

Agenda Item No.: 3
Work Plan: Fire Protection Work Plan
Topic: Firefighter Legal Defense
Presentation Title: Firefighter Criminal Defense Expenditures Rule Adoption
Date of Presentation: June 8, 2016
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SUMMARY

This agenda item will briefly review changes made to the rule proposals since the March 9 meeting of the Board and request approval to adopt final rules. The rules establish procedures to be used in the event the State Forester invokes ORS 477.128 (Attachment 1) allowing payment of costs to defend against criminal charges that might be brought against an employee for actions taken in the course of suppressing a wildfire.

CONTEXT

As discussed previously with the Board in 2011, at the request of the Governor and the Board of Forestry, the Legislature enacted ORS 477.128, allowing the State Forester to expend monies to provide legal defense of a firefighter, if that firefighter is charged with a crime as a result of decisions made in the due course of suppressing a fire. Attachments 2 and 3 are the rulemaking notices filed with the Secretary of State describing the need for the rules, announcing a date for public hearing, and analyzing the fiscal impact of the proposed rules.

BACKGROUND

The underlying purpose of ORS 477.128 is to ensure the Department of Forestry is able to continue to develop and retain highly motivated individuals in firefighting leadership positions. The statute authorizes the expenditure of funds from the State Forestry Department revolving account to pay costs and reasonable attorney fees for independent counsel if a firefighter is charged with a crime, stemming from firefighting actions, to defend against that charge. Payment for such a defense would occur only if upon review, the State Forester determines the person charged was acting within the scope of their firefighting responsibilities and acted within the reasonable range of actions that could be chosen in fighting the fire.

For a review of a more detailed history of this issue, please see the staff report on this topic for the Board of Forestry meeting of March 9, 2016.

ANALYSIS

Discussion of the rule proposals at the Board's March 9 meeting included questions by Board members as well as comments by the presenter regarding some additional changes to be made in the rules. Since that time, the rule proposals were also presented and discussed with the

Department of Forestry's three incident management teams (IMT) at their annual training on March 30 and rule notice was published by the Secretary of State on April 1.

The following adjustments were made to the rule proposals responding to the discussions with the Board and some suggestions from employees at the IMT training, prior to their distribution to the lists of interested parties, legislative committees, and posting on the agency's website:

- Rule 0001 (3) – A comment from an IMT member regarding interpretation of timing, “where criminal charges have resulted,” led to a change in tense so that it now reads “where criminal charges result.”
- Rule 0005 (2)(c) – A Board member asked whether the authority in ORS 477.128 extends to situations where ODF or Association firefighters are sent out of state on firefighting assignments, or are fighting fire on federal land within Oregon under a “delegation of authority” from a federal agency. A definition of “under the direction and control of the forester” was added to further define the language used in the statute, drawing on existing authority of the State Forester to participate with other firefighting jurisdictions to enhance the capacity of all appropriate jurisdictions. It would be the Department's, and if adopted, the Board's intent that firefighters in the above described situations are still under the direction and control of the forester and therefore potentially eligible for the remedies provided by ORS 477.128.
- Rule 0025 (2) – As suggested by an employee and discussed at the Board meeting in March, section 2 of this rule was added to add emphasis that, in addition to the firefighters request for expenditures needing to be timely, the State Forester should also strive to make a determination of eligibility in a timely fashion.
- Rule 0035 (1)(d) – As discussed with the Board, an additional item, “Timing of expenditures,” was added to the list of issues to be included in a written agreement regarding the terms of reimbursement.
- Rule 0035 (3) – Addressing a comment from an IMT member that the language, “the firefighter's criminal case,” might imply legitimacy of the charges, the phrase was changed to “the facts of the criminal case.”
- Rule 0040 – As discussed with the Board, the phrase “knowledgeable in firefighting organization, tactics and procedures” was added to the designation of an employee to carry out the responsibilities of the State Forester. This was to avoid any possible circumstance where the person investigating and making decisions regarding the actions of a firefighter, might not have appropriate background for such decisions.

A public hearing was scheduled at Department Headquarters in Salem on Friday, April 22. Charlie Stone presided as hearing officer, however, no one else attended the hearing and no written comments were received. The hearing report is attached (Attachment 4).

With the changes listed above, and having received no public comment to the contrary, Fire Protection staff believe that the identified issues have been addressed and the rule package (Attachment 5) is ready for adoption.

RECOMMENDATION

The Department recommends the Board adopt the final rule proposals for OAR Chapter 629, Division 170 as shown in Attachment 5 and direct the State Forester to file the adopted rules with the Secretary of State and Legislative Counsel as required by ORS 183.355 and 183.715 to be effective July 1, 2016.

NEXT STEPS

1. File the adopted rules.
2. Hope the State Forester never needs to implement the rules.

ATTACHMENT

- (1) ORS 477.128
- (2) Rulemaking Notice
- (3) Statement of Need and Fiscal Impact
- (4) Presiding Officer's Hearing Report
- (5) Final Rule Proposal for Administration of ORS 477.128