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# The State of South Carolina



Office of the Attorney General

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*Opinion No 868*  
*P36*

January 15, 1986

The Honorable Glenn F. McConnell  
Senator, District No. 41  
1370 Remount Road, Suite D  
North Charleston, South Carolina 29406

Dear Senator McConnell:

You have asked this Office to address the Freedom of Information Act as it relates to the rights of public university or college boards of trustees with regard to employment contracts. Specifically, you inquired about the following:

1. Whether a college president could issue a letter of tenure and bind the college and its board of trustees by granting an administrative official tenure as a professor with a guaranteed salary position of 75 percent of whatever the previous administrative salary was without formal board approval or other board approval?

2. Must there be board of trustees approval, formal or informal, of any contract for employment? In other words, for a contract to be properly ratified and become binding on the institution, must it be considered by the board of trustees at a duly called meeting? Can it be done in executive session without ever having it ratified in open session?

We must advise that the resolution of your questions depends in large part upon facts which this Office is not empowered to investigate. Op. Atty. Gen. dated November 15, 1985. Each college or university would have its own policy, adopted by the board of trustees pursuant to relevant statutory authority, which would necessarily have some effect on the

The Honorable Glenn F. McConnell  
Page 2  
January 15, 1986

result in each case. 1/ There may also be policies or regulations of the Budget and Control Board (Human Resource Management Division) or statutes governing state employment which may be applicable in certain instances, as determined on a case-by-case basis. ~~We will attempt herein to set forth the general law to which each college's policy would then be applied.~~ No particular fact situation is addressed herein, due to the many unknown variables.

Statutes relative to appointment of professors or employees and determining their compensation appear to fall into three categories. The first type provides that the particular board may appoint or otherwise provide for the appointment of personnel; typical is Section 59-105-40 (5) of the Code, applicable to the State College Board of Trustees who are empowered to

appoint a chairman and to appoint or otherwise provide for the appointment of subordinate and assistant officers and agents, faculty members, instructors and other employees prescribing the terms of their employments, their duties, and fixing their compensations.

See also Section 59-117-40 (6) as to similar provisions for the trustees of the University of South Carolina.

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1/ Enclosed herewith are pages 29-34 of the Faculty Manual of the University of South Carolina, detailing the procedures used for granting tenure and promotions. Functions of the University's Board of Trustees are highlighted. See also Section 59-117-40 (6), Code of Laws of South Carolina (1976), as to power of the board relative to appointment of faculty members and other employees.

Also enclosed is Op. Atty. Gen. No. 84-64, concerning application of the Freedom of Information Act to the Tenure Committee of Lander College. Procedures for granting tenure are detailed therein. See also Section 59-105-40 (5) of the Code, as to the function of the State College Board of Trustees relative to appointment of faculty members and employees.

The Honorable Glenn F. McConnell  
Page 3  
January 15, 1986

A second type of statute is represented by Section 59-119-50, relative to the board of trustees of Clemson University:

~~The board of trustees shall elect one of their number to be president and elect a secretary and fix his salary. It shall prescribe the course of study, declare the professorships, elect the professors and define their duties and fix their salaries and make all rules and regulations for the government of the university. It may employ such superintendent, head workman and laborers for the farm, shops and grounds as may be necessary and fix their compensation.~~  
[Emphasis added.]

Similarly, see Section 59-123-60 as to the Medical University board of trustees and Section 59-125-90 as to the board of Winthrop College. Each of these statutes uses the term "shall" in detailing the respective board's powers.

By contrast, Section 59-121-50 provides in part that the Board of Visitors of the Citadel

may appoint professors qualified to give instruction in military science and other branches of knowledge which it may deem essential and may fix their salaries and the period for which they shall serve. ...  
[Emphasis added.]

See also Section 59-127-70, relative to South Carolina State College. Both of these statutes contain the term "may."

From a literal reading, it would appear that in the first and third types of statutes, delegation of appointment powers by the various boards may be authorized. In the second type of statute, it would appear that the boards themselves are being directed to make professorial appointments, since the use of the term "shall" generally connotes mandatory compliance. 2A Sutherland Statutory Construction § 57.03. However, courts in states having statutes similarly worded have construed such statutes as permitting the board of trustees to delegate authority to determine tenure, employment, or compensation. See State ex rel. Anderson v. Bellows, 287 Minn. 373, 179 N.W.2d 307 (1970); and Op. Atty. Gen. dated August 8, 1985, as to

The Honorable Glenn F. McConnell

Page 4

January 15, 1986

delegation generally; but see Anderson v. Board of Trustees, 56 Ill. App.3d 937, 372 N.E.2d 718 (1978). In instances in which university boards of trustees have been given rule-making authority, courts have found that delegation by the boards in employment or tenure matters is appropriate. State ex rel. Anderson v. Bellows, supra; Abramson v. Board of Regents, University of Hawaii, 56 Haw. 680, 548 P.2d 253 (1976). Because most, if not all, public college and university governing boards in this State have been given the authority to promulgate rules and regulations, <sup>2/</sup> a court faced with the issue could conclude that delegation of tenure and employment matters would be permissible. Thus, it would be necessary to determine, on a case-by-case basis, exactly what powers have been delegated by a given board and to what body.

Another consideration may well be how much authority a particular board has retained, even though it has the power to delegate, in the areas of tenure and employment contracts. As stated in an opinion of this Office dated November 15, 1985 (enclosed) that

where a public body itself has entered into an agreement, ratification of the agreement would have to be done in public session pursuant to the Freedom of Information Act in order to constitute the legally binding and effective action of the public body. ...

Such ratification is extensively discussed in the enclosed opinion and would be applicable to any formal action taken by a board of trustees; first, however, the appropriate board, official, or committee to act in cases of tenure determination or other employment matters must be determined.

In response to your first question, it would first be necessary to determine the respective roles of the president and governing body of the given institution in granting tenure and in determining compensation. As to your second question, it would be necessary to determine what powers or duties may have been delegated or retained by a board of trustees relative to employment contracts. As noted earlier, this Office cannot

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<sup>2/</sup> See, for example, Sections 59-105-40 (6), (13), and (18) (State College Board of Trustees); 59-117-40 (7) and (14) (University of South Carolina); 59-119-50 (Clemson University); 59-121-50 (The Citadel); 59-123-60 (1) (Medical University of South Carolina); and 59-125-80 (Winthrop College).

The Honorable Glenn F. McConnell  
Page 5  
January 15, 1986

investigate or determine facts but can only suggest areas for further inquiry. For additional guidance, reference is made to Opinion No. 84-64, in which applicability of the Freedom of Information Act to a college tenure committee was discussed.

We hope that this general discussion and especially the prior opinion will begin to clarify the applicability of the Freedom of Information Act and its requirements, such as ratification, to the tenure, employment, and compensation processes of state educational institutions. Because policies and delegation of authority will necessarily vary on an institution-by-institution basis, further comment by this Office is difficult. If we may provide additional assistance or clarification on the general law, please advise.


Sincerely,

*Patricia D. Petway*  
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Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:

  
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