

Agenda Item No.: 2
Work Plan Title: Fire Protection Work Plan
Topic: Firefighter Legal Defense
Presentation Title: Firefighter Legal Defense (ORS 477.128) Rulemaking
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SUMMARY

This agenda item requests approval of the Board to file rulemaking notice, hold a hearing and develop final rules that 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

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. As a matter of prudence, and as suggested by some of the legislators involved in discussions with the department, it would be appropriate to establish rules for the State Forester’s review of the circumstances leading to a potential expenditure, and possible limits and procedures for managing the costs of such a defense.

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.

Since 2001, in other states, there have been at least two major incidents where wildland firefighting decision-makers have been charged or threatened with charges for criminal offenses as a result of injuries or deaths to firefighters overtaken by fires. Although actual culpability is theoretically possible under such circumstances, there is also the very real potential that a prosecuting entity could bring charges against an incident commander or other decision-maker, due to political pressure or other circumstances. Wildland firefighting, particularly in cases of fires large enough to “make their own weather” and in rough terrain, is a highly complex

endeavor requiring specialized knowledge and experienced leadership. Lacking such knowledge and experience, a prosecutor might choose to let a jury sort out the facts and make a decision regarding the events and actions leading to a firefighting tragedy.

The prospect of criminal prosecution, despite acting within the scope of their duties, poses a great concern to wildland firefighters. Most wildland firefighters in this nation that have any level of responsibility on an Incident Management Team are aware of the Thirtymile Fire (fire in Washington State where a crew boss was charged by the U.S. Attorney with involuntary manslaughter due to the deaths of four crewmembers) and its subsequent implications. When the subject individual was charged, a virtual shock wave went through the firefighting community and many individuals contemplated and even followed through on resigning from participation in firefighting to avoid any similar risk.

Under ORS 477.125, a person acting as an agent of a public body is not *civilly* liable for any injury to persons or property resulting from carrying out the provisions of chapter 477 (forest fire protection) or while acting within the scope of a duty imposed by this chapter, except for cases of willful misconduct or gross negligence. If the Attorney General determines there is no willful misconduct or gross negligence, defense against a civil action is provided by the Justice Department. There is no corresponding protection against potential criminal prosecution (the state cannot act as both prosecutor and counsel for the defendant). ORS 477.128 allows the State Forester to apply the specialized knowledge and experience that exists within the department to make a determination similar to the Attorney General in civil matters. If the forester determines the charged firefighter did act reasonably within the circumstances of the fire and our doctrine of summarily abating all fire nuisances (ORS 477.066), then the State Forester could authorize paying for legal defense. ORS 477.128 does not allow department payment of any costs or attorney fees incurred on appeal or in seeking post-conviction relief.

For several years after the Thirtymile Fire, the Department of Forestry worked with legal counsel and others to develop a solution for the potential of losing qualified and properly motivated firefighters to the threat of potential criminal prosecution. One alternative considered was to seek the authority to purchase professional liability insurance for our firefighters. Beginning in 2007, the department worked with the National Association of State Foresters (NASF) to try and find an insurance provider to provide this type of insurance to state firefighters. The search concluded in January 2010 with no success. In January 2010, the NASF Fire Committee recommended to states it appeared the only viable actions states could take to provide this kind of protection to firefighters was to pursue state legislation. ORS 477.128 was the successful result of such efforts.

ANALYSIS

The Department of Forestry certainly hopes that the circumstances contemplated in ORS 477.128 never arise, and does not anticipate that such occurrence would be at all frequent. The department has never elected to request any funding for such a contingency. Nonetheless, if the case were ever to occur, we believe it is prudent to have predetermined some methods to administer a case of reimbursement for legal defense, so that processes are not unduly influenced by the emotions of the moment and the parties involved can have some understanding of what to

expect. Attachment 2 is a set of draft rules developed by staff to guide the processes envisioned above.

By the time the March meeting of the Board takes place, the attached rule document will have been reviewed and endorsed or revised by a workgroup comprised primarily of fire suppression managers most exposed to the possibility of defending against charges relating to actions taken fighting wildland fires, individuals involved with the original development of the governing statute, and additional representation of a landowner(s) paying fire patrol assessments.

RECOMMENDATION

The department recommends the Board direct the State Forester to file rulemaking notice with the Secretary of State, solicit public input on the proposed rules regarding administration of ORS 477.128 and develop a final rule for Board consideration.

NEXT STEPS

1. Conduct a rulemaking hearing and analyze any comments received.
2. Report back to the Board the outcomes of the formal rulemaking process, make adjustments as appropriate, and request permanent adoption of Rules for Administration of ORS 477.128 (June 2016).

ATTACHMENT

- (1) ORS 477.128
- (2) Placeholder for Draft Rules for Administration of ORS 477.128