Connecticut Attorney General Opinion No. 1990-13

April 17, 1990

Representative Richard J. Balducci
Speaker of the House
State of Connecticut
Legislative Office Building, Room 4100
Hartford, Connecticut 06106

Dear Speaker Balducci:

This is in reply to your letter of March 13, 1990.

You ask whether the following provision included in Conn. Gen. Stat. e 19a-460(a) (Rev. to 1989), amended by P.A. 89-325, e 21, is an unconstitutional infringement upon the executive branch:

The department of mental retardation shall be under the supervision of a commissioner of mental retardation, who shall be appointed by the governor in accordance with the provisions of sections 4-5 to 4-8, inclusive, on recommendation of the council on mental retardation.

The question is directed to the last phrase of this sentence, "on recommendation of the council on mental retardation."

You indicate that the Legislative Program Review and Investigations Committee recently reported out a bill deleting this phrase, based partly on the constitutional concern previously referred to. The committee cochairmen have requested that you seek our opinion.

We conclude that this provision is constitutional.

The Council on Mental Retardation, which recommends the

appointment to the Governor, consists of thirteen members. Seven are appointed by the Governor, four by designated legislative leaders and one each by the Boards of Trustees of the Mansfield Training School and Southbury Training School. Conn. Gen. Stat. e 19a-445(a) (Rev. to 1989), as amended by P.A. 89-99.[1]

In considering the constitutional issue, "'every intendment will be made in favor of constitutionality, and invalidity must be established beyond a reasonable doubt.'" University of Connecticut Chapter, AAUP v. Governor, 200 Conn. 386, 390 (1986).

The Connecticut Constitution does not specifically discuss the appointive power for this type of office. Article Second divides governmental powers into three distinct departments, legislative, executive and judicial.

Article Third, e 1, vests legislative power in the General Assembly. Each house "shall have all other powers necessary for a branch of the legislature of a free and independent state." Article Third, e 13. The Constitution is a grant of power and the powers granted the General Assembly are legislative only. Adams v. Rubinow, 157 Conn. 150, 154 (1968). "But the legislative powers granted the General Assembly are complete except as restricted by the state or federal constitution. . . ." Id. [Citation omitted].

Article Fourth, e 5, vests "[t]he supreme executive power of the state" in the Governor.

The courts have held, however, that such a provision vests little or no inherent power in the governor. [Citations omitted.] The governor is authorized to see that the laws are faithfully executed [Art. Fourth, e 12], but the remainder of the governor's authority must be found in other constitutional provisions and in the statutes.

Bridgeport v. Agostinelli, 163 Conn. 537, 546-47 (1972).

Article Fourth, e 14, provides that all commissions shall be in the State's name, sealed with the State seal, signed by the Governor, and attested by the Secretary of the State. It does not, however deal with the appointive power.

There is a distinction between an appointment and a commission. A commission is evidence of an appointment, but not the appointment itself. A commission may be issued by one other than the appointing power. See 67 C.J.S. Officers e 44 (1978); 63A Am. Jur. 2d Public Officers and Employees, ee 121-126 (1984); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156-57 (1803); State ex rel. Coogan v. Barbour, 53 Conn. 76, 85-86 (1885); State ex rel. Coleman v. Lewis, 181 S.C. 10, 33-37, 186 S.E. 625 (1936). Compare the commissioning provision with the specific language concerning the nomination and appointment of judges in Article Fifth, e 2, as amended, Conn. Constitution; compare also U.S. Constitution, Art. II, e 2, Cl. 2, involving the appointment power, with Art. II, e 3, requiring that the President commission all federal officers; see also Marbury v. Madison, 5 U.S. at 156; Conn Gen. Stat. e 4-9. (Rev. to 1989), providing that the Governor "shall commission all officers appointed by him or elected by the general assembly or by any other authority. . . ."

Concerning the relationship between the branches of government, "the separation of powers doctrine cannot always be rigidly applied." University of Connecticut Chapter, AAUP, 200 Conn. at 394. There is a certain amount of overlapping responsibility and flexibility, at least subject to certain limits. Id. at 394-95; Mistretta v. United States, ____ U.S. ____, 109 S.Ct. 647, 659 (1989). The objective is "a carefully crafted system of checked and balanced power within each branch." Mistretta, 109 S. Ct. at 659.

We discussed this aspect of the separation doctrine in respect to the appointive power in our advice to the State Elections

Commission. Conn. Op. Atty. Gen. No. 76-109, February 11, 1976 (enclosed). We noted one significant difference between the United States and Connecticut Constitutions. The former has an Appointments Clause (Art. II, e 2, Cl.2). The latter does not. Id. at 3-4.

The federal Appointments Clause, except for "inferior Officers," vests appointive power in the chief executive with advice and consent of the Senate. No such provision exists in the State Constitution. Id. at 3-5.

Thus we advised in that opinion that although there may be authority to the contrary, "there is ample authority for the proposition that the appointive power is not exclusively executive and that save for those offices for which it is otherwise provided by the Constitution, the Legislature may appoint or delegate the power of appointment." Id. at 6. (Emphasis added; citations omitted.) Seealso id. at 7.

"[A] majority of jurisdictions do consider the appointive power not exclusively executive, or if executive not exercisable exclusively by the governor." 1 N. Singer, Sutherland Statutes and Statutory Construction, e 3.20 at 76 (4th ed. 1985 Rev.). See also 38 Am. Jur. 2d Governor e 5 at 935 (1968). The legislature may prescribe how offices shall be filled, in the absence of constitutional restrictions. 1 T. Cooley, Constitutional Limitations, 213-214 n.3 (1927).

In fact, the Connecticut Supreme Court has recognized the General Assembly's appointive role over officers. See State ex rel. Barlow v. Kaminsky, 144 Conn. 612, 619 (1957); State ex rel. Ryan v. Bailey, 133 Conn. 40, 50 (1946); cf. Levitt v. Attorney General, 111 Conn. 634, 648 (1930) (legislative power of removal).

These principles are illustrated by a number of examples in Connecticut. The Governor appoints department heads with the advice and consent of either legislative house. Conn. Gen.

Stat. e 4-6 (Rev. to 1989). See also Conn. Gen. Stat. e 4-2 (Rev. to 1989). The statutes also recognize that there are other appointments made by the General Assembly alone. See Conn. Gen. Stats. ee 4-1, 4-19.

There are certain agencies, such as the Commission on Human Rights and Opportunities and the State Ethics Commission – as well as the Mental Retardation Council itself – which have some members appointed by the Governor and others by designated legislative officials. See Conn. Gen. Stats. e 46a-52 (Rev. to 1989), as amended by P.A. 89-332, e 1(a); Conn. Gen. Stat. e 1-80(a), (Rev. to 1989); e 19a-445(a), supra. See also our advice to the State Elections Commission, No. 76-109, supra, at 4-5.

Constitutional differences in other states may explain divergent results. Thus in Westlake v. Merritt, 85 Fla. 28, 95 So. 662 (1923), the Court held unconstitutional a law which provided that the Governor appoint a chiropractic board from a list recommended by a chiropractic association. However, the Florida Constitution specified that " '[t]he Legislature shall provide for the election by the people or appointment by the Governor of all state and county officers not otherwise provided for by this Constitution. . . .' " Article 3, e 27, quoted in 95 So. at 662 (emphasis added). The case turned on this provision. See id.; concurring opinion, id. at 663.

No such article is contained in the Connecticut Constitution.

In Townshend v. Danaher, 8 Conn. Sup. 172 (Super. Ct. 1940), the Court applied the Civil Service Act which provided that the personnel director " 'shall be appointed by the governor, with the advice and consent of the senate, and selected from a list of eligible persons provided by the advisory personnel committee.' " Supp. [1939] e 643e, quoted in 8 Conn. Sup. at 173. After discussing other issues involved, the Court ruled:

But it is further obvious that the Governor may not select at

will. He is limited in his choice to those whose names appear upon a list submitted to him by the advisory committee, for he cannot ignore the conditions which attach to those eligible for the office, and one such limitation is that his appointee must be obtained from a list provided by the personnel advisory committee. Until such a list is prepared, he is powerless to fill the vacancy.

8 Conn. Sup. at 174.

This issue was also dealt with in Crow v. McAlpine, 277 S.C. 240, 285 S.E. 2d 355 (1981). In that case the Governor appointed a County Board of Education upon the recommendation of the County Legislative Delegation. The Court upheld this provision and found that it did not violate the separation of powers doctrine. The separation of powers article in that constitution was, if anything, stricter than Connecticut's. It stipulated that "no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." South Carolina Constitution, Art. I, e 8.

We therefore conclude that the provision in e 19a-460(a) that the Governor appoint the Commissioner of Mental Retardation on recommendation of the Council on Mental Retardation, in accordance with Conn. Gen. Stat. e 4-5 to 4-8 inclusive, (Rev. to 1989), is constitutional.

Very truly yours,

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Enclosure

[1] This statute prescribes various qualifications for the Council members. One must be a board certified pediatrician; certain others must be parents or guardians of mentally retarded persons; and two others must be trustees of the Mansfield and Southbury Training Schools. Id. The Commissioner of Mental Retardation, furthermore, shall be an ex officio member of the council, but without vote. Id. The Council advises on such matters as its members, the Training School boards of trustees and the Commissioner of Mental Retardation may request. The Council also consults with the Commissioner on administration of the State program for the mentally retarded. The Council shall also recommend to the Governor and General Assembly legislation to improve the care and training of mentally retarded persons. Conn. Gen. Stat. e 19a-445(b), (Rev. to 1989), amended by P.A. 89-99. The Council also advises the Commissioner on other matters. Conn. Gen. Stat. e 19a-460(a), (Rev. to 1989), as amended by P.A. 89-325, e 21. See also Conn. Gen. Stat. e 19a-24(a), (Rev. to 1989), concerning civil actions against the council members in their official capacities and their representation by the Attorney General. It is clear, therefore, that the Council is part of the State government. See also Conn. Op. Atty. Gen. No. 85-080, December 9, 1985, at 301 (Members of the Department of Children and Youth Services State Advisory Board and Regional Advisory Boards are state officers and employees under Conn. Gen. Stat. e 4-141).