RESOLUTION NO. 1992-66

APPROVING THE GENERAL MANAGER'S RECOMMENDATIONS
CONCERNING CLAIMS FOR INDEMNIFICATION BY
AUTHORITY EMPLOYEE JUAN E. ADORNO

WHEREAS, by Resolution No. 1991-151 the Board of Trustees has adopted Indemnification Policies and Procedures implementing Article IX, Section 4 of the Authority's By-Laws; and

WHEREAS, Common Pleas Court Judge Burt W. Griffin, in Case No. 177994 (Declaratory Judgment Action), has made an initial ruling that the Greater Cleveland Regional Transit Authority has the power to indemnify its trustees, officers and employees in matters involving criminal charges consistent with the Authority's By-Laws; and

WHEREAS, employee Juan E. Adorno has submitted three claims for indemnification (Claim Nos. 1992-2, 1992-3 and 1992-4) under the Indemnification Policies and Procedures; and

WHEREAS, the General Manager has conducted an investigation into Claim Nos. 1992-2, 1992-3 and 1992-4, pursuant to the provisions of the Indemnification Policies and Procedures and has submitted a report with his determinations and recommendations thereon to the Board of Trustees.

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Greater Cleveland Regional Transit Authority:

Section 1. The report included in Attachment A hereto of the General Manager on Indemnification Claim Nos. 1992-2, 1992-3 and 1992-4 by Juan E. Adorno are hereby accepted.

Section 2. The recommendations made by the General Manager in his report shown in Attachment A concerning Claim Nos. 1992-2, 1992-3 and 1992-4 are hereby approved and adopted.

Section 3. The General Manager is hereby authorized to pay to Juan E. Adorno the sum of sixty-nine thousand five hundred seventy-four dollars and ninety-six cents ($69,574.96) as the indemnification payment for Claim Nos. 1992-2 and 1992-3, consistent with the recommendations contained in Attachment A.

Section 4. This Resolution will become effective immediately upon its adoption.

Attachment A: General Manager's Report-Indemnification Claims of Russell T. Adrine (Claim No. 1992-1) and Juan E. Adorno (Claim Nos. 1992-2, 1992-3 and 1992-4) dated May 7, 1992.

Adopted: May 12, 1992

President

Attest:

General Manager/Secretary-Treasurer

ATTACHMENT A

RESOLUTIONS
11600

THE GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY

REPORT OF THE GENERAL MANAGER
TO
THE BOARD OF TRUSTEES
REGARDING

APPLICATION OF RUSSELL T. ADRINE
FOR INDEMNIFICATION - CLAIM NO. 1992-1
(submitted January 3, 1992)

and

APPLICATION OF JUAN E. ADORNO
FOR INDEMNIFICATION - CLAIM NOS. 1992-2, 1992-3 AND 1992-4
(submitted January 9, 1992)

Ronald J. Tober
General Manager
Secretary-Treasurer

May 7, 1992

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Regional Transit Authority

Inter-Office Correspondence

To: Earl Martin, President
and Members, Board of Trustees

Date: May 7, 1992

From: Ronald J. Tober
General Manager
Secretary-Treasurer

Subject: General Manager's Report - Indemnification Claims of Russell T. Adrine (Claim No 1992-1) and Juan E. Adorno (Claim Nos. 1992-2, 1992-3, and 1992-4)

I. SUMMARY OF THE CLAIMS

Claimant, Russell T. Adrine, filed on January 3, 1992 his Claim No. 1992-1 in two (2) separate parts:

1. Part 1: Cuyahoga County Court of Common Pleas of Ohio, Case No. 228949, State of Ohio vs. Russell T. Adrine, for acts alleged in the indictment and/or trial dated:

   a. August 19, 1987 through September 4, 1987 (Obstruction of justice, intimidation); and

   b. October 20, 1987 (Obstruction of justice);

2. Part 2: Cuyahoga County Court of Common Pleas of Ohio, Case No. 177994, Judge Burt W. Griffin, GCRTA, et al. vs. Russell T. Adrine filed on October 20, 1989 and still pending (the "Declaratory Judgment Action") and Eighth District Court of Appeals of Ohio, Case Nos. 60843, 60844, 61013, State, ex rel. GCRTA, et al. vs. Griffin, filed November 15, 1991 and Writ of Procedendo granted on April 22, 1991 (the "Mandamus/Procedendo Action"). In the pending Declaratory Judgment Action, Russell T. Adrine has filed and is pursuing Counterclaims against the Authority for alleged breach of terms of his employment, alleged wrongful refusal to indemnify him, and for the costs and legal fees of his pursuit of his claims in the lawsuit.

Claimant, Juan E. Adorno filed on January 9, 1992 three (3) separate claims:

1. Claim No. 1992-2: Cuyahoga County Court of Common Pleas of Ohio, Case No. 228949, State of Ohio vs. Russell T. Adrine and Juan Adorno, for acts alleged in the indictment and/or trial dated August 19, 1987 through September 4, 1987 (Obstruction of justice, intimidation);

2. Claim No. 1992-3: Cuyahoga County Court of Common Pleas of Ohio, Case No. 226665, State of Ohio vs. Juan Adorno, for acts alleged in the indictment and/or trial dated January 12, 1988 (Perjury; obstruction of justice); and

3. Claim No. 1992-4: Cuyahoga County Court of Common Pleas of Ohio, Case No. 228994, State of Ohio vs. Juan Adorno, for acts alleged in the indictments and/or criminal proceedings for arbitrations conducted between July 30, 1987 and September 24, 1987 (theft in office).

II. BACKGROUND INFORMATION

A. RUSSELL T. ADRINE CLAIM NO. 1992-1 AND JUAN E. ADORNO CLAIM NOS. 1992-2 AND 1992-3

The criminal charges stem originally from the electrocution death of Robert Risberg at a bus shelter in downtown Cleveland on June 29, 1987. Following the incident, various entities, including The Greater Cleveland Regional Transit Authority ("GCRTA" or the "Authority"), the City of Cleveland, and others commenced claims investigations in anticipation of civil litigation.

The Authority commenced its own investigation, through its Legal Department, headed by its General Counsel, Russell T. Adrine. Mr. Adrine held the position of "General Counsel" from August 20, 1984 until February 16, 1988 when his title was changed to "Assistant General Manager - Legal", his present title, upon amendment of the Authority's Bylaws at that time. All of the acts alleged in CR 228949 which are the subject of Mr. Adrine's Indemnification Claim No. 1992-1 occurred when Mr. Adrine held the position of General Counsel (8/19/87 through 9/4/87; and on 10/20/87).

Shortly after the incident, the Cuyahoga County Prosecutor and the Cuyahoga County" Sheriff's Department investigators began to investigate information concerning an alleged destruction of records of the Authority by employees of the Authority. The investigation eventually resulted in the indictments of Mary Jenks, Director of the Authority's Planning Department, and Dale Madison, an employee acting as a Planner within that department.

During the course of the investigation, an Authority employee named Rose Moviel, a clerk acting as a statistical recorder from the Planning Department, was apparently contacted by Sheriff's Department investigators. Ms. Moviel, in turn, contacted the Authority's General Counsel, Russell T. Adrine, for legal advice.

Thereafter, Mr. Adrine's conduct, and the conduct of Juan E. Adorno, an Associate Counsel in the Authority's Legal Department, apparently became the subject of a separate or collateral investigation by the County Prosecutor.

Mr. Adrine states, in his Application upon his indemnification claim that "my conduct consisted of rendering legal advice to RTA employees and supervising my assistant, Juan Adorno, for the purposes of defending the Authority from a large civil claim and advising employees of their rights and responsibilities for information in regard thereto." The Claimants' conduct which resulted in the criminal charges centered upon providing legal advice to GCRTA employee Rose Moviel when she was contacted by Cuyahoga County Sheriff's Department investigators and called to testify before a Cuyahoga County Grand Jury conducting an investigation involving the interests of the Authority and their later, separate testimony as witnesses before the Cuyahoga County Grand Jury when asked questions inquiring into their actions taken in behalf of the interests of the Authority.

B. JUAN E. ADORNO CLAIM NO. 1992-4

Mr. Adorno's Claim No. 1992-4 arises from his defense of criminal charges brought in the Cuyahoga County Court of Common Pleas, Case No. CR 228994. Mr. Adorno was charged with theft in office for his alleged personal receipt of arbitration fees in a manner not in conformance with the Authority's arbitration policy applicable to employee members of its Legal Department. A detailed review is contained in this Report at IV, C. where Mr. Adorno's eligibility for indemnification under the Authority's Bylaws is considered and a recommendation of non-eligibility is made by the General Manager.

III. ELIGIBILITY - CLAIM OF RUSSELL T. ADRINE, CLAIM NO. 1992-1

Mr. Adrine's claim has been submitted under Article IX, Section 4 of the Authority's present Bylaws, for investigation and review under the Indemnification Procedures And Policies of the Authority adopted by Resolution 1991-151 on July 21, 1991.

The Indemnification Procedures And Policies provide that the General Manager conduct an initial investigation and review of whether the Claimant is Eligible for consideration of indemnification. The initial investigation is to be conducted in an expeditious manner. If the General Manager finds on initial review that the Claimant is eligible for consideration of indemnification, that finding is "preliminary and non-final and shall be made a part of the General Manager's written Report with recommendation to the Board of Trustees." See Indemnification Procedures And Policies, at V, C., 1 & 2.

The standards for Eligibility are contained in the Bylaws. For this claim, reference must be made to Bylaws, as amended on February 16, 1988, and to the preceding Bylaws, as amended on August 5, 1986. Eligibility is only extended to:

> "each member of the Board and each officer of the Authority (and his heirs, executors and administrators) who is made a party to any litigation, action, suit or proceeding (whether civil, criminal or administrative)

by reason of his being or having been a member of the Board or officer of the Authority . . . " (See Bylaws, as amended on February 16, 1988, at Article IX, Section 4, and the preceding Bylaws, as amended on August 5, 1986, at Article IX, Section 2, which are identical in language.)

To be eligible an indemnitee must qualify as a member of the Board of the Authority or an "officer" of the Authority at the time of the acts for which the indemnification is claimed giving rise to the litigation, action, suit, or proceeding:

a. Under the February 16, 1988 Bylaws at Article II, Section 1, - the definition of "officer" shall be the "President, Vice-President, and General Manager who shall also serve as Secretary-Treasurer, and all other officers as the Board of the Authority may from time to time designate." (Emphasis added).

b. Under the August 5, 1986 Bylaws at Article II, Section 1 - the definition of "officer" shall be the "president, vice-president, secretary-treasurer, general manager, treasurer, general counsel, and all other officers and such assistants thereto as the Board of Authority may from time to time designate." (Emphasis added).

Russell T. Adrine states that he was an "officer" of GCRTA within the definition of the Authority's Bylaws since he was General Counsel from August 20, 1984 until February 16, 1988 when the Bylaws were amended when his title changed to "Assistant General Manager - Legal", his present title. By reason thereof, the Claimant states that he is eligible for consideration of indemnification.

A. ELIGIBILITY REVIEW OF PART 1 OF RUSSELL T. ADRINE'S CLAIM NO. 1992-1

My review of the Bylaws leads to the conclusion that Claimant Russell T. Adrine's position as "General Counsel" from August 20, 1984 until February 16, 1988 when his title was changed to "Assistant General Manager-Legal", upon amendment of the Bylaws at that time, would fit within the definition of "officer" under Article II, Section 1 of the Bylaws, as amended on August 5, 1986, until the amendment of the Bylaws of February 16, 1988. At the relevant time, the Bylaws specifically included the position of "General Counsel" within the definition of "officer" under Article II, Section 1. Therefore, for all of the acts or conduct alleged in CR 228949 against the Claimant in Part 1 of the claim (8/19/87 through 9/4/87; and on 10/20/87), the Claimant appears to be Eligible for consideration of indemnification, by the definition of "officer" in effect at the time, and he appears to have been made a party to the litigation "by reason of his being or having been a member of the Board or an officer of the Authority", as required by the Bylaws.

The general facts submitted by the Claimant with his Application appear on my review to support the requirement that the Claimant was named a party in the criminal cases "by reason of his being or having been a member of the Board or an officer of the Authority." The Claimant states that, as General Counsel, "my conduct consisted of rendering legal advice to RTA employees and supervising my assistant, Juan Adorno, for the purposes of defending the Authority from a large civil claim and advising employees of their rights and responsibilities for information in regard thereto." The Claim is based upon Mr. Adrine's acts or conduct as General Counsel providing legal advice to GCRTA employee Rose Moviel when she was called before a Grand Jury conducting an investigation involving known interests of GCRTA and his testimony when called before the Grand Jury inquiring into his actions taken in behalf of the interests of the Authority.

On February 4, 1992 I determined on a preliminary, non-final basis that Mr. Adrine was eligible under the Bylaws for consideration of Part 1 of his Claim No. 1992-1 for indemnification. (See Binder Exhibit 61)

B. ELIGIBILITY REVIEW OF PART 2 OF RUSSELL T. ADRINE'S CLAIM NO. 1992-1

Part 2 of Mr. Adrine's claim is different from Part 1 of his claim, and relates to his claim for reimbursement/payment of attorney fees and expenses incurred to date and which will be incurred in the future in the pending Declaratory Judgment Action, which includes Mr. Adrine's monetary Counterclaims against the Authority, and for his attorney fees and expenses which were incurred in the Mandamus/Procedendo Action. Part 2 of Mr. Adrine's claim would logically fall under the Bylaws applicable after February 16, 1988 - the present Bylaws.

For Part 2 of Mr. Adrine's claim, relating to his claim for reimbursement of attorney fees and/or expenses arising out of the pending Declaratory Judgment Action, in which Mr. Adrine is pursuing various monetary Counterclaims against the Authority, and the Mandamus/Procedendo Action, I have reviewed the matter and identified the following key issues:

> Issue 1. Whether the Board's amendment of the Bylaws on February 16, 1988 intended to exclude the "General Counsel" (then changed to "Assistant General Manager - Legal") from the scope of the definition of "officer" in Article II, Section 1 of the Bylaws.
>
> Issue 2. As a corollary, whether the Board otherwise "designated" the "Assistant General Manager - Legal" as an "officer" of the Authority on or after February 16, 1988 -- so as to potentially entitle him to indemnification/ reimbursement as an "officer" of the Authority (Article IX, Section 4 of the Bylaws).

Review of the express language of the August 5, 1986 Bylaws at Article II, Section 1, where "officer" is defined, shows that the "general counsel" was specifically included as an "officer" of the Authority. But, when contrasted with the express language of the February 16, 1988 Bylaws at the

parallel Article II, Section 1, where "officer" is defined, a clear change is shown which omits the general counsel from the definition of officer after that date. Comparison of the August 5, 1986 provision with the February 16, 1988 provision reveals an express change which omits both the general counsel and the treasurer from the "officer" definition. The amendment is clear and appears to constitute an intentional change.

In addition, in the February 16, 1988 amendment, the General Counsel's title was changed to "Assistant General Manager - Legal", indicating a focus on the position. But, at the same time, the newly titled position was omitted from the definition of "officer" in Article II, Section 1 of the Bylaws of February 16, 1988. This additional fact appears to confirm an intentional change.

Furthermore, review of the action of the Authority which amended the Bylaws on February 16, 1988, and Board action since that date, does not show any "designation" of the Assistant General Manager - Legal as an "officer" of the Authority, as the Board of Trustees may do from "time to time."

Given this analysis, the February 16, 1988 Bylaws does not include the "Assistant General Manager - Legal" (formerly the "general counsel") within the definition of "officer" at Article II, Section 1 of the Bylaws. By reason of the omission, the Authority has not extended the entitlement to indemnification under Article IX, Section 4 of its Bylaws to the "Assistant General Manager - Legal" after the February 16, 1988 amendment of the Bylaws. Therefore, by definition, Mr. Adrine, as Assistant General Manager - Legal, is not eligible for consideration of indemnification under Article IX, Section 4 of the Authority's Bylaws for acts or conduct after February 16, 1988 -- and this includes the acts or conduct which Mr. Adrine sets forth in Part 2 of his Claim 1992-1.

> Issue 3. Also at issue is whether the Declaratory Judgment Action or the Mandamus/Prohibition Action named Mr. Adrine as a party to the litigation "by reason of his being or having been of member of the Board or an officer of the Authority," as required by Article IX, Section 4 of the Bylaws, so as to qualify the lawsuit as the type of action for which the Claimant may be indemnified -- but only if he is eligible as an "officer" of the Authority.

The express language and the intent of Article IX, Section 4 of the Authority's Bylaws is to afford a potential defense to Board members and officers who are named as party to litigation (civil, criminal, or administrative) by reason of their position as a Board member or as an officer. The business purpose of this type of an indemnification provision in the Bylaws is to afford some measure of protection so as to encourage qualified persons to take Board and officer positions -- with the sense that their employer will defend them against third-party claims seeking affirmative monetary or injunctive relief from them.

By contrast, the purpose of the indemnification provision of Article IX of the Authority's Bylaws is not to provide a Board member or officer with a

promise of payment or reimbursement of attorney fees and expenses for litigation in claims brought by the Authority against the individual or in litigation involving disputes between the individual and the Authority involving essentially internal administrative issues. Also, as will be discussed below, Mr. Adrine used the pending Declaratory Judgment Action as an opportunity to file monetary Counterclaims against the Authority, for which he seeks payment of his personal litigation expenses in the context of his indemnification claim and his so-called "pursuit fees" for suing the Authority. In doing so, Mr. Adrine seeks to avoid the fact that his claim is an administrative claim for internal review, rather than a litigation claim.

The Declaratory Judgment Action was filed by the Authority to answer a simple legal issue only, that is, whether the Authority had the legal power to consider an indemnification claim and to expend public monies to pay a claim of reimbursement sought by Claimant Adrine (and Claimant Adorno) for the costs of defense of criminal charges brought against him for acts allegedly conducted in good faith and in the course and scope of employment. The legal issue involved an interpretation of the state law raised by the Cuyahoga County Prosecutor. See the Letter of County Prosecutor John T. Corrigan dated May 20, 1988. (Binder Exhibit 6)

As such, the Declaratory Judgment Action was not brought "against" Claimant Adrine and sought no monetary or affirmative relief against him. Mr. Adrine was named as a party so that he could "protect his interests" in the legal issue. He did not have to defend against any claim since none was brought against him. In fact, Mr. Adrine could just have likely filed a declaratory judgment lawsuit naming the Authority as party. He also did not have to file monetary Counterclaims against the Authority since the Authority had clearly indicated in the Declaratory Judgment Action its willingness to administratively review and consider his indemnification claim, if the final judgment and declaration of the Courts held that the Authority had the legal authority to do so. (See Binder Exhibit 10, ¶ 29.).

Reading Article IX, Section 4 of the Bylaws in its entirety, the types of litigation for which indemnification is afforded a Board member or an officer are described therein -- but the Bylaws do not include the type of litigation in the nature of declaratory judgment action.

Given this analysis, the General Manager recommends to the Board that Part 2 of Claimant Adrine's Claim 1992-1 is not of the type of litigation qualifying for indemnification under Article IX, Section 4 of the Authority's Bylaws. This position is consistent with the standards set forth in Authority's Indemnification Procedures And Policies at V, B., 3. entitled Eligibility for Consideration. On March 19, 1992 I made this same determination on a preliminary, non-final basis. (See Binder Exhibit 61)

Therefore, even if Mr. Adrine were otherwise eligible as an officer (which I have determined that he is not, as discussed above), the General Manager recommends that Claimant Adrine is not eligible for consideration of Part 2 of his indemnification Claim No. 1992-1 on this additional ground.

Issue 4. Whether an exception exists to the traditional "American Rule" regarding attorney fees and the Ohio law, which would permit Mr. Adrine's Part 2 of his Claim No. 1992-1. Mr. Adrine is not the "prevailing party" in the litigation and no exception to the "American Rule" appears to apply. Under the traditional "American Rule" regarding attorney fees and the Ohio law on the subject, Mr. Adrine would not be entitled to recover the fees incurred in the representation of his interests in the Declaratory Judgment Action, in the affirmative pursuit of his pending monetary Counterclaims against the Authority, and his own filing or participation in the Mandamus/Procedendo Action.

Ohio law and the "American Rule" generally require a litigant to pay for his or its own litigation expenses, including attorney fees. The "American Rule" provides that, absent a statutory provision allowing for attorney fees as costs, the prevailing party is not entitled to an award of attorney fees unless the party to whom the fees are taxed was found to have acted in bad faith. Mr. Adrine is not the "prevailing party" in the Declaratory Judgment Action, which was not adversary between the parties since the Authority filed the suit to resolve a legal question and was always ready to administratively review the claim if the declaration of the Court was that it had the legal authority to do so. There is no statutory authority for the awarding of attorney fees in Part 2 of the Claim.

However, the Declaratory Judgment Act provides for discretionary awarding of "costs," which arguably could include the awarding of attorney fees, although this issue will be determined by a court in the final analysis.

Furthermore, even assuming that the Claimant was a "prevailing party", Part 2 of the Claim does not fall within any of the three exceptions to the American Rule, (a) bad faith, (b) common fund, or (c) breach of the contractual duty to defend. Accordingly, it would appear that Mr. Adrine is not entitled to the recovery of attorney fees incurred as a result of being named in the Declaratory Judgment Action.

As stated above, the general rule in Ohio is that, absent a statutory provision allowing attorney fees as costs, the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith; this is often referred to as the "American Rule." Sorin v. Board of Education (1976), 46 Ohio St. 2d 177; State, ex rel. v. Robinson (1981), 67 Ohio St. 2d 363; State, ex rel. Kabatek v. Stackhouse (1983), 6 Ohio St. 3d 55. No "prevailing party" exists in the pending litigation. Exceptions to the "American Rule" are discussed below:

a. Bad Faith Exception

There are exceptions, however, to the American rule. The first exception is that of bad faith. Attorney fees can be assessed when there is evidence of bad faith or fraud or a stubborn propensity toward needless

litigation. The fact that a party interposes a defense which is ultimately overruled does not, in and of itself, demonstrate bad faith. State, ex rel. Kabatek v. Stackhouse (1983), 6 Ohio St. 3d 55. There is nothing in the facts of Declaratory Judgment Action, however, to indicate that GCRTA acted in bad faith. Accordingly, the bad faith exception would not appear to be applicable.

b. Common Fund Exception

The second exception provides that where one initiates litigation that causes the recovery or preservation of a "common fund" for the benefit of himself and others similarly situated or facilitates its ability and/or distribution through such efforts, he should be entitled to compensation for the payment of attorney fees from the fund on the theory that those benefited by the fund would otherwise be unjustly enriched. Claimant Adrine clearly does not fall within the "common fund" exception; his intent was to procure indemnification reimbursement solely for himself. The services performed by his counsel may have aided the court in the performance of its duties, but the services did not benefit a "common fund."

The involvement in the declaratory judgment action by Adrine was limited to advancing his own personal interests. Further, there is no "common fund" which Mr. Adrine has been attempting to preserve. Cases typically addressing the common fund exception involve trusts and wills. Accordingly, the common fund exception does not appear to be applicable in Mr. Adrine's claim.

c. Breach of Duty to Defend Exception

A third exception to the "American Rule," created by judicial interpretation, has developed when a party wrongfully breaches a contract obligation or an insurance contract obligation to protect or defend another. For example, an insurer which breaches the insurance policy by wrongfully refusing to defend a tort action brought against its insureds may be held liable for the attorney fees associated with the breach of contract litigation as well as the underlying contract obligation. While the rule including necessary attorney fees as part of damages in failure-to-indemnify cases has generally been applied only to those incurred in defending the original suit, the rule has been extended to include attorney fees incurred in defending a declaratory judgment action brought by the insurer. This is the closest parallel to Mr. Adrine's situation, but appears to be distinguishable because the Authority has not breached any contract between it and Mr. Adrine.

In Allen v. Standard Oil Company, (1982), 2 Ohio St. 3d 122, the Ohio Supreme Court further expanded the exception by holding that it need not impute bad faith to invoke the Trainor exception. Id. at 125-126. The court held that the question was not whether the decision not to defend was made in good faith, but whether the refusal was wrongful under the terms of the contract. Id. However, Allen involved the relationship of an indemnitor and indemnitee, not the relationship of an insurer and the insured. The court held:

> As a practical matter, however, appellee's acceptance of the indemnity provision placed it in the position of an insurer to the extent provided for in the agreement. An indemnitee, no less than an insured, is entitled to recover attorney fees and expenses when an indemnitor wrongfully refuses to defend an action against the indemnitee. Accordingly, we hold that when an indemnitor wrongfully refuses to defend an action against an indemnitee, the indemnitor is liable for the costs, including attorney fees and expenses, incurred by the indemnitee in defending the initial action and in vindicating its right to indemnity in a third-party action brought against the indemnitor.

Allen, 2 Ohio St.3d at 126.

The rationale behind allowing attorney fees to the insured in the declaratory judgment action between the parties is to put the insured in the same position he would have occupied if the insurer had performed its duty to defend under the contract. Trainor, supra, at 47. Implicit in the case law developing the rights of an insured to recover attorney fees in a declaratory judgment action is that a breach of a contract must occur under the policy. As a precondition to the award of attorney fees, the insurer must breach the contract by wrongfully or unjustifiably refusing to defend. Id.

Thus, the matter involving Mr. Adrine is distinguishable because the Authority has never breached his indemnification rights by refusing to administratively review and consider this claim. GCRTA has never been determined to have breached its employment obligations toward the Claimant. The Authority is in fact administratively reviewing the claim, thereby proving that it has not and is not breaching his rights.

The Declaratory Judgment Action dealt not with a wrongful refusal to defend; rather, the issue was whether the GCRTA had the statutory authority to indemnify. There was no dispute as to the language of the indemnification provision of the GCRTA Bylaws. The only issue was whether GCRTA, as a political subdivision of the State and a body corporate, had the statutory authority to indemnify. This issue was not raised by the Authority in order to defeat Mr. Adrine's indemnification claim. It was raised by the Cuyahoga County Prosecutor. The Authority filed the Declaratory Judgment Action in order to remove an uncertainty of law, to seek a statutory interpretation as a matter of fairness and as an even-handed response to the claims and issues presented. Mr. Adrine is not a "prevailing party" in the litigation and no breach of a contract obligation has occurred. Accordingly, the third exception to the American Rule would not appear to be applicable in the instant matter.

As to this fourth issue, my recommendation to the Board is that Part 2 of Mr. Adrine's Claim No. 1992-1 is not included within his indemnification

rights under Article IX, Section 4 of the Authority's Bylaws, Mr. Adrine would not be entitled to recover the fees incurred in the representation of his personal interests in the Declaratory Judgment Action, in the affirmative pursuit of his pending monetary Counterclaims against the Authority, and his own filing or participation in the Mandamus/Procedendo Action.

C. GENERAL MANAGER'S RECOMMENDATION AS TO THE ELIGIBILITY OF RUSSELL T. ADRINE, CLAIM NO. 1992-1, PARTS 1 AND 2

Under the Indemnification Policies And Procedures, at V. D., if the General Manager determines that Mr. Adrine is Eligible, no written determination is necessary. If the General Manager determines that the Claimant is Non-Eligible, he is required to promptly communicate to the Board of Trustees in writing his finding of Non-Eligibility together with a recommendation of Non-Eligibility. I have previously issued a Memorandum of March 19, 1992 of Non-Eligibility on a preliminary, non-final basis for Part 2 of Mr. Adrine's Claim No. 1992-1. (See Binder Exhibit 61) The Board of Trustees makes the final determination of whether the Claimant is Eligible or Non-Eligible.

As to Part 1 of Mr. Adrine's Claim No. 1992-1, as General Manager, I recommend to the Board of Trustees that Mr. Adrine is eligible for consideration of indemnification. As to Part 2 of Mr. Adrine's Claim No. 1992-1, I recommend to the Board of Trustees that Mr. Adrine is not eligible for consideration of indemnification.

IV. ELIGIBILITY - CLAIMS OF JUAN E. ADORNO - CLAIM NOS. 1992-2, 1992-3, AND 1992-4

Juan E. Adorno's three claims have been submitted under Article IX, Section 4 of the Authority's Bylaws, for investigation and review under the Indemnification Procedures And Policies of the Authority adopted by Resolution 1991-151 on July 21, 1991.

As to all three (3) claims, Mr. Adorno claims Eligibility for indemnification simply on the basis that he was "Associate General Counsel" for the GCRTA. Since Mr. Adorno was never a member of the Board, to be Eligible he must qualify as an "officer" of the Authority or as an assistant designated as an "officer" by the Board of Trustees. Mr. Adorno's three (3) separate claims will be considered separately for Eligibility purposes.

Mr. Adorno's Personnel File reflects the following facts:

(1) Mr. Adorno was appointed "Assistant General Counsel I" in the Legal Department on May 24, 1982, effective April 25, 1982 (See Binder Exhibits 39A; 39B);

(2) Mr. Adorno was promoted to "Associate Counsel - Unclassified," effective July 27, 1986, by the Board of Trustees (See Binder Exhibits 39C; 39D), his present position; and

(3) Nothing in the Board of Trustees' appointment or otherwise contained in Mr. Adorno's Personnel File reflects any action by the Board designating Mr. Adorno as "officer" or "such assistant" within the definition of Article II, Section 1 of the August 5, 1986 Bylaws of the Authority so as to entitle him, by definition, to indemnification under Article IX, Section 4 of the Bylaws.

A. ELIGIBILITY REVIEW OF JUAN E. ADORNO'S CLAIM NOS. 1992-2 AND 1992-3

A literal reading of the August 5, 1986 Bylaws, leads to the conclusion that Mr. Adorno does not technically qualify for Eligibility for indemnification under Article IX, Section 4 of the Bylaws for acts or conduct between August 5, 1986 and February 16, 1988 since he was not an "officer" of the Authority nor was he ever "such assistant" designated by the Board as an officer. The amendment of the Bylaws on February 16, 1988 does not change the result since all acts were conducted in 1987 and 1988. The last act was conducted on January 12, 1988, approximately one month prior to the amendment.

A review of the language of the August 5, 1986 Bylaws at Article II, Section 1, where "officer" is defined, establishes that Mr. Adorno's position of "Associate Counsel - Unclassified" is not included as one of the six specific positions (i.e., president, vice-president, secretary-treasurer, general manager, treasurer, and general counsel) which are expressly included in the definition of "officer." Furthermore, nothing in the Board of Trustees' appointment or otherwise contained in Mr. Adorno's personnel file reflects that Mr. Adorno was named or appointed as an "officer" or "such assistant" within the definition of Article II, Section 1 of the August 5, 1986 Bylaws.

Accordingly, by a strict, literal reading of the Bylaws, Mr. Adorno is not Eligible for consideration of indemnification of any of his three (3) claims under Article IX, Section 4 of the August 5, 1986 Bylaws because he was not a member of the Board or an "officer" of the Authority at the time of the acts for which indemnification is sought.

Although by a strict, literal reading of the Bylaws, Mr. Adorno is not, by definition, Eligible for indemnification under Article IX, Section 4, and Article II, Section 1 of the August 5, 1986 Bylaws, principles of common law and equity support management consideration of his Eligibility for indemnification, given the unique facts applicable only to Claim Nos. 1992-2 and 1992-3. (As will be discussed below, these unique facts do not apply to Claim No. 1992-4.)

Principles of the common law of agency and restitution have been applied to the law of indemnity to determine the entitlement of agents and/or subagents to indemnification or reimbursement from a principal for the expenses of defending third-party actions. These principles should be considered when a principal is asked to provide indemnity for the acts of agents and subagents alleged to be authorized and conducted in the course

and scope of the business of the principal. Thus, if the Authority, as a principal, provides indemnification to certain of its "officers" acting as its agents, then by principles of law and equity the Authority should also consider providing indemnification to its "subagents" for authorized acts done at the express direction of its "officers" and in the stead of its "officers." The principles of law and equity are discussed below.

Section 439 of the Restatement 2d, Agency[1], provides, in pertinent part:

> Unless otherwise agreed, a principal is subject to a duty to exonerate an agent who is not barred by the illegality of his conduct to indemnify him for:
>
> * * *
>
> (d) expenses of defending actions by third persons brought by the agent's authorized conduct, such actions being unfounded but not brought in bad faith. . . .

Restatement 2d, Agency, §439.

Furthermore, §438 of the Restatement 2d, Agency, also provides, in pertinent part:

> (2) In the absence of terms to the contrary in the agreement of employment, the principal has a duty to indemnify the agent where the agent . . . (b) suffers a loss which, because of the relation, it is fair that the principal should bear.

Restatement 2d, Agency, §438.

While there is no Ohio case law directly on point, case law does support the general legal and equitable principle that a principal must indemnify its agent for damages the agent incurs resulting from the principal's failure to perform under a contract created by the agent on behalf of the principal, if to do so was within the scope of the agent's authority. Minnesota Farm Bureau v. North Dakota Agr. Marketing (8th Cir. 1977) 563 F.2d 906. In Southern Farm Bureau Casualty Insurance Co. v. Gooding (1978), 263 Ark. 435, the court held that a principal has a duty to indemnify its agent when the agent suffers a loss which, because of their relation, it is fair that the principal should bear. In particular, the court held that the agent can recover the expenses of defending an action brought by a third person because of the agent's authorized conduct.

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[1]The Restatement of Law Agency, 2d edition, is a legal treatise designed to "stat(e) the rules which exist where there is a relation of agency" and "deal(s) also with cognate situations which have legal consequences similar to those characteristic of the agency relation." Id., Scope Note, p.1.

Furthermore, the Restatement, Restitution, §90,[2] provides:

> A person who, at the direction of and on account of another, has done an authorized act because of which both are liable in tort, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if he acted in reliance upon the lawfulness of the direction, and, as between the two, his reliance was justifiable.

Restatement, Restitution, §90.

As to the first two claims only (Claim Nos. 1992-2 and 1992-3), common law principles of law and equity would support Mr. Adorno's Eligibility for indemnification for such conduct if, and only if, his supervisor, General Counsel and "Officer" Russell T. Adrine is Eligible for indemnification for the same essential conduct. This result follows only if it is found that Mr. Adrine's conduct was entirely authorized and within the scope of his own employment, and that Mr. Adorno's conduct was done at the direction of and on account of Mr. Adrine, was authorized, and was done in justifiable reliance upon the directions he received from Mr. Adrine.

I made an initial determination of Eligibility of Mr. Adrine, on a preliminary and non-final basis, for Part 1 of his Claim No. 1992-1, set forth in my Memorandum to Mr. Adrine of February 4, 1992. (See Binder Exhibits 61 and 62) In this Report, I have recommended to the Board of Trustees that Mr. Adrine is eligible under the Bylaws for consideration of Part 1 of his Claim No. 1992-1.

Mr. Adorno's first two (2) claims incorporate Part 1 of Mr. Adrine's claim (Claim No. 1992-1) and the documentary evidence attached to Mr. Adrine's Application. Especially significant is Exhibit AA to Mr. Adrine's Claim No. 1992-1. (See Binder Exhibits 18, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34.) My review of Exhibit AA, including particularly at Tab L, Document I (4)(c), the "Taped Conversation Between Rose Moviel, Russell Adrine, and Juan Adorno of August 19, 1987" and Tab H, "The Court's Opinion of May 25, 1989 Dismissing CR. 228949," indicates that Mr. Adorno acted solely at the express direction of his supervisor, General Counsel and "Officer" Russell T. Adrine and in his stead in representing GCRTA employee Rose Moviel, and in accompanying her to her Grand Jury appearance, where her interests and GCRTA's interests were at risk. (See also my discussion below regarding whether the Claimant's conduct was done in good faith and within the scope of his employment in the discharge of his official duties for the Authority.)

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[2]Similar to the Restatement, Agency, 2d edition, "The Restatement of the Law of Restitution . . . treats as one coherent subject principles, rules, and remedies applicable to restitution as they have been developed through actions at law and proceedings in equity." Restatement, Restitution, Introduction, p.vii.

From the information available to me, Mr. Adrine appears to have been acting as an agent of GCRTA and within the scope of his employment. Also, Mr. Adorno appears to have acted in justifiable reliance on the directions he received from Mr. Adrine. The analogous case law and Restatements could be read to support Mr. Adorno's claimed entitlement to indemnification pursuant to legal and equitable principles of the common law. Mr. Adorno appears to have acted solely at the express direction of General Counsel Adrine and in his in stead. GCRTA Employee Rose Moviel was entitled to counsel at her Grand Jury appearance where her interests and GCRTA's interests were at risk. Accordingly, Mr. Adorno probably acted in the capacity best characterized as a subagent of GCRTA. The Authority, as principal, under common law principles would arguably have a duty to indemnify its agent "officer" (Mr. Adrine) and any person acting at the direction of and standing in the stead of such officer (Mr. Adorno) for losses suffered which, because of their relation, it is "fair" that the principal (the Authority) should bear.

In interpreting and applying the indemnification provisions of the Bylaws, Article IX, Section 4, the Board of Trustees has the power to determine its own intent and its own policy, so long as there is compliance with law. Indemnification for third-party litigation filed against persons acting in the good faith performance of the Authority's business is a policy which management and the Board may support for its basic business interests, both for accomplishing its mission and for maintaining the loyalty, protection, and morale of its work force. State of Ohio audit risk exists because this determination of Eligibility applies common law legal and equitable principles of agency and restitution and is outside the strict, literal reading of the language of the August 5, 1986 Bylaws, i.e., not an "officer" or a designated "assistant". If viewed as a substantial management issue, without setting any broad precedents, the unique facts of Mr. Adorno's Claim Nos. 1992-2 and 1992-3 could be read to support indemnification under common law principles of law and equity when applied to the literal language of the August 5, 1986 Bylaws.

Risk exists that the Auditor of the State of Ohio may raise the issue of the wrongful expenditure of public funds for any monies of the Authority expended by the Board outside of the literal provisions of the Bylaws of the Authority. Neither the State Attorney General nor the Auditor of State are parties to the Declaratory Judgment Action and are not bound by the Declaratory Judgment rendered by Judge Griffin. When the issue of the power of the Attorney General to render a legal opinion in the lawsuit was presented by Judge Griffin, the Attorney General declined and stated that he was "without authority to do so." With regard, however, to the power of the Cuyahoga County Prosecutor to recover public funds, the Attorney General stated, "I am aware of R.C. 117.28 which grants powers to, inter alia, the county prosecutor to recover public money determined by the Auditor of State to have been illegally expended. In this case, however, no such determination has been made by the Auditor of State." (See Binder Exhibit 5, Letter of Attorney General of Ohio, Chief Counsel's Staff, September 24, 1990). Recovery of public funds determined to have been illegally expended may be sought against individual Board members. Consequently, personal liability may attach to Board Members in the event a determination of illegal expenditure is made by the Auditor of State under these circumstances.

B. GENERAL MANAGER'S RECOMMENDATION AS TO THE ELIGIBILITY OF JUAN E. ADORNO'S CLAIM NOS. 1992-2 AND 1992-3

For Mr. Adorno's first two (2) claims (Claim Nos. 1992-2 and 1992-3) I recommend that the Board consider as a substantial management issue application of the common law legal and equitable principles of agency and restitution to the strict, literal language of the August 5, 1986 Bylaws which would lead to a determination that the Claimant is eligible for consideration of indemnification. A determination of eligibility of Mr. Adorno in this situation should have very limited precedential impact, given the unique facts presented in Claim Nos. 1992-2 and 1992-3, and should not serve either to expand or to abrogate the literal language of the Bylaws.

C. ELIGIBILITY REVIEW OF JUAN E. ADORNO'S CLAIM NO. 1992-4

Mr. Adorno's third claim (Claim No. 1992-4), relates to his claim arising out of the charge of theft in office for his apparent personal receipt of arbitration fees in a manner not in conformance with GCRTA's arbitration policy applicable to members of its Legal Department. It is my recommendation that Mr. Adorno is not eligible as to Claim No. 1992-4 based on this following review:

(1) The position of Associate Counsel - Unclassified is not, by definition under Article II, Section 1 of the August 5, 1986 Bylaws an "officer" of the Authority, nor do I have any evidence that the Board designated the position an "officer" of the Authority -- making Mr. Adorno's Claim No. 1992-4 subject to denial for Non-Eligibility on this basis alone;

(2) The facts known at this time and recounted above in my review of Mr. Adorno's Claim Nos. 1992-2 and 1992-3 do not appear to exist with regard to Claim No. 1992-4 so as to cause or require the Authority to consider or apply the common law legal or equitable principles of agency or restitution, as discussed above;

(3) The assertions contained in Mr. Adorno's Application and certain policy documents of the Authority bearing on the Authority's arbitration participation policy for its attorneys and from Mr. Adorno's attorneys regarding the background facts supporting his claim;

(4) The Application for Claim 1992-4, at Section III, submitted by Mr. Adorno states:

> "It was the unwritten policy of General Counsel Charles E. Mosley, Jr., deceased, that all GCRTA attorneys participate as arbitrators in the Common Pleas arbitration system . . . panels. There existed no policy regarding fees received for participation as an arbitrator."

This statement in Mr. Adorno's Application is not supported by my review of the Application, the additional information obtained from Mr. Adorno's attorneys, and from the Authority's own documents. Request for any supportive documents made to Mr. Adorno's attorneys did not result in the production of any documents or records confirming this statement contained in the Application. Vincent Gonzalez, Esq., one of Mr. Adorno's attorneys has confirmed in writing by letter of March 13, 1992 that Mr. Adorno "does not have any documentation regarding the Policy on attending arbitrations by RTA lawyers." (Binder Exhibit 53) Mr. Adorno's Application refers the Authority to the lawsuit on the like issues in the criminal case captioned "State of Ohio vs. Douglas Gonda," Cuyahoga County Court of Common Pleas of Ohio; Case No. CR 228995. Claimant Adorno incorporates the transcript of the "Gonda trial" in his Claim.

Vincent Gonzalez, Esq., one of Mr. Adorno's attorneys, stated in his letter of March 13, 1992 (Binder Exhibit 53) that:

(a) Mr. Adorno has no documents regarding RTA policy on arbitration participation other than were already used in the "Gonda trial";

(b) Mr. Adorno has no documents or records to his supervisors or to GCRTA advising or reporting his participation in the arbitrations, including but not limited to the specific case arbitrations in which Claimant participated as an arbitrator, except for "weekly activities summaries" already in possession of the Authority;

(c) Mr. Adorno did in fact participate as an arbitrator in Common Pleas Court arbitrations between the dates set forth in the indictments, while employed by GCRTA;

(d) Mr. Adorno has no documents or records to his supervisors or to GCRTA reporting his disposition of any arbitration fees received by him, i.e., any payment of such fees for his personal benefit or deposit of such fees to his personal accounts;

(e) "Mr. Adorno turned some of his fees over to RTA but also kept some of his arbitration fees" for his personal benefit on other occasions;

(f) "Mr. Adorno's decision to keep the arbitration checks was based in part on the accepted practice of other RTA attorneys in the legal department to keep their checks"; and

(g) Mr. Adorno's basic factual and legal defenses to the charges brought by the State of Ohio against him, if CR 228994 had been tried, would have been the same as were put forth in the "Gonda trial."

(5) Documents obtained from GCRTA reflect that the Authority, by and through its Legal Committee of the Board of Directors, had in fact adopted a written policy regarding the participation by GCRTA employee attorneys in the Cuyahoga County Court of Common Pleas, Arbitration program, approving such participation voluntarily by attorneys, provided: (a) complete and accurate records were kept and reported by attorneys in writing to GCRTA, and (b) all arbitration fees received as compensation for participation were turned over to the Authority. Documents indicate that Juan Adorno received written communications from supervisors at GCRTA outlining the terms of the policy, all dated before the acts or conduct which were the subject of the indictments in CR 228994.

The appropriate documents are contained in the Binder available to the Board of Trustees for its independent review and determination:

(a) Minutes, GCRTA Legal Committee, June 7, 1982 (See Binder Exhibit 39E);

(b) GCRTA Inter-Office Correspondence dated May 4, 1982, entitled "Participation in the Arbitration List for the Court of Common Pleas, Cuyahoga County, Ohio" by Arthur R. Fitzgerald, Chief Assistant General Counsel, directed to "All Attorneys" with a copy to Charles E. Mosley, Jr. (See Binder Exhibit 39F);

(c) Correspondence of June 21, 1982 from Charles E. Mosley, Jr., General Counsel to Robert A. Williams, Arbitration Commissioner of the Court of Common Pleas, listing GCRTA employee attorneys wishing placement on the arbitration list (including Juan E. Adorno) (See Binder Exhibit 39G); and

(d) GCRTA Inter-Office Correspondence, dated April 20, 1984, entitled "Arbitrator's Fees Common Pleas Court" with distribution to GCRTA employee attorneys (including Juan Adorno) (See Binder Exhibit 39H).

(6) While Mr. Adorno's Application refers to an "unwritten policy of General Counsel Charles E. Mosley, Jr." allowing GCRTA attorneys to participate in the Court of Common Pleas arbitration system and claims that "there existed no policy regarding fees received for participation as an arbitrator," this is directly contrary to the Authority's documents described above and attached hereto (See Binder Exhibits 39E through 39H inclusive). Vincent Gonzalez, Esq., attorney for Mr. Adorno, stated in his letter of March 13, 1992 that Mr. Adorno "does not have any documentation regarding the Policy on attending arbitrations by RTA Lawyers" and then states that "Mr. Kohout's testimony demonstrates that there was no set policy on receipt of arbitration fees." The GCRTA documents were used as evidence by the State of Ohio in the Gonda trial. These documents confirm a written policy of the Legal Committee of the Authority dating back to 1982, rather than an "unwritten policy of General Counsel Charles E. Mosley." Apparently it is a fact that a number of attorneys did not follow the policy, while other attorneys did follow it. The policy did not "die with Mr. Mosley's death," as Mr. Gonda claimed, in essence, as one of his defenses at his trial. Since it was a policy of the Authority as an institution, it remained an Authority policy after Mr. Mosley's death and did not have to be reinstituted after Mr. Mosley's death. As General Counsel, and successor to Mr. Mosley, Russell T. Adrine apparently issued no memoranda or directives to RTA attorneys regarding either affirming or negating the arbitration participation fee policy.

(7) Mr. Adorno's adoption of the basic legal and factual defenses offered by Douglas Gonda in the "Gonda trial" also would place his Claim No. 1992-4 outside the scope of Article IX, Section 4 since Mr. Gonda claimed that the arbitration fees were paid to him for services entirely as a private attorney, unrelated to his employment as a GCRTA attorney and not subject to any policies of GCRTA. As such, any litigation against Mr. Adorno (or Mr. Gonda) would <u>not</u> be brought "by reason of being a member of the Board or an officer of the Authority," as required by Article IX, Section 4 of the Authority's Bylaws.

(8) The litigation brought against Mr. Adorno by the State of Ohio forming the basis for his indemnification Claim No. 1992-4 was not brought against him "by reason of his being or having been a member of the Board or an officer of the Authority" and does not appear to be the type of litigation for which the indemnification provision of Article IX, Section 4 of the Authority's Bylaws on its face is intended to provide a defense.

D. GENERAL MANAGER'S RECOMMENDATION OF NON-ELIGIBILITY OF JUAN E. ADORNO'S CLAIM NO. 1992-4

It is my recommendation that the Board of Trustees determine that Mr. Adorno is non-eligible as to Claim No. 1992-4 for consideration of indemnification. On March 19, 1992 I issued a finding of Non-Eligibility on a preliminary, non-final basis on Mr. Adorno's Claim No. 1992-4. (See Binder Exhibit 62.)

The Board of Trustees makes the final determination of whether the Claimant is Eligible or Non-Eligible as to Mr. Adorn's Claim No. 1992-4.

V. REVIEW OF "GOOD FAITH" AND "SCOPE OF EMPLOYMENT" OF RUSSELL T. ADRINE'S CLAIM NO. 1992-1, PART 1, AND JUAN E. ADORNO'S CLAIM NOS. 1992-2 AND 1992-3

All of the claims have been submitted under Article IX, Section 4 of the Authority's Bylaws, for investigation and review under the Indemnification Procedures And Policies of the Authority adopted by Resolution 1991-151 on July 21, 1991.

The Indemnification Procedures And Policies provide, in relevant part at Article VI, A.:

"A. In order to process the claim, should the Claimant be Eligible for consideration of indemnification, the General Manager shall investigate and review the following:

1. Whether the Claimant acted in good faith;

2. Whether the Claimant's acts were conducted in the discharge of the official duties of his employment; and

3. If the answers to paragraphs 1 and 2 above are in the affirmative, the amount of the indemnification reimbursement or payment of expenses actually incurred by the Claimant in his defense, based upon the standard that the "expenses", as defined in the Bylaws, are both:

(a) reasonable; and

(b) were actually incurred by the Claimant in connection with the defense of the litigation, action, suit or proceeding." (Emphasis added.)

This portion of the General Manager's Report focuses only on the issues of whether the Claimants' conduct was done "in good faith" and "in the discharge of the official duties of his employment." (Article VI, A., 1 & 2 above.) Issues regarding the amount of any indemnification reimbursement of payment of expenses actually incurred by the Claimant based upon the standard for such "expenses" defined in the Bylaws will be reviewed and considered separately. (Article VI, A., 3 above.)

Regarding the issues of "good faith" and "scope of employment", for this General Manager's Report and for the independent review and determination by the Board of Trustees, I have attempted to gather as much information and documentation as is available and relevant to these claims, including:

(a) information and documents in the possession, custody, or control of the Authority;

(b) documents identified in the Claimants' respective Applications; and

(c) information and documents in the possession, custody, or control of the Office of the Cuyahoga County Prosecutor.

A Binder of Documents is available to the Board for its independent review and determination.

In investigating and reviewing the "good faith" and "scope of employment" issues, I have followed the guideline factors set forth in the Authority's Indemnification Procedures And Policies, entitled "The Legal Standard of Good Faith", at Article VII, D., as follows:

"D. The Legal Standard of "Good Faith":

1. In investigating and reviewing whether the Claimant acted in "good faith", the General Manager may consider some or all the following factors:

(a) Were the acts for which indemnification is claimed the kind of acts that the Claimant was hired to perform or part of an actual duty connected with his performance?

(b) Were the acts done within the time and space limits of his employment?

(c) Did the Claimant have the express or implied authority of the Authority to act in the

circumstances which gave rise to the litigation, action, suit, or proceeding?

(d) Did the acts further the Authority's interests, as opposed to the Claimant's own private interests?

(e) Did the Claimant gain any personal profit or advantage?

(f) Was the Claimant charged in pending litigation, or was he found liable in completed litigation, with acts in dereliction in the performance of his duties?"

In its examination and determination of a claim for indemnification of legal fees and expenses actually incurred or used in connection with the defense of criminal charges for which the person was indicted and subsequently acquitted, found innocent, or the charges dismissed, the Board should consider application of the following relevant tests and/or criteria as a standard of conduct in its decision-making process:

(1) The person must act in "good faith" - that is, in an honest belief that his conduct was legal, or at least not unlawful.

(2) The person's acts must be conducted in the discharge of "official duties" of his employment - that is, within the kind of duties for which the employee was hired or within the actual duties performed by the employee in the performance of his duties. Also the act within "official duties" must occur within the space and time limits of his employment, within the express or implied authorization of the employer, and in furtherance of the employer's interests rather than the employees' private, independent purposes.

An independent factual determination prior to authorization must be made that the Claimant 1) acted in good faith and 2) acted within the scope of his official duties.

In order to determine whether a Claimant acted in "good faith", it should first be determined if the person acted with an honest belief that his conduct was legal. Did the person intend to further the interests of the Authority or did he have an independent, private purpose? Were there any circumstances which would have put the person on inquiry or lead him to believe that his conduct was improper or unlawful?

The basic issue to resolve is whether the Claimant appears to have been motivated by an honest belief that he was properly furthering the interests of the Authority.

The Board must also determine that the Claimant's acts arose from the discharge of "official duties". To satisfy this criteria, the act must be the kind of act that the person is hired to perform or a part of an actual duty connected with his performance. Whether the act is within the scope of official duties depends on the nature of the duties.

To further satisfy the "official duties" criteria, the act must be done within the time and space limits of his employment. For example, an act committed while off-duty from work may not be within the scope of employment. The act within "official duties" must occur while the Claimant is actually working or conducting business for the employer.

Furthermore, the Claimant must be carrying out authorized duties, supported by either express or implied authorization. If the Claimant is acting under the direction of the Authority, he is clearly authorized to act. The duties do not necessarily have to be specified. If a Claimant has discretion in the performance of his duties, he impliedly has the authority to do all things which may be necessary to execute such duties. If the Claimant is doing the type of thing he was hired to do, he is acting within the scope of his authorized duties.

To satisfy the "scope of official duties" criteria, the Claimant must also be acting to further the Authority's interest as opposed to his own private interest. If a Claimant has an independent purpose (i.e., his own financial benefit) or if he is attempting to escape the consequences of his own illegal or improper act, then he is not acting in the Authority's interests.

In making a determination, the Board may not simply rely on the fact that the charges against a Claimant were dismissed or that the Claimant was acquitted or found innocent. Had the Claimant been convicted, there would be little justification for indemnification. However, mere acquittal or dismissal is not evidence that the Claimant was acting in "good faith" and "within the scope of his official duties".

Based upon the factual information and documents reviewed by me, I report the following:

(1) Russell T. Adrine, as Assistant General Manager - Legal, formerly General Counsel, has acted under a written Position Description dated May, 1979. (Binder Exhibit 37.)

(2) The Position Description broadly provides, among other things, that he "provide legal advice to the Board of Trustees, General Manager, Assistant General Manager, Secretary-Treasurer and all division managers of the Authority and supervise all legal matters arising out of the operation of the Authority." (Binder Exhibit 37.)

(3) By written authority, as well as under historical practice, the Legal Department has provided legal advice to GCRTA employees where the interests of the Authority may be implicated or at risk. (Binder Exhibit 37.)

(4) Juan E. Adorno, as "Associate Counsel - Unclassified" formerly "Assistant General Counsel," has acted under a written Position Description dated June, 1979. (Binder Exhibit 38.)

(5) The Position Description broadly provides, among other things, that he "provide legal representation to the GCRTA to enable the Authority to conduct its affairs according to law and resolve legal controversies in its best interests." (Binder Exhibit 38.)

(6) Under the written Position Description, the "Assistant General Counsel" reports to the "Chief Assistant General Counsel", who in turn reports to the General Counsel. Under historical practice it appears that, the "Assistant General Counsel" may also report ultimately to the "General Counsel" for direction and instructions. (Binder Exhibit 38.)

(7) Juan E. Adorno has stated by Memorandum dated June 27, 1989 (Binder Exhibit 9A) that his legal representative of GCRTA employee Rose Moviel occurred on August 19, 1987 as he was

> ". . . in my office on the 11th floor of the State Office Building carrying out my normal duties as Associate Counsel for the Authority. At approximately 11:00 a.m. I was called to Mr. Adrine's office where I met with him and Rose Moviel, a GCRTA employee and where I was directed by Mr. Adrine to escort Ms. Rose Moviel to the Justice Center to answer a subpoena instructing her to testify before the Grand Jury that morning. I was requested to advise Ms. Moviel of her due process rights and answer her questions.
>
> I did escort Rose Moviel to the Justice Center. The meeting with Rose Moviel and Mr. Adrine and my escorting Ms. Moviel to the Justice Center and back gave rise to the above referenced charges [CR 228949], which are a matter of public record." (Binder Exhibit 9A.)

(8) Mr. Adorno states, "Since the beginning of my employment with the GCRTA as Assistant General Counsel part of my duties have been to meet with and prepare GCRTA employees served with subpoenas to testify as witnesses in a variety of court proceedings. On the day in question, August 19, 1987, there was nothing unusual in being called to meet with Rose Moviel and escort her to the Justice Center in that these activities fall within my duties as Assistant General Counsel." (Binder Exhibit 9A.)

(9) Taped transcript of Rose Moviel, Russell Adrine, and Juan Adorno dated August 19, 1987 (Binder Exhibit 31) relates the chronology regarding Juan Adorno's representation of GCRTA employee Rose Moviel before the Grand Jury. Mr. Adorno is quoted as advising Rose Moviel "I got a call from the General Counsel a minute ago and he says I want you to go to the Prosecutor's (inaudible) Rose Moviel got a subpoena." (Binder Exhibit 31, p.6.)

(10) The subject matter of Rose Moviel's testimony before the Cuyahoga County Grand Jury involved witnessing activity relating to the alleged destruction of GCRTA records by Mary Jenks and/or Dale Madison in the Planning Department relevant to the Robert Risberg electrocution case.

(11) Juan Adorno acted as Rose Moviel's counsel at the express direction of Russell T. Adrine, Assistant General Manager - Legal, who told him and Ms. Moviel: "We're telling you to tell the truth and you tell whatever you want to tell. I have no problems with that. All I'm saying is, to protect yourself, and do the thing that needs to be done to protect you cause you could be involved in the lawsuit under the hammer" . . . "Well, whatever it is you, handle it that way Juan." (Binder Exhibit 31, p.14.)

(12) Russell T. Adrine's conduct is the subject of Rose Moviel's handwritten notes of 8/14/87 (Binder Exhibit 29), wherein Rose Moviel states, in part, that "Mr. Adrine told me I was not to go talk to Det. Calvey or Sgt. Battone. He told me not to talk to anyone, he would take care of everything. Mr. Adrine told me he would represent me and not let me get involved in this matter." Also, Ms. Moviel states, "Also, during my conversation with Mr. Adrine, I told him I had no information and that I knew nothing."

(13) Also contained in the file is the Transcript of an interrogation done of Rose Moviel on August 17, 1987 by Cuyahoga County Prosecutor's Office and Cuyahoga County Sheriff's Department investigators. (Binder Exhibit 30.)

(14) At the Cuyahoga County Grand Jury appearance of Rose Moviel on August 19, 1987, Mr. Adorno acted as her counsel, after conducting an interview of her at GCRTA Offices. (Binder Exhibit 31).

(15) Mr. Adorno's conduct in his interview and representation of Rose Moviel is subject to personal interpretation upon your individual review. The taped transcript of August 19, 1987 encompasses private conversations intended by Mr. Adorno to fall under the attorney/client privilege. Rose Moviel, of course, knew that a taped transcript was being made with her participation. Mr. Adorno's conversation and Ms. Moviel's conversation include many crudities and expletives, some involving references to employment at the Authority. (Binder Exhibit 31)

(16) After appearing at the Grand Jury on August 19, 1987, Ms. Moviel and Mr. Adorno returned to the GCRTA Offices and reported to Mr. Adrine. (Binder Exhibit 31, p.42 et seq.) Mr. Adorno reported that he took Ms. Moviel to the Cuyahoga County Prosecutor's Office (to Steve Canfil, Assistant Cuyahoga County Prosecutor and to two detectives, one of whom was Detective Calvey). Mr. Adorno states "When they asked if I represented her personally I said I didn't." From the transcript, therefore, it appears that Mr. Adorno represented Ms. Moviel in her interests as a GCRTA employee, rather than in her personal interests. (Binder Exhibit 31, p.43.)

(17) Russell Adrine advised Rose Moviel regarding a private attorney for her own personal interests, stating, in relevant part: "And it has to be a line of demarcation between Rose Moviel, individual and Rose Moviel, employee of RTA. Juan was there and I'm here to represent RTA as such. You as an individual have to respond to certain things in your individual capacity." (Binder Exhibit 31, p.45.)

(18) The conduct for which Mr. Adrine and Mr. Adorno were indicted in CR 228949 is also described in the public record, including the following documents:

(a) Indictments (Binder Exhibit 24);

(b) Bill of Particulars (Binder Exhibit 26) and related clarifications between counsel of record (Binder Exhibits 27 and 28); and

(c) Transcript of Proceedings, May 25, 1989, before Judge Mark K. Wiest dismissing CR 228949.

(19) Russell Adrine's testimony before the Cuyahoga County Grand Jury on October 20, 1987 is available for individual review. (Binder Exhibit 32.) Mr. Adrine was indicted in CR 228949 for this testimony, which is also explained in the indictments, Bill of Particulars, and the Court's Ruling of May 25, 1989. (See Binder Exhibits 24, 26, 27, 28, 34) The testimony of Mr. Adrine before the Cuyahoga County Grand Jury relates to his conduct as GCRTA counsel representing the Authority in various aspects of the Risberg electrocution case, including the representation of GCRTA employees (such as Ms. Rose Moviel) contacted during the investigatory proceedings. In essence, Mr. Adrine was indicted for allegedly perjuring himself by his testimony under oath denying that he had ever taken action to interfere with the Cuyahoga County Grand Jury investigation of the Risberg electrocution case. (For specifics, see Binder Exhibit 34)

(20) Juan Adorno's testimony before the Cuyahoga County Grand Jury on January 12, 1988 is available for individual review. (Binder Exhibit 33) Juan Adorno was separately indicted in CR 226665 for this testimony, which is also explained in the indictments, the letters of his counsel (Jerome Emoff, Esq. and Vincent Gonzalez, Esq.), and in the Court Order of 7/10/89 dismissing CR 226665. (See Binder Exhibits 25, 26, 41, 50A-E) The testimony of Mr. Adorno before the Cuyahoga County Grand Jury relates to his conduct representing GCRTA employee Rose Moviel in her appearance before the Cuyahoga County Grand Jury responding to a subpoena, and also the subject of CR 228949, referred to herein. In essence, Mr. Adorno was indicted for allegedly perjuring himself by denying in testimony before the Cuyahoga County Grand Jury any acts or conduct obstructing the investigation of the Risberg electrocution case. (See Binder Exhibit 33)

(21) The General Manager has obtained and reviewed the following listed information and documents regarding the "good faith" and "scope of employment" issues:

(a) Trial Transcript, "State of Ohio v. Russell T. Adrine, Juan Adorno, and Roger Heller", CR 228949 (Multiple Volume transcript available upon request) -- (See Binder Exhibit 55)

(b) Trial Transcript, "State of Ohio v. Mary Jenks and Dale Madison", CR 222202 (Multiple Volume transcript available upon request) - (See Binder Exhibit 56) This transcript includes testimony by a number of witnesses, including:

(1) James B. Schiller, former GCRTA Board Member;

In the trial of GCRTA employees Mary Jenks and Dale Madison, Cuyahoga County Court of Common Pleas Case No. CR 222202, James J. Schiller testified generally that General Counsel Russell T. Adrine, who was responsible for securing legal documents of the Authority for the Board of Trustees and its Legal Committee following the Risberg electrocution incident of June 29, 1987, did not timely furnish the Legal Committee with the requestd documents, though he did provide the Board with an assessment of the exposure of the Authority to litigation. (See Binder Exhibit 56, TR 1870.) Eventually the documents requested were provided to the Legal Committee by the General Counsel's Deputy, Edward Opett and First Assistant Counsel Douglas Gonda on July 24, 1987, while Mr. Adrine was out of town on vacation. (See Binder Exhibit 56, TR 1877-1882; also TR 2215-2218). Mr. Schiller was critical of the timeliness of Mr. Adrine's performance of his duties.

(2) Rose Moviel, GCRTA employee;

At trial of Case No. 222202, Ms. Moviel testified generally as to her contact with Mr. Adrine and Mr. Adorno, when she was called before the Cuyahoga County Grand Jury during the investigation of the Risberg matter. (See Binder Exhibit 51, TR 1063-1070.) Ms. Moviel's testimony at the trial of Case No. 222202 involving Mary Jenks and Dale Madison did not describe details of the conduct of Mr. Adrine or Mr. Adorno.

(3) Edward Opett, GCRTA Deputy Assistant General Counsel.

Edward Opett's testimony at the trial of Case No. CR 222202 confirmed that on July 24,

1987 Mr. Opett delivered GCRTA documents to Mr. Schiller and to the Legal Committee for the Board of Trustees of the Authority, while Mr. Adrine was on vacation. (See Binder Exhibit 56, TR 2215-2220.)

(22) The General Manager reports that a meeting was held on March 30, 1992 between Stephen T. Parisi, Esq. and Steve W. Canfil, Assistant Cuyahoga County Prosecutor to review the "good faith" and "scope of employment" issues and the request for documents or information from the Prosecutor. The substance of the meeting has been confirmed by letter. (See Binder Exhibits 57, 58, 59, 60, and 61)

In essence, the County Prosecutor's office advised that the Authority could derive any information as to the "good faith" and "scope of employment" issues from its own review of the transcripts of the two relevant criminal trials, namely "State of Ohio v. Russell T. Adrine, et al.", Case No. CR 228949, and "State of Ohio v. Mary Jenks, et al.,", Case No. CR 222202. For this reason, the General Manager obtained transcripts of the two trials. Also, the County Prosecutor's office declined to submit a written position statement with regard to the "good faith" and "scope of employment" issues under consideration with the indemnification claims.

Based upon my review of the facts and circumstances presented by the Claimants in their Applications, the documents, tape transcripts, trial transcripts, and my contact with the County Prosecutor's office, I find and determine that Mr. Adrine and Mr. adorno acted in "good faith" in representing GCRTA employee Rose Moviel and the interests of the Authority when she was called before the Cuyahoga County Grand Jury and they acted within the scope of their employment in the discharge of the normal, expected duties of their positions within the Legal Department of the Authority. I find and determine that both Claimants acted in behalf of the public purposes of the Authority, and not for a private purpose.

Based upon the factual information and documentation available to me it appears that both Mr. Adrine and Mr. Adorno acted "in the discharge of the official duties of his (their) employment" and "in good faith" under the legal standard set forth in the Indemnification Procedures And Policies at Article VIII, D., discussed above.

A. <u>GENERAL MANAGER'S RECOMMENDATION ON "GOOD FAITH" AND "SCOPE OF EMPLOYMENT" OF RUSSELL T. ADRINE'S CLAIM NO. 1992-1, PART 1, AND JUAN E. ADORNO'S CLAIM NOS. 1992-2 AND 1992-3</u>

On April 6, 1992, I issued a Memorandum finding on a preliminary, non-final basis that Mr. Adrine and Mr. Adorno acted in "good faith" and within the scope of their employment in the discharge of "official duties". (See Binder Exhibit 69)

As General Manager, therefore, I recommend to the Board of Trustees, based on the information and documentation available to me that Mr. Adrine (for Claim No. 1992-1, Part 1) and Mr. Adorno (for Claim Nos. 1992-2 and 1992-3) be found to have acted in "good faith" and within the "scope of employment", "in the discharge of the official duties" of the Authority, as defined in the Indemnification Procedures And Policies, Article VI, A.1. and 2.

VI. GENERAL MANAGER'S REVIEW OF "EXPENSES" - RUSSELL ADRINE'S CLAIM NO. 1992-1, PART 1, AND JUAN E. ADORNO'S CLAIM NOS. 1992-2 AND 1992-3

The Indemnification Policies And Procedures provide, in relevant part:

"VI. A. In order to process the claim, should the Claimant be Eligible for consideration of indemnification, the General Manager shall investigate and review the following:

1. Whether the Claimant acted in good faith;

2. Whether the Claimant's acts were conducted in the discharge of the official duties of his employment; and

3. If the answers to paragraphs 1 and 2 above are in the affirmative, the amount of the indemnification reimbursement or payment of expenses actually incurred by the Claimant in his defense, based upon the standard that the "expenses", as defined in the Bylaws, are both:

(a) reasonable, and

(b) were actually incurred by the Claimant in connection with the defense of the litigation, action, suit or proceeding."

* * *

VII. F. The Legal Standard of "Reasonableness" of "Expenses":

1. Should the General Manager find that the Claimant acted in good faith and that his acts were conducted in the discharge of the official duties of his employment, the General Manager must then investigate and review the amount of the "expenses" sought to be indemnified by reimbursement or payment based upon a standard of "reasonableness", as defined in the Bylaws.

2. "Expenses" shall be those defined in the Bylaws, as they may be amended from time to time. "Expenses" under the Bylaws, as amended to February 16, 1988, "shall be deemed to mean and to include, but not be limited to fines and penalties imposed on such member or officer; amounts paid upon a plea of Nolo Contendere or similar plea; amounts paid in compromise or settlement of the litigation; amounts paid in satisfaction of any judgment; costs of

investigation; reasonable attorney's fees incurred in the defense of such litigation and costs of attachment on similar bonds."

3. The standard of "reasonableness" is a two-part test requiring that the "expenses" be both (a) reasonable, and (b) "actually incurred in the defense of the litigation, action, suit, or proceeding for which indemnification is claimed."

The General Manager has reviewed and has submitted for outside review the "expenses", including attorney fees, which are the subject of the Indemnification Claims. The Claimants have had their "expenses" reviewed by their own experts. (See Binder Exhibits 44, 45, and 46)

As will be discussed below, the Board of Trustees will have to review any limitation of "expenses" which may be imposed by the policies or fee schedules of the Authority or the specific provision at Article IX, Section 4 of the Bylaws."

The Board of Trustees, in my opinion, is aided by consulting with and considering the opinions of outside experts in order to ensure the Board with an independent, experienced and objective opinion. In this regard, as General Manager, I have engaged two experts, Burt Fulton, Esq. and Patrick M. McLaughlin, Esq., both of whom have extensive legal backgrounds involving public, governmental bodies, as well as civil and criminal litigation. The Binder contains the Curriculum Vitae of both experts. (Binder Exhibits 71 and 72)

In order to review the nature and extent of legal services and the reasonableness and necessity of such services, consideration should be given to the ethical rules and Ohio law. The test formulated by the Ohio Supreme Court is stated as follows:

> [R]easonable attorney fees shall be based upon the actual services performed by the attorneys and upon the reasonable value of those services.

In re Estate of Verbeck, 173 Ohio St. 557, 558-59 (1962); In re Estate of Wood, 55 Ohio App. 2d 67, 72 (Franklin Cty. 1977); Neiman v. Neiman, 7 Ohio App. 3d 172, 173 (Mont. Cty. 1982).

The burden is on the attorney requesting fees to submit evidence of the services rendered and of the reasonable value of such services. Verbeck at 559; Wood at 72; Jacobs v. Holston, 70 Ohio App. 2d 55 (Lucas Cty. 1980). Although the amount of actual time expended is an important factor in determining the award it is not controlling. Swanson v. Swanson, 48 Ohio App. 2d 85, 90 (Cuyahoga Cty. 1976). The value of services may be greater or less than that which would be reflected by a simple multiplication of an hourly rate by time expended.

Ohio Courts, in establishing the criteria for reasonableness reference the Code of Professional Responsibility, (DR 2-106(B)) guidelines which state:

> "Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> 1) The time and labor required, the novelty and difficulty of the questions involved, and the sill requisite to perform the legal service properly.
>
> 2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> 3) The fee customarily charged in the locality for similar legal services.
>
> 4) The amount involved and the results obtained.
>
> 5) The time limitations imposed by the client or by the circumstances.
>
> 6) The nature and length of the professional relationship with the client.
>
> 7) The experience, reputation, and ability of the lawyer or lawyers performing the service.
>
> 8) Whether the fee is fixed or contingent."

Jacobs at 60; Wood at 72; Swanson at 90.

Treatises on the subject state that proof of the following facts and circumstances tends to establish the reasonable value of an attorney's services;

- Complexities of particular litigation
- Amount involved and responsibility of attorney
- Nature and extent of preliminary investigation required
- Time spent in preparation of pleadings, exhibits, briefs and legal memoranda
- Years of Practice
- Standing and eminence at the bar
- Previous experience in similar matters
- Number of office conferences, phone calls, letters and out of office conferences

- Time spent in and out of office
- Time spent in taking depositions
- Time spent in preparation for examination and cross-examination of technical witnesses
- Trial time
- Character and determination of opposition
- Result of litigation
- Benefits for client
- Expenses and disbursements
- Attorney's opinion of the reasonable value of services

2 Am. Jur., Proof of Facts 235.

The attorney may offer evidence of these facts in the form of an affidavit, accompanied by his time records. However, while there exists an implied duty on the part of an attorney to keep an account of the time involved in a matter under consideration for the determination of his fees, such time records are not absolutely mandatory. Wood at 75; Cannell v. Bulicek, 8 Ohio App. 3d 331, 336 (Cuyahoga Cty. 1983). Courts have based awards of attorney fees on consideration of factors such as the nature of the litigation, the amount involved, the skill required, and experience of counsel, etc., without making any determination of the hours spent or of a reasonable hourly rate. (See Fed-Mart Corporation v. Pell Enterprises, Inc., 111 Cal. App. 3d 215, 226 (1980) (Indemnification of corporate officer for expenses incurred in defense of anti-trust violations).) The attorney attempting to recover attorney fees without time records would be required to offer other evidence, such as the testimony of an expert witness concerning the value of the services he rendered. Actual time expended is not the controlling factor in making a determination of reasonable fees, but is an important factor.

In my evaluation, I have asked outside experts to address the following specific concerns:

(1) Whether the defense of the criminal charges, as to each Claimant, merited the use of two (2) defense attorneys and was "reasonable" in this regard;

(2) Whether the use of two (2) defense attorneys, as to each Claimant, resulted in unnecessary or duplicative services and was "unreasonable" in this regard. If so, what is the extent of such unnecessary services;

(3) Whether the hourly rates charged by the individual attorneys was "reasonable";

(4) Whether the hours of service provided was accurate, accurately recorded, and sufficient to justify the claimed fees;

(5) Whether the total number of hours claimed by each separate attorney was "reasonable", and, if not, what in your opinion would be a "reasonable" number of hours for each separate attorney to expend in representing the Claimant(s) in this matter.

(6) Whether the value of the claimed fees which are based upon a mathematical calculation of hours against an hourly rate can be justified as "reasonable"; and

(7) Whether the claimed fees were "actually incurred" by the Claimant(s) in connection with the defense of the criminal charges.

A. REVIEW BY OUTSIDE EXPERTS AND EVALUATION BY GENERAL MANAGER

1. REASONABILITY OF EXPENSES AND NECESSITY OF SERVICES

Review and evaluation of the reasonableness of the attorney fees was conducted with expert witnesses, Burt Fulton, Esq. and Patrick M. McLaughlin, Esq.

Burt Fulton, Esq. has rendered a written expert opinion "based upon a reasonable legal certainty, fairness and good faith," (See Binder Exhibit 76) Patrick M. McLaughlin, Esq. has provided an oral report. As General Manager, I have used the reports as a roadmap for evaluation and analysis of the reasonableness of Claimants' attorney fees. Mr. Fulton states, in appropriate part:

> "In the instant case, only one attorney, Niki Schwartz, presented an engagement or retention letter to his client prior to undertaking legal activity on behalf of Russell T. Adrine.
>
> Attorney John Carson, another attorney working for Russell T. Adrine, indicated that his rate was $150 an hour. This was in a letter forwarded to his client June 27, 1989.
>
> Attorney Vincent F. Gonzalez stated that he had no retention or engagement letter with his client, Juan E. Adorno. He further stated he had no specific policy regarding fees but as an individual practitioner those fees would range between $95 and $250 per hour.
>
> Attorney Jerome Emoff, also an attorney for Adorno, had no engagement or retention letter but on May 26, 1989 by letter advised Adorno that his

hourly rate was $150. The retainer received from Adorno was only $1500, which supports the issue of consideration of the client's ability to pay.

Since this is a question of indemnity, one must examine the engagement letter of September 8, 1988 between Attorney Schwartz and his client, Adrine. In that letter, he states that Adrine would be required to pay $75 per hour for lawyer time and $15 per hour for paralegal/law clerk time, plus out-of-pocket expenses. A retainer of $7500 was obtained and Russell T. Adrine was notified that after its exhaustion, periodical billings would be submitted. This is the only engagement or retainer letter in existence.

Thus, RTA could take the position that it is required only to reimburse Attorney Schwartz for his time of 460 hours and the hours of other lawyers in his office at $75 an hour; the remaining hours would be billed at $15 an hour. RTA also would be obligated to pay all expenses incurred. This, however, seems patently unfair for an attorney of the caliber of Niki Schwartz.

As Attorney Schwartz indicated, criminal matters normally are handled on a lump sum retainer, which amount must cover the trial and any subsequent appeal What is an appropriate lump sum fee retainer for the defense of the claims made against Russell Adrine? Keeping in mind the guidelines and canons set forth in this letter, it would appear that a reasonable lump sum retainer for each defendant would be between $35,000 and $55,000.

However, we are faced here with a request for fees based upon an hourly rate. It is the opinion of the undersigned based upon the factors set forth in this letter that a fair and good faith hourly rate to a governmental entity such as RTA is $75 to $175 per hour. Further, that a fair and good faith charge for in-court trial time is $1250 to $1750 a day. In this case, trial lasted 8 days.

Since all lawyers were present during the trial, in my opinion they should be compensated. However, only lead counsel should receive the maximum of $1750 per trial day.

* * *

A more troubling aspect of this matter is the necessity of Adrine and Adorno to employ two counsel. It is the opinion of the undersigned based upon reasonable legal certainty, fairness and good faith that each defendant, Adrine and Adorno, were entitled to one lawyer of their choice. Each then should be indemnified for reasonable and good faith fees charged by that lawyer. However, the RTA should not be held responsible to indemnify for additional counsel chosen by each of the attorneys.

While research was required, dual research certainly was not necessary. Charges against the defendants and the issue of separate trials had to be addressed, but one attorney and his staff could have accomplished this for each defendant. Further, all research and documents could have been shared by all other defendants. Interestingly, defendant Roger Heller retained only one counsel throughout the proceedings and that counsel ws able to adequately represent Heller.

In conclusion, the opinion of the undersigned (Mr. Fulton) is as follows:

(1) Defendants Adrine and Adorno each were entitled to a single attorney of their choice;

(2) The only engagement, retainer and fee letter from Niki Z. Schwartz to Russell Adrine. It states that Adrine will be charged $75 per hour for lawyer time and $15 an hour for paralegal/law clerk time. That amount was the responsibility of Adrine and would be the amount for which he seeks indemnity;

(3) However, a fair and reasonable fee for a governmental entity to pay in this matter is between $75 and $175 per hour;

(4) A fair and reasonable figure for a governmental entity to pay for Court time is $1250 to $1750 a day. The senior in-charge attorney only should receive the $1750;

(5) While research may have been undertaken by each attorney employed by the defendants, it is the opinion of the undersigned that only one attorney and

his staff was needed or required to research the legal issues in this case. As stated by Judge Wiest, the key to the case was "criminal intent" on behalf of each defendant. In applying the appropriate standard and analyzing the facts, not the law, Judge Wiest could find no criminal intent. Facts were of primary importance in this case;

(6) While each attorney probably should be reimbursed for his court time, it is unreasonable to reimburse each attorney for what the undersigned feels was duplication in the area of research and preparation;

(7) While many of the entries appear redundant and inconsistent, the undersigned has not specifically analyzed the bill of each attorney. However, the entries of Attorney Schwartz and his staff appear to best describe what in fact was undertaken regarding research for and preparation of this case for trial.

(8) RTA should not be required to pay for duplication of legal research and preparation time. Further, RTA should be entitled to request documentation of research performed or preparation undertaken as set forth in the bills submitted.

(9) Further, RTA, as a governmental entity supported in part by taxpayers, should be required only to indemnify attorneys for what would be an appropriate and fair fee charged in good faith to their client and for which their client would be obligated to pay.

Patrick M. McLaughlin, Esq. has orally reported to me his views that:

(1) An indemnitee under the GCRTA Bylaws would be entitled to reimbursement of the reasonable expenses actually incurred, without a fee cap;

(2) An indemnitee would be entitled to single law firm of his choice to defend him from criminal charges, not two separate law firms;

(3) an engagement letter at the onset of the attorney/client relationship and timely fee statements for review would provide the Authority with supportive evidence of the reasonability and necessity of fees, and should be considered prospectively;

(4) An attorney hourly rate range of $75 to $175 per hour is fair for the matters at issue with a fee cap of $175 per hour;

(5) No daily fee cap is set under the Bylaws or state law;

(6) GCRTA shouldn't be compelled to pay duplicative or unnecessary services;

(7) It seems fair for Niki Schwartz, Esq. to charge $175 per hour and for Jerome Emoff, Esq. to charge $150 per hour; and

(8) That he had no reason to contend at this time that the hours expended by Niki Schwartz, Esq. or Jerome Emoff, Esq. to defend their respective clients was not actually incurred or was unreasonable.

Using this roadmap, the documents provided with Mr. Adrine's Claim No. 1992-1 reflect the following claims for expenses:

(1) Niki Schwartz, Esq. (Statement June 19, 1989)

- 460 partner hours @ $225/hr.	$103,500.00
- 272.5 associate hours @ $125/hr.	34,093.75
- 20 paralegal hours @ $35/hr.	700.00
	$138,293.75

[Plus out of pocket expenses of 12,016.33]

(2) John Carson, Esq. (Statement June 27, 1989)

- In Court, 162.5 @ $200/hr.	$ 32,500.00
- Out of Court, 303.0 @ $150/hr.	45,450.00
	$ 77,950.00

[Mr. Adrine also submitted a statement of John Carson, Esq. purportedly billed on August 22, 1991 reflecting 465.5 hours at a straight hourly rate of $175 for a total of $81,462.50 which was inconsistent with his statement of

June 27, 1989 which charged two different rates, i.e. $200 per hour for court time and $150 per hour for out of court time.]

With regard to Mr. Adorno's claims for expenses, the documents provided to the authority present the following claims for attorney fees:

1.	Jerome Emoff, Esq. (Statement 5/26/89) (Claim 1992-2) CR 228949: 494.5 hours @ $150/hr.	$ 74,175.00
2.	Vincent Gonzalez, Esq. (Statement 6/2/89) (Claim 1992-2) CR 228949: 300 hours @ $150/hr.	45,000.00
3.	Vincent Gonzalez, Esq. (Statement 1/7/92) (Claim 1992-3) CR 226665: 100 hours @ $150/hr.	$ 15,000.00
	Total Claim No. 1992-3:	$ 15,000.00
	Total Claim Nos. 1992-2 and 1992-3	$134,175.00

Mr. Gonzalez also claims "case expenses" based upon "receipts representing $2,074.96 paid." (See Binder Exhibit 51).

My evaluation and analysis of the reasonableness of the expenses has considered a number of factors, including:

1. Niki Schwartz, Esq. had a retention letter dated September 8, 1988 with Russell J. Adrine, setting a maximum charge to Mr. Adrine at $75 per hour for lawyer time and $15 per hour for paralegal/law clerk time. (See Binder Exhibit 48). At the same time, Mr. Schwartz purported to charge $225 per hour for partners, $125 per hour for associates, and $35 per hour for paralegals/law clerks.

2. Niki Schwartz, Esq. has stated in his Affidavit that his firm's "billing rates have ranged from $150 to $250 per hour for senior partners, $100 to $150 per hour for associates, and $30 to $50 per hour for paralegals/law clerks." (See Binder Exhibit 42, p. 3).

3. On civil litigation matters known to the Authority, where Niki Schwartz, Esq. has represented the Authority upon retention as outside counsel by General Counsel Russell T. Adrine, Mr. Schwartz in 1988 charged at an hourly rate of $150 per hour for his personal services.

4. An hourly rate of $225 is well above the Fee Schedule imposed upon the Authority (See Binder Exhibit 76) and above the high range of $75 to $175 recommended by the Authority's experts. (See Binder Exhibit 77).

5. Mr. Schwartz's retention letter on September 8, 1988 provided, in part, "The balance (above Mr. Adrine's personal maximum fee) is to be collected from RTA to the extent that it is legally permitted to pay for your defense," indicating that Mr. Schwartz and Russell T. Adrine implicitly understood that an indemnification claim would have to be submitted to the Authority at the conclusion of the defense of the criminal charges, if successful, and tested under a standard of "reasonableness" set forth in the Bylaws of the Authority.

6. General Counsel Adrine, as Mr. Schwartz' client, certainly must have understood that his indemnification claim would be tested under a standard of "reasonableness" set forth in the Bylaws of the Authority.

7. No authority exists in the Bylaws for an indemnitee to retain two (2) counsel of his choice, rather than one (1) counsel with competent, capable law firm support. This policy principle applies to both Claimants.

8. Niki Schwartz, Esq. and his firm have the capacity to provide a criminal defendant with competent trial counsel and with competent, capable support. This fact raises questions as to the necessity for Russell T. Adrine to also hire a second trial counsel, John Carson, Esq.

9. Similarly, Jerome Emoff, Esq. and his firm have the capacity to provide a criminal defendant with competent trial counsel and with competent, capable support. This fact raises questions as to the necessity for Juan Adorno to also hire a second trial counsel, Vincent Gonzalez, Esq.

10. John Carson, Esq. has submitted inconsistent statements, one at a straight hourly rate of $175 per hour and one at a split rate of $200 for court time and $150 for out of court time. (See Binder Exhibits 2 and 43). No original attorney/client retention letter exists with John Carson, Esq.

11. Niki Schwartz's office provided support and legal research and trial preparation (Orville Stefel, Esq.; Kent Markus, Esq.; and Lois Robinson, Esq.) at the same time when John Carson, Esq. was providing duplicative services as co-counsel, including numerous hours in non-specific categories such as "legal Research and trial preparation" and "reviewed documents", "legal research", and trial preparation." It is always the burden of the attorney to justify and substantiate his work.

12. A comparison of Niki Schwartz's fee statements with John Carson's fee statements also reflects duplicative services, duplicative court and conference appearances, and missing or differing entries in one fee statement or the other.

13. Similarly, no retention letters exist between Juan Adorno and either Jerome Emoff, Esq. or Vincent Gonzalez, Esq. While Mr. Emoff and Mr. Gonzalez purported to submit fee statements to Mr. Adorno based on an hourly rate structure, it appears that purported billings were prepared only after conclusion of the criminal cases on a reconstructed basis. Mr. Gonzalez, in fact, states that his bills prior to his letter of February 12, 1992 were "estimates." (See Binder Exhibit 51).

14. Mr. Adorno paid a retainer of $1,500 to Mr. Emoff and no retainer to Mr. Gonzalez. In addition, Mr. Gonzalez paid the majority of Mr. Adorno's "case expenses" out of his general office overhead and does not appear to have ever timely billed Mr. Adorno for these expenses--even as an advance. (See Binder Exhibit 51). These case expenses were apparently pulled together only in 1992 in conjunction with Mr. Adorno's indemnification claim.

15. Mr. Gonzalez's services appear to be almost entirely duplicative in nature, with duplicative court appearances, conferences, and issue review. In addition, Mr. Gonzalez' "estimates" as fee bills and his non-billing of case expenses raise questions as to whether a true retention obligation occurred or whether there was ever any expectation that the client was to pay attorney fees or was obligated to pay.

16. Given the "reasonableness" requirement in the Authority's Bylaws and the fact that the Authority is a public entity responsible for the expenditure of public funds, and reviewing the significant questions posed by double counsel arrangements, it is reasonable for the Authority to lump the double counsel services into a one-counsel treatment.

17. The attorney always bears the burden to justify the "reasonableness" of attorney fees. Actual time expended is not the controlling factor. Here, double counsel arrangements with substantial duplicative services cannot be justified as "reasonable". It seems certain that neither Claimant could afford the double counsel arrangements (let alone the substantial claims of a one counsel arrangement), nor be obligated to pay for such double counsel services.

18. As a starting point, it seems reasonable to consider the range of lump sum fee retainers given by the Authority's expert, Burt Fulton, Esq., that is, a $35,000 to $55,000 fee with a range of $1250 to $1750 per day for in court trial time, only lead counsel to receive the maximum of $1750.

19. Neither Claimant has been subjected to any collection efforts by their counsel. Claimant Adrine has paid only an initial retainer of $7500 to date, which amount is even exceeded by the out of pocket expenses of his attorneys. Claimant Adorno has paid only an initial retainer of $7500 and expenses of $470.37, which in total approximates the out of pocket expenses of his attorneys. Both Claimants appear to rely only upon the Authority's ability to pay.

20. The Authority, as a policy principle, always has the right to determine the "reasonableness" of the indemnification fee claim.

21. The Authority, as a policy principle, should apply a one-counsel rule (i.e., one counsel with competent, capable law firm support) as a requirement of "reasonableness" under its Bylaws.

22. Given my review, a "reasonable expense" for Mr. Adrine's Claim No. 1992-1 appears to me, as General Manager, to be $78,750. On an approximate hourly basis, this is supported by 450 hours at $175 per hour. This applies a reasonable hourly rate of $175, supported by the Authority's expert witnesses and the Fee Schedule limitations. [By rough comparison, this is supported by a calculation of $55,000 for the primary defense or lead trial counsel plus $15,000 for second counsel (based on approximately ten days of trial or other court time and support services.)] The high range is chosen due to the known competence and reputation of Niki Schwartz, Esq. and John Carson, Esq. in the legal community and due to the perceived interest of the Authority to defend the good name, character, and license of its General Counsel, Russell T. Adrine. Mr. Adrine would be free to allocate payment to his counsel.

23. Given my review, a "reasonable expense" for Mr. Adorno's Claim Nos. 1992-2 and 1992-3 appears to me, as General Manager, to be $67,500. On an approximate hourly basis, this is supported by 450 hours at $150 per hour. This applies a reasonable hourly rate of $150, supported by the range provided by the Authority's expert witnesses. It comports with the hourly rate of both Mr. Emoff and Mr. Gonzalez. [It also can be justified based on a calculation of $45,000 for the primary lead counsel plus $15,000 for the second counsel (based on approximately ten days of trial or other court time and support services.)] A reasonable fee of $67,500 is premised upon the standard fee of $150 per hour charged by Mr. Adorno's defense counsel, Mr. Emoff and Mr. Gonzalez, and by the perceived interest of the Authority to defend a member of its Legal Department who acted in the stead of and at the direction of the General Counsel. Mr. Adorno would be free to allocate payment to his counsel.

24. Both Claimants have executed sworn Applications stating: "As claimant, I further understood and agree that the determination of the Board of Trustees upon this claim is final and that I have no further right of reconsideration or administrative appeal."

B. LOST TIME AND OTHER BENEFITS OF EMPLOYMENT

1. Russell T. Adrine: Claim No. 1992-1, Part 1:

The following has been submitted as a part of Russell T. Adrine's Indemnification Claim No. 1992-1 (See Binder Exhibit 23, p. 3):

"7. From the day of my indictment (June 29, 1988) to the last day of my trial (May 25, 1989) I was required to charge to my vacation or personal leave, or be unpaid for, more than sixteen days spent in the preparation and trial of my case, as follows:

October 26, 1988	8 hours vacation
October 27, 1988	8 hours vacation
December 8, 1988	5 hours vacation
December 9, 1988	8 hours vacation
December 12, 1988	8 hours vacation
December 13, 1988	8 hours vacation
January 31, 1989	1 hour personal time
March 16, 1989	1 hour personal time
May 5, 1989	2 hours personal time
May 10, 1989	8 hours vacation
May 15-25, 1989	9 days off payroll (trial)

My daily rate of pay during the period that I was unpaid for time expended in defending the lawful performance of my duties against false accusations was Two Hundred Eighty Three and 45/100 Dollars ($283.45)."

From the above, Mr. Adrine seeks a cash payment for 16 days of lost time which he calculated in the value of $5,669.00. (See Binder Exhibit 2, p. 6.) A review of GCRTA Employee Attendance Records (see Binder Exhibit 75) determined that the dates and times submitted by Mr. Adrine are accurate (except for a minor transposition not affecting the total). Verification was made that Mr. Adrine's salary for the time period in question was $2,834.50 bi-weekly or $283.45 per day (based upon a 5 day/ 40 hour per week analysis).

Sixteen (16) days lost time times a daily rate of of $283.45 equals a total of $4,535.20, not $5,669.00 (which is a calculation based upon 20 days at the daily rate).

However, a payment for lost time may not be consistent with the Authority's Personnel Policies And Procedures. If approved, Mr. Adrine should be credited with the lost vacation and/or personal time in a manner consistent with the Authority's Personnel Policies And Procedures.

2. Juan E. Adorno: Claim No. 1992-2 and 1992-3

Mr. Adorno submitted the following as a part of his Indemnification Claim Nos. 1992-2 and 1992-3:

> "In reference to indemnification claim no. 1992-3 (CR22665), I am requesting that I be credited a total of twenty-four (24) hours vacation time from the date of my first arrest, April 19, 1988, to June 29, 1988. Please see attachment (Employee Attendance Record-Greater Cleveland Regional Transit Authority) for specific dates and hours taken on said dates.
>
> In reference to indemnification claim no. 1992-2 (CR 228949), I am requesting a credit of vacation time in the amount of one hundred sixty-four (164) hours during the period of June 29, 1988, the date of my second arrest, to June 2, 1989. I am also requesting a credit of twenty-four (24) hours personal days taken during the same period of time. Please see attached Employee Attendance Record-Greater Cleveland Regional Transit Authority for specific dates and hours taken on said dates.
>
> * * *
>
> Please note that from the time of my initial Indictment on April 19, 1988, to the final dismissal of all charges on July 13, 1989, every hour of vacation time and/or personal time was taken to have conferences with my attorneys, to prepare for trial, to attend pretrials, to attend hearings, to participate in my trial, etc. and none of said time was taken for "personal" vacation time or "personal" time."

(See Binder Exhibit 52; also see Binder Exhibits 3, p. 6 and 4, p. 6).

Mr. Adorno submitted his request by letter dated February 13, 1992 together with a chart. Mr. Adorno seeks a credit of 164 hours vacation time and 24 hours personal time for Claim No. 1992-2; and he also seeks a credit of 24 hours vacation time for Claim No. 1992-3.

A review of GCRTA Employee Attendance Records maintained by the Authority in the ordinary course of its business determined that the

copy submitted by Mr. Adorno was accurate. (See Binder Exhibits 74 and 75). As noted above, Mr. Adorno seeks credits for lost time, rather than payment.

However, full credit as requested for lost time may not be consistent with the Authority's Personnel Policies And Procedures. If approved, Mr. Adorno should be credited with the lost valaction and/or personal time in a manner consistent with the Authority's Personnel Policies And Procedures.

3. General Manager's Recommendation As To Lost Time Or Benefits

Based on the foregoing, the General Manager recommends to the Board of Trustees:

A. that Russell Adrine's Claim No. 1992-1, Part 1 be approved with a credit for lost vacation time and/or personal time totalling sixteen days, in a manner consistent with any requirements or limitations in the Authority's Personnel Policies And Procedures;

B. that Juan E. Adorno's Claim No. 1992-2 be approved with a credit of 164 hours vacation time and 24 hours personal time; and that his Claim No. 1992-3 be approved with a credit of 24 hours vacation time, in a manner consistent with any requirements or limitations in the Authority's Personnel Policies And Procedures.

C. INTEREST

At issue for the Board's review of the indemnification claims is whether an attorney may charge interest on a delinquent account for professional services rendered.

The General Manager has reviewed the issue and has considered both legal and ethical requirements. The General Manager believes that the Authority should follow an approach consistent with that of a fiduciary when considering the application of public funds to the payment of interest. Such an approach, in my view, would only permit an attorney to charge interest on a delinquent account for professional services rendered if the client is advised in writing at the outset of the attorney-client relationship and the client agrees to the payment of interest.

In Formal Opinion No. 35 (November 20, 1981) of the Ohio State Bar Association, the precise issue was considered. The Ohio State Bar Committee on Legal Ethics and Professional Conduct cited to Ethical Consideration 2-19, which provides:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding, but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee,

> particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason, he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

The Committee was of the opinion that interest charges on delinquent accounts may be charged "provided the client is advised in writing at the outset of their relationship that the lawyer intends to charge interest and the client agrees to the payment of interest on accounts that are delinquent for more than a stated period." Formal Opinion 35, Ohio St. Bar Assn. (Emphasis in original).

In Formal Opinion 338 (November 16, 1974), the American Bar Association's Committee on Ethics and Professional Responsibility was considering the use of credit card plans to pay for professional services. The Committee addressed the issue of charging interest on delinquent accounts since the issue was considered a "necessary corollary to the use of credit cards." The Committee held, in pertinent part:

> It is also the Committee's opinion that a lawyer can charge his client interest, providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than the stated period of time.

Noteworthy is the fact that the ABA's opinion does not require the agreement to charge interest to be in writing or to be made at the outset of the attorney-client relationship. However, in light of Ethical Consideration 2-19, I am persuaded that it is better position based upon common sense and good business judgment to consider a claim for interest on attorney fees only if it is in writing and made at the outset of the attorney-client relationship, as provided for in the Ohio State Bar Association Formal Opinion No. 35.

With regard to the indemnification claims of Mr. Adrine and Mr. Adorno, only one attorney/client retention letter exists or has been provided with the Applications, that of June 16, 1988 between Niki Z. Schwartz, Esq. and Russell T. Adrine. (See Binder Exhibit 48) No attorney/client retention letter exists between John Carson, Esq. and Mr. Adrine or between either Jerome Emoff, Esq. or Vincent Gonzalez, Esq. and Mr. Adorno. (See Binder Exhibits 49, 50A, and 51) Attorney Schwartz's attorney/client retention letter makes no mention of interest at the outset of the attorney/client relationship and there is no agreement of Mr. Adrine to pay interest. It also appears to be the agreement between Mr. Adrine and his attorney Niki Z. Schwartz, Esq. that Mr. Adrine's fees be limited to a personal maximum ($75 per hour for lawyer time, $15 per hour for paralegal/law clerk time, plus out-of-pocket expenses) and "[t] balance is to be collected from RTA to the extent that it is legally permitted to do so." Any after the fact charges for interest do not comport with the attorney/client retention agreement or with the legal and ethical approach recognized under Ohio law.

It should also be noted that the Authority's Bylaws, at Article IX, Section 4, governing indemnification, do not provide for the payment of interest associated with any payments or reimbursements of "expenses" which may be so authorized. The Indemnification Procedures And Policies follow the Bylaws and do not authorize the reimbursement or payment of interest.

As General Manager, therefore, I recommend to the Board of Trustees that the Authority not pay or agree to pay interest on the underlying "expenses", including attorneys' fees, which are the subject of the indemnification claims of Russell T. Adrine (Claim No. 1992-1) and Juan E. Adorno (Claim Nos. 1992-2 and 1992-3). Also, if the Board of Trustees finally determines to approve, appropriate, and pay expenses to the Claimants, I recommend that the Authority take the position that no right to interest shall accrue until after the Claimants' monetary Counterclaims and the pending Declaratory Judgment Action are fully concluded by a final judgment under Ohio law.

D. LIMITATION IMPOSED BY ARTICLE IX, SECTION 4 OF THE THE AUTHORITY'S BYLAWS

Article IX, Section 2 of the Authority's Bylaws, as amended on August 5, 1986, and the comparable provision at Article IX, Section 4 of the Authority's present Bylaws, as amended on February 16, 1988, entitled "Indemnification" provides, in relevant part:

> "such Board member or officer may have counsel of his or her own choice as a recognized expense to the extent that it does not exceed the fee schedule set by the Board for outside counsel."

See also the Indemnification Procedures And Policies, at I, which governs and provides the policies and procedures for investigating and evaluating any claims for indemnification submitted under the Authority's Bylaws, as adopted by Resolution No. 1991-151 on July 23, 1991. (See Binder Exhibit 1).

By way of background, the 1987 fee schedules set with particular firms engaged by Resolution of the Board to perform particular public sector legal work was $125.00. (See Resolution Nos. 1987-199 and 1987-60 at Binder Exhibit 77) The Authority has conducted a review through its Internal Audit Department of the use of outside legal counsel during 1990. This review identified improvements needed in the policies and procedures employed by the Authority in the retention and administration of outside legal counsel.

As a result, the Board of Trustees adopted "Policies And A Fee Schedule For The Retention Of Outside Legal Counsel By The Authority", by Resolution 1991-129 on June 18, 1991. (See Binder Exhibit 76). At that same time, the Board of Trustees reviewed its prior Resolutions 1975-23, 1982-79, 1987-60, and 1987-199 and repealed them. Further, past payments to outside legal counsel approved by the General Manager/Secretary-Treasurer and/or the Assistant General Manager - Legal at fee charges consistent with the Fee Schedule adopted by the Board on June 18, 1991, were ratified. Effective with adoption of the Resolution on June 18, 1991, the Board of Trustees set the following as its Fee Schedule:

"1. Maximum rate paid will be $185 per hour (i.e. for partners).
2. Less senior members of the outside legal firm will be paid at appropriate hourly rates below that of a partner of the firm."

Given the historical circumstances which existed in 1988 and 1989 (when the legal services were provided to Claimants) under which a fee schedule limitation of $125 per hour existed for outside counsel retention, leading to the Authority's adoption of Resolution 1991-129 and a $185 per hour maximum, I feel that it would be inappropriate to limit hourly rate charges to $125 per hour. Under the facts of these claims, I am prepared to follow the range of $75 to $175 per hour offered by the Authority's experts as reasonable rates for these claims.

E. GENERAL MANAGER'S RECOMMENDATION AS TO REASONABLENESS OF EXPENSES

As General Manager, under the Indemnification Procedures And Policies, at VII, F., I have reviewed and determined the "reasonableness" of the "expenses" actually incurred by the separate Claimants in defense of the criminal charges brought against them and I make the following recommendations to the Board of Trustees:

1. For Russell T. Adrine's Claim No. 1992-1, Part 1:

   a. Payment of legal fees of $78,750 to be allocated by Claimant to his counsel;

   b. Reimbursement of $12,016.33 for out-of-pocket expenses advanced by Niki Schwartz, Esq; and

   c. Credit of 16 days lost vacation and/or personal time to be credited to Mr. Adrine in a manner consistent with any requirements or limitations contained in the Authority's Personnel Policies And Procedures.

   Mr. Adrine's total indemnification payment under Claim No. 1992-1, Part 1, for "expenses" would be $90,766.33.

2. For Juan E. Adorno's Claim Nos. 1992-2 and 1992-3:

   a. Payment of legal fees of $67,500 to be allocated by Claimant to his counsel;

   b. Reimbursement of $2,074.96 for out-of-pocket expenses paid by Vincent F. Gonzalez, Esq; and

   c. Credit of 164 hours of lost vacation time and 24 hours of lost personal time for Claim No. 1992-2 and credit of 24 hours of lost vacation time for Claim No. 1992-3, to be credited to Mr.

Adorno in a manner consistent with any requirements or limitations contained in the Authority's Personnel Policies And Procedures.

Mr. Adorno's total indemnification payment under Claims Nos. 1992-2 and 1992-3 for "expenses" would be $69,574.96.

3. Regarding interest, as General Manager I recommend to the Board of Trustees that the Authority not pay or agree to pay interest on the underlying "expenses" which I have determined above regarding the Claims of Russell T. Adrine (Claim No. 1992-1) and Juan E. Adorno (Claim Nos. 1992-2 and 1992-3). Also, if the Board of Trustees determines to approve, appropriate, and pay expenses to the Claimants, I recommend that the Authority take the position that no right of interest shall accrue until after the Claimants' monetary Counterclaims and the pending Declaratory Judgment Action are fully concluded by a final judgment under Ohio law.

VII. IMPACT OF PENDING LITIGATION

The Declaratory Judgment entered by Judge Griffin in Case No. 177994 is not final. The Claimants also have pending monetary Counterclaims against the Authority.

As General Manager, I recommend that any payment of any claim, if approved, be conditioned upon the Authority first obtaining final judgment on all claims in the litigation and after all appeal rights have expired and all appeals have been exhausted.

Also, as General Manager, I recommend that before any payment is made the General Manager should first be satisfied that the Authority and its Board have not been named in any proceedings initiated by the Cuyahoga County Prosecutor, the Auditor of State, or any governmental entity, under R.C. §117.28 (or R.C. §309.12, or any other analogous laws) for alleged improper expenditure of public funds, or in any taxpayer litigation, and that any such proceedings be finally concluded and does not restrain payment by the Authority.

RJT:bp