STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Michael E. Nieskes
Racine County District Attorney
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403-1274

Dear District Attorney Nieskes:

Your office, like others across the state, employs assistant district attorneys to help carry out your statutory functions. Pursuant to Executive Order 285, these assistant district attorneys are subject to mandatory furlough[1] days.

QUESTION PRESENTED AND BRIEF ANSWER

¶ 1. You ask whether an assistant district attorney is entitled to representation by the Attorney General for the defense of any claims, and to indemnification for any damages or costs, arising out of the performance of duties on a day when the assistant district attorney is on state-mandated furlough. In my opinion, an assistant district attorney on furlough is entitled to representation and indemnification if he or she is carrying out duties within the scope of his or her employment.

ANALYSIS

¶ 2. Assistant district attorneys are employed by the State of Wisconsin. *See* Wis. Stat. § 978.12(1)(b). Wisconsin Statute § 895.46(1)(a) provides that, in actions against a state officer or employee "because of acts committed while carrying out duties as an officer or employee . . . within the scope of employment, the judgment as to damages and costs entered against the officer or employee . . . shall be paid by the state . . . ." In addition, the state must provide or pay for legal representation if the state officer or employee is "doing any act growing out of or committed in the course of the discharge of his or her duties." *See id.* Consequently, if an assistant district attorney is carrying out duties within the scope of his or her employment, he or

[1] A "furlough" for purposes of this opinion is limited to the eight days of unpaid leave (or 64 hours of unpaid leave) during each fiscal year of the 2009-2011 fiscal biennium which are required by Executive Order 285. In addition, although you also asked questions regarding prosecutorial immunity and when a furlough days begins and ends, you have notified my office that you are no longer seeking answers to those questions.

she is entitled to representation and indemnification regardless of whether those duties are performed during normal work hours or outside normal work hours on a regular work day, weekend day, vacation day, holiday, or furlough day.

¶ 3. An act is within the "scope of employment" if it can fairly be said to be a natural part or incident of the employee's duties. *See Scott v. Min-Aqua Bats Water Ski Club*, 79 Wis. 2d 316, 320-321, 255 N.W.2d 536 (1977). An act is within the "scope of employment" if it is similar in kind to that authorized and is actuated by a purpose to serve the employer. *See Block v. Gomez*, 201 Wis. 2d 795, 806, 549 N.W.2d 783 (Ct. App. 1996); *Scott*, 79 Wis. 2d at 321. An employee may be found to have acted "within the scope of employment" as long as the employee was actuated, at least in part, by a purpose to serve the employer. *See Olson v. Connerly*, 156 Wis. 2d 488, 499-500, 457 N.W.2d 479 (1990). The phrase "scope of employment" is to be interpreted, consistent with legislative intent, "to offer the broadest protection reasonably available to public officials and to public employees." *See Schroeder v. Schoessow*, 108 Wis. 2d 49, 67-68, 321 N.W.2d 131 (1982).

¶ 4. You indicate that on a furlough day, an assistant district attorney could be called upon to answer questions from law enforcement officers about search and seizure, to make charging decisions, and to draft or approve search warrants. These are duties routinely performed by assistant district attorneys as part of their state employment. When determining whether duties are within the assistant district attorney's "scope of employment," relevant factors would include, among other considerations, whether the duties being performed are essentially the same duties that would be performed on a non-furlough day, whether the duties would be performed subject to the general control and supervision of the district attorney or other supervisor, *see Wuorinen v. State Farm Mut. Auto. Ins. Co.*, 56 Wis. 2d 44, 54, 201 N.W.2d 521 (1972), whether the assistant district attorney intends to serve the interests of his or her employer, whether the assistant district attorney would have any personal motivation or would derive any personal benefit from the performance of the duties, whether resources of the district attorney's office would be available for use in the performance of the duties, whether there is a history of assistant district attorneys performing duties outside of normal work hours, and whether the district attorney expects that assistant district attorneys will respond to the needs of law enforcement officers, notwithstanding the furlough status. Absent a very unusual situation, these factors would all weigh in favor of a finding that an assistant district attorney would be acting within the scope of employment if performing the types of duties that you describe on a furlough day. Therefore, in my opinion, the work that you describe would generally involve carrying out duties within the "scope of employment" of an assistant district attorney, even on a furlough day.

¶ 5 The opinion expressed in this letter is supported by the *Wuorinen* case, cited above. In *Wuorinen*, the Wisconsin Supreme Court held that a member of the Wisconsin National Guard was not acting within the scope of his military duties at the time of an automobile accident, even though he was considered to be on "active duty" at all times. 56 Wis.2d at 56-57. In reaching this conclusion, the court noted that, at the time of the accident, the

guardsman was on a 24-hour "free time" pass, was driving a personal vehicle, was pursuing his own personal interests, and was not under the supervision and control of his employer. As applied to the situation you pose, the *Wuorinen* case means that an employee's *status* is not the controlling factor in determining whether certain acts are within the scope of employment. Rather, courts must consider the nature of the activities being performed.

CONCLUSION

¶ 6. In conclusion, it is my opinion that an assistant district attorney on furlough is entitled to representation and indemnification if he or she is carrying out duties within the scope of his or her employment. This opinion does not address issues relating to furloughs under civil service rules or comparable provisions of collective bargaining agreements.

Sincerely,

J.B. Van Hollen
Attorney General

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