S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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April 11, 2000

Opinion No. 00-070

"Emeritus Programs" Established by the Board of Regents of the State University and Community College System and the Board of Trustees of the University of Tennessee

QUESTION

With respect to the "Emeritus Programs" established for certain former presidents of Tennessee universities and colleges by the Board of Regents of the State University and Community College System (the "Board of Regents") and the Board of Trustees of the University of Tennessee (the "Board of Trustees"): (a) are either or both such Emeritus Programs permissible under State law; and (b) are either or both such Emeritus Programs retirement programs?

OPINION

Based upon facts and documentation provided by your office and certain supplementary materials provided by the offices of the legal counsel to the Board of Regents and the Board of Trustees, we find that the Emeritus Programs established for certain former presidents of Tennessee universities and colleges by the Board of Regents and the Board of Trustees: (a) constitute legitimate exercises of power delegated to the Board of Regents and the Board of Trustees under current law; and (b) constitute employment or consulting agreements with the participating former presidents as opposed to retirement programs.

ANALYSIS

A. Power of the Board of Regents and the Board of Trustees.

If the Emeritus Programs be construed as employment or consulting agreements with participating former presidents of Tennessee universities and colleges (the "Participants"), each of the Board of Regents and the Board of Trustees has sufficient power to establish such a program. If the Emeritus Programs be construed as retirement programs, neither the Board of Regents nor the Board of Trustees has sufficient power to establish such a program.

The powers and duties of the Board of Regents are set forth in Tenn. Code Ann. § 49-8-203.

The powers and duties of the Board of Trustees are set forth in Tenn. Code Ann. § 49-9-209. These statutory provisions vest considerable discretionary powers in both governing boards that permit the boards to select and employ administrative personnel, teachers and other employees and to fix their salaries and terms of office. *See* §§ 49-8-203(a)(1)(A); 49-9-209(d)(1); 49-9-209(d)(4). None of these statutory provisions, nor any other statutory provisions, contain limitations on the powers of the respective boards with respect to employment decisions or salary levels. The Board of Regents and the Board of Trustees possess sufficient power to define the nature of the services rendered by the Participants and to determine whether such services are rendered pursuant to an employment agreement or a consulting agreement. In addition to the powers vested in the boards to fix salaries and terms of office for employees, each of the governing boards has power over contracts and fiscal affairs and general residual powers sufficient to permit the boards wide discretion in contractual relationships with third parties. With regards to the Board of Regents, such power would derive from the power to supervise fiscal affairs or the residual powers set forth in § 49-8-203. *See* § 49-8-203(a)(1)(C) ("otherwise set policies for fiscal affairs") and § 49-8-203(a)(4) ("such other powers, not otherwise prescribed by law, as are necessary to carry out the provisions of this part"). With regards to the Board of Trustees, such power would be derived from the residual powers set forth in § 49-9-201(e)(1) ("authority to make such bylaws, rules and regulations for the government of the university and the promotion of education therein as in their opinion may be expedient or necessary").

Tenn. Code Ann. § 8-36-805 expressly permits a retired employee of the state "to return to service temporarily in a position covered by the Tennessee consolidated retirement system and continue to draw such person's retirement allowance" provided that the conditions set forth in such section are followed. The conditions set forth in Tenn. Code Ann. § 8-36-805 include a limitation of one hundred days as the total number of days that a retired employee may work during any twelve-month period.[1]

For the reasons stated above, we find that each of the Board of Regents and the Board of Trustees has sufficient power under Title 49 of the Tennessee Code to establish an Emeritus Program if such program be construed as an employment agreement or a consulting agreement with the Participants.

Neither the Board of Regents nor the Board of Trustees would have the power to establish an Emeritus Program if such program be construed as a retirement program. In 1972, the Legislature enacted the "Tennessee Consolidated Retirement System" (the "TCRS") pursuant to Tenn. Code Ann. §§ 8-34-101, *et seq*. Participation in the TCRS is mandatory for all employees of the state under § 8-35-101(a), which states: "Any person who becomes a teacher, a general employee, a state police officer, a wildlife officer, a firefighter or a police officer on or after July 1, 1972, ***shall become a member of the retirement system as a condition of employment*** [emphasis added]." The

[1] It should be noted that, in order to receive pension benefits while temporarily employed by a state agency, a retired employee must fulfill certain statutory requirements under Tenn. Code Ann. § 8-36-805, including making certain periodic filings with the board of trustees of TCRS. If the state employee is engaged as an independent contractor or as a consultant, these requirements may not apply.

terms "general employee" and "teacher" are defined in Tenn. Code Ann. §§ 8-34-101(18) and (46), respectively. Tenn. Code Ann. §§ 8-35-401, *et seq.*, establish optional retirement programs ("ORP") in state institutions of higher education. Tenn. Code Ann. § 8-35-403(a) states that any individual "employed in a state-supported institution of higher education hereafter establishing an optional retirement program hereunder may elect either membership in the retirement system or participation in the optional retirement program under the conditions provided herein." It is clear that the Participants, as former presidents of Tennessee colleges and universities who may be characterized as either teachers or general employees, would be forced to participate in the TCRS or in an ORP.

It is clear that the Emeritus Program, were it construed as a retirement program, would not qualify as an ORP under the governing statutory provisions. *See, e.g.*, Tenn. Code Ann. §8-35-401(c) (the Board of Trustees and the Board of Regents shall "designate a minimum of two (2) companies, not to exceed three (3), from which contracts are to be purchased under such optional retirement program..."). Therefore, the Participants would not have the option of choosing the Emeritus Program if it were construed as a retirement program.

Tenn. Code Ann. § 8-35-111(a) provides that "the public policy of this state is that no public official or employee shall have multiple memberships in any retirement program or programs financed from public funds, whereby such official or employee obtains or accrues pensions or retirement benefits based upon the same compensation and for the same years of service to the state..." The power granted to both the Board of Trustees and the Board of Regents contains a clear mandate that such boards refrain from violating provisions of state or federal law. *See* Tenn. Code Ann. § 49-8-203(a)(4) and Tenn. Code Ann. § 49-9-209(e)(2). Accordingly, neither the Board of Trustees nor the Board of Regents would have the authority to establish the Emeritus Program if such program were construed as a retirement program that would violate the provisions of Tenn. Code Ann. § 8-34-101(a) and § 8-35-111(a).

B. Employment and Consulting Agreements vs. Retirement Programs.

Whether the economic relationship between the Tennessee universities and colleges and the Participants under the Emeritus Program constitutes an employment or consulting agreement or a retirement program is largely a question of fact. Based upon (i) the broad discretionary authority with respect to employment decisions granted to the Board of Trustees and the Board of Regents by the legislature, (ii) the stated intent of these governing bodies with respect to the Emeritus Program, (iii) the absence of any evidence of improper intent or action on the part of the Board of Trustees and the Board of Regents, and (iv) a detailed review of materials delivered to us by your office and the legal counsel to each of the governing boards, we conclude that the economic relationship with the Participants under the Emeritus Program constitutes an employment or consulting agreement and not a retirement program, and, accordingly, constitutes a valid exercise of the powers granted to the Board of Trustees and the Board of Regents.

As discussed above, each governing board has been granted broad authority to select and hire administrative personnel, teachers and other employees and to fix their salaries and terms of office,

whether as employees or as consultants. We know of no limitations upon these boards' respective authority and discretion over employment decisions other than the general mandate to comply with the provisions of state and federal law.

Your office and both the Board of Regents and the Board of Trustees, by and through their respective offices of legal counsel, have presented documentation regarding the establishment and implementation of the Emeritus Programs. These materials clearly state that the intent of each governing board when establishing the Emeritus Program was to provide to the Tennessee university and college systems the benefit of the experience of the Participants. These materials indicate that some of the Participants are treated as employees for federal income tax purposes, while others are treated as consultants. In no case are the payments characterized as retirement benefits. As best this office can determine based upon the facts made available to us, the practice of these institutions is to treat the Emeritus Programs as employment arrangements with the Participants as opposed to unauthorized retirement benefits. Based upon the documentation presented to our office, we defer to the judgment of the Board of Trustees and the Board of Regents when establishing and implementing the Emeritus Programs and find no evidence to rebut a presumption that these boards acted in good faith, in accordance with their respective statutory authority, and in the best interests of the universities and colleges when discharging their respective duties in this matter.

For the reasons expressed above, it is the opinion of this Office that Emeritus Programs constitute employment or consulting agreements with the Participants and not retirement programs and, therefore, constitute legitimate exercises of statutory authority granted to the Board of Trustees and the Board of Regents.

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