



STATE OF CONNECTICUT
STATE ETHICS COMMISSION

ADVISORY OPINION NUMBER 86-2

Defendant in Law Suit Taking Official Action
Affecting Person Suing Him

An associate professor on the faculty of one of the constituent units of Connecticut State University has asked whether the president of his university must disqualify himself, when actions involving the professor are concerned, because of the adversarial relationship which has developed between the professor and the president.

Several years ago the professor filed an action in State court based on the president's failure to recommend the professor for tenure. The case was settled out of court, with the professor receiving tenure and being awarded court costs.

This spring the professor sued in State court the Board of Trustees of the Connecticut State University, the president of his university, and others, claiming a number of improper actions. Some actions relating to the promotion process in his case, to his earlier failure to gain tenure, and to a reorganization plan affecting his academic department allegedly denied the professor his constitutional rights. The complaint contained charges that the president had acted wilfully, wantonly, maliciously, and recklessly. Included in the relief sought were money damages, court costs, and attorney fees. Following the suit the professor filed two complaints with the Commission on Human Rights and Opportunities (CHRO). Both charged discrimination because of his national origin (he is not native born), plus the second one alleged retaliation for his first complaint to the Commission. The Board of Trustees is a respondent in both. The president is a respondent in neither, but in one discriminatory action by the president is charged. Recently the professor brought suit in U.S. District Court against the Board of Trustees, the president, and others, claiming denial of his constitutional rights in several respects. The defendants are also accused of taking unlawful actions against the professor because he had filed the complaints with the CHRO. The suit seeks substantial money damages, court costs, and attorney fees, among other relief.

As described in some detail in a previous Ethics Commission Advisory Opinion, No. 81-18, 43 Conn. L.J. 23, p. 43A (December 8, 1981), involving the same university when it was denominated a State college, the "...appointment, continued employment,

Phone: (203) 566-4472

97 Elm Street — Rear [REDACTED] • Hartford, Connecticut 06106

An Equal Opportunity Employer

promotion, discipline, and termination of a member of the faculty of a State college, and the vitality of programs with which the faculty member is associated, depend upon official actions which the president of the college is required to take, either at his own discretion or with the approval of the Board...." The power of the president over faculty members and over the allocation of resources among university departments and faculty members is relatively unchanged under the current collective bargaining agreement between the State University's Board of Trustees and the labor union of which the professor is a member.

In requesting advice as to whether the president must disqualify himself in his case, the professor is particularly concerned about the president's role in grievance procedures. Several grievances and complaints, for which the professor holds the president at least in part responsible, have been brought against the professor. Under the procedure for handling them, the decisions on them are currently being appealed to the president, or his designee, and the president of the professor's local union chapter, or his designee. See Article 14.5.3, Collective Bargaining Agreement Between Connecticut State University American Association of University Professors and the Board of Trustees for The Connecticut State University 1984-1987.

Several provisions of the Code of Ethics for Public Officials, Chapter 10, Part I, General Statutes, have possible application to the situation presented.

a. A State employee, such as the university president, may not engage in any transaction or professional activity which is in substantial conflict with the proper discharge of his duties in the public interest and of his responsibilities as prescribed by State law. Subsection 1-84(a), General Statutes. In this case, there would be a substantial conflict if the president had reason to believe or expect that he would derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity. Section 1-85, General Statutes.

b. A State employee may not use his public position, or confidential information acquired by virtue of it, to obtain financial gain for himself. Subsection 1-84(c), General Statutes.

c. If a State employee, in the discharge of his official duties, would be required to take an action that would affect a financial interest of himself, other than an interest of a de minimis nature, either he should request and be excused from acting or he must file with his superior a written description of the action required and the potential conflict perceived.

His superior assigns the matter to another. Section 1-86, General Statutes.

In considering what financial interests of the president might be affected by his official actions, it will be recalled that the president is not a respondent in either complaint before the CHRO. Furthermore, the State will hold any State employee harmless from financial loss and expense arising out of any suit based on alleged negligence or other act or omission resulting in damage or injury, if caused in the discharge of duties or within the scope of employment and not wanton, reckless, or malicious. Sections 4-165, 5-141d, General Statutes. Wantonness, recklessness, and maliciousness on the part of the president have been charged in the State suits brought by the professor against the president and others. In both the State and federal suits, the president is accused of acting outside the scope of his employment and, conceivably, other than in the discharge of his duties.

For the president to have an actual or potential conflict of interests under the Code of Ethics for Public Officials (Chapter 10, Part I, General Statutes), there would have to be a relationship between an official action he took, or was required as president to take, and a financial interest of the president.

The president, who is not a respondent in the CHRO complaints, has no financial interest in them. For the president to have a financial interest in the two court actions in which he is a defendant and the professor the plaintiff, the professor must not only prove that the president acted improperly to the detriment of the professor, but that the president's actions were unauthorized or so outrageous that the State will not provide the usual protection from personal liability.

Under the circumstances given, it is clear that the president could not derive a direct monetary gain or suffer a direct monetary loss as a result of taking any official action affecting the professor. Therefore, subsection 1-84(a) does not prevent him from taking action as president, including actions which affect the professor. By the same token, it does not appear under the circumstances that he can use his position at the university, or confidential information acquired in it, to obtain financial gain for himself as a result of official action affecting the professor. Consequently, subsection 1-84(c) also does not prevent him from taking normal official action in cases involving the professor.

The only other provision of the Code possibly applicable is section 1-86. That section is intended to ensure that official actions by a State servant are taken in the public interest, not for the private financial benefit of the State servant. Section 1-86 precribes the proper steps for a State employee when, in the course of his official duties, he is required to take an action that would affect a financial interest of his, except when the interest is of a de minimis nature or not distinct from that of a substantial segment of the general public (the latter exception of no applicability to the case at hand). The subjective nature of the analysis of potential conflicts of interests under section 1-86 is discussed at some length in Ethics Commission Advisory Opinion No. 83-6, 45 Conn. L.J. 1, p. 5B (July 5, 1983). Since a State servant cannot be influenced by a potential conflict of which he is unaware, for section 1-86 to bear the president must perceive that he has a financial interest, that the interest is other than de minimis, and that it will be affected by an official action which he is required to take. In that event, he must take action pursuant to section 1-86.

For the case at hand, the president must believe that he has a financial interest in the outcome of the law suits brought against him and others by the professor (a financial interest which, incidentally, if it exists has been created by the professor, not by the president). If the president were to believe, for example, that his actions were of the character protected by sections 4-165 and 5-141d, General Statutes, he undoubtedly would not see a financial interest in the outcome of the cases. If he sees any financial interest, he must determine whether it is so remote and speculative as to be de minimis or is of some consequence. If he understands he has a financial interest that is not de minimis, he must decide whether an official action he is required to take could affect that financial interest by influencing the outcome of a case. If he sees that it might, he may not take the action. Section 1-86, General Statutes.

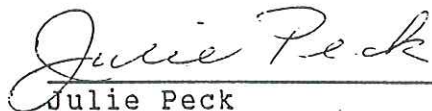
That section appears to be the only Code provision applicable to the situation presented. Therefore, to summarize the response in a positive tone, the president may take any official action involving the professor if he considers that he has no financial interest in the outcome of the suits, or that the interest is de minimis, or that the action will not affect any financial interest of his.

In requesting the advice of the Ethics Commission, the professor also asked whether, should the president have to disqualify himself, he could designate a subordinate to act for

him. He may not. In numerous advisory opinions the Ethics Commission has pointed out that when a State servant not a member of a legislative body or regulatory agency is disqualified from acting by section 1-86, the substitute must be a peer or a superior of the disqualified person.

A final question posed to the Commission asked who the substitute should be. If one becomes necessary, that is something to be determined by the president's superior (section 1-86, General Statutes), so long as the substitute is a peer or a superior of the president.

By order of the Commission,



Julie Peck

Dated 1/10/86

