maliciously, or with reckless disregard" of Mohammadipour's free speech rights by retaliating against him, according to a question posed to the jury.

After the verdict, Greer said, she met with Romney administration officials and the attorney general's office about passing a special law to pick up Smith's portion of the award and legal expenses.

"The problem wasn't so much that they wanted to reimburse Smith," Greer said. "It was that if this stood out there and a former state manager loses his house because of personal liability, who's going to go work for the state?"

Greer said the reason Maxwell was drawing attention to the special law now was because she filed two motions in the past week seeking to have the jury award thrown out in Superior Court.

Fearing that possibility or a reversal of the verdict on appeal, Maxwell wanted to embarrass state officials to extract a big settlement, she said.

Maxwell called that ludicrous, saying that if state officials "weren't embarrassed by the verdict of this jury, then they will never be embarrassed by anything."

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