Connecticut Attorney General Opinion No. 1990-40

Honorable Betty L. Tianti
Commissioner
Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109

Dear Commissioner Tianti:

In your letter dated June 1, 1990, you requested the opinion of this office as to whether any person designated by you as a serving officer to collect money owed the Unemployment Compensation Fund would be entitled to a statutory right of indemnification. Specifically you inquire as to whether there is a right to indemnification from financial loss and expense from the state for any negligence or civil rights violations arising from such a person's actions while functioning as a serving officer. Information subsequently provided by your office has confirmed that your request pertains to those designated as serving officers who are neither sheriffs, deputy sheriffs, constables nor classified Labor Department employees.[1] Your office has also provided factual information as to the working relationship between you and those whom you designate. We conclude that a person whom you designate as a serving officer is not entitled to a statutory right of indemnification.

Conn. Gen. Stat. e 31-266 authorizes you to collect money owed to the Fund by any means provided for the collection of any tax owed the state including those provided by e 12-35. 1989 Conn. Pub. Acts 89-157 amended e 12-35 to authorize you to designate someone who is neither a Labor Department employee nor a sheriff, deputy sheriff or constable to serve warrants to collect unemployment compensation taxes. It did so by

expanding the definition of the term “serving officer” to include “any person so designated by the Commissioner of Labor.”

Issues concerning who qualifies for both immunity from personal liability and indemnification are framed by statutory language which refers to the term “state officer or employee.” Therefore, this language must be examined. Conn. Gen. Stat. e 4-165 affords immunity by providing that “[n]o state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment.” Conn. Gen. Stat. e 5-141d(a) offers additional protection in declaring that

[t]he state shall save harmless and indemnify any state officer or employee, as defined in section 4-141…from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person’s civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious.

Both of these statutes refer to the statutory definition of “state officer or employee” contained at e 4-141. This statute defines the term “state officers and employees” as “includ[ing] every person elected or appointed to or employed in any office, position or post in the state government, whatever his title, classification or function and whether he serves with or without remuneration or compensation….”

The nature of your relationship with those designated provides insight into whether they are “state officers or employees.” Those designated perform their services on an indefinite basis as opposed to for a period certain. Assignments to collect

taxes are made by agreement. You may choose not to make a particular assignment or to stop making any future assignments to any such person whenever you choose. You may terminate the relationship for any reason or no reason simply by making no further assignments. Persons designated have no right to perform services following their designation or to have assignments continue after some have been made. Someone designated may also refuse to accept a particular assignment or all future assignments whenever he chooses.

The criteria for determining whether a function constitutes a public office are well established in Connecticut. " '[T]he essential characteristics of a 'public office' are (1) an authority conferred by law, (2) a fixed tenure of office, and (3) the power to exercise some portion of the sovereign functions of government…. An individual so invested is a public officer.' " Murach v. Planning and Zoning Commission, 196 Conn. 192, 198, 491 A.2d 1058 (1985). (Citations ommitted.)

The fixed tenure requirement is not satisfied in the sense that those designated as serving officers do not serve for a fixed term. They provide their services on an indefinite basis. This standard has elsewhere been applied so that the terms "fixed term" and "fixed tenure" are used interchangeably. Macy v. Heverin, 44 Md. App. 358, 408 A.2d 1067, 1069 (1979). This is because "[t]he term ['office'] embraces the idea of tenure, duration, emoluments and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term…." Metcalf and Eddy v. Mitchell, 269 U.S. 514, 520 (1926). (Citation omitted.)

Connecticut law is consistent with this authority. The fixed tenure requirement is satisfied when a position is to be held for a certain period of time prescribed by law. Housing Authority v. Dorsey, 164 Conn. 247, 320 A.2d 820, cert. denied, 414 U.S. 1043 (1973); Kellyv. Bridgeport, 111 Conn. 667, 151 A. 268 (1930). The same conclusion was reached

in Bredice v. City of Norwalk, 152 Conn. 287, 206 A.2d 433 (1964), in which the office holder was appointed for life. Opinions rendered by this office support this conclusion. A fixed tenure exists when there is either a statement of a period of time of service or a statement from which the period can be determined, e.g., by reference to the term of another public officer. 88 Conn. Op. Atty. Gen. 223 (1988); 79 Conn. Op. Atty. Gen. 223 (1988); 78 Conn. Op. Atty. Gen. (6-15-78).

The fixed tenure requirement is also not met in the sense that there is insufficient continuity and permanence in your relationships with those designated. There are no statutory or contractual provisions which restrict your authority from effectively terminating the relationship. However, when service is of an indefinite nature, "the idea of tenure and duration" requires that for an office to exist the office holder cannot lose his office without reference to any standard which restricts such a removal. Murach, 196 Conn. at 199. In Murach this requirement was met because the municipal fire department member holding a position of indefinite duration could not be removed from his position but for cause after a hearing. He was entitled to hold his position during good behavior. This concept of tenure is consistent with recent rulings. Tenure in the context of government service means the right to hold one's position absent good cause for the termination of the relationship. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Bartlett v. Krause, 209 Conn. 352, 551 A.2d 710 (1988).

As a result, an essential requirement of Connecticut law is unsatisfied with respect to establishing state officer status. Other jurisdictions are not as rigid as Connecticut concerning fixed tenure. They only consider fixed tenure as one of the characteristics, and make clear that not each part of their standards for officer status has to be met. Macy, 408 A.2d at 1069; Midwest Television, Inc. v. Champaign-Urbana Communications, Inc., 37 Ill.App.3d 926, 347 N.E.2d 34,

38 (1976). However, our Connecticut Supreme Court has repeatedly held that, collectively, the three standards are essential characteristics. Murach, 196 Conn. at 198; Spring v. Constantino, 168 Conn. 563, 568-569, 362 A.2d 871 (1975); Dorsey, 164 Conn. at 251; Kelly, 111 Conn. at 671. Therefore, we are without authority to alter the indispensible nature of this consideration.

This determination is also consistent with the law in other respects. Although persons may occupy positions which are authorized by statute, this does not compel the conclusion that they are public officers. Spring, 168 Conn. at 563; Reese v. Danforth, 486 Pa. 479, 406 A.2d 735 (1979). The title of the position is not controlling. Advisory Opinion to the Senate of the State of Rhode Island No. 1449-M.P., 277 A.2d 750 (1971). Your administration of the oath of office applicable generally to executive officers pursuant to e 1-25 upon the designation is also not controlling. See Gary v. Board of Trustees of Employees' Retirement System, 223 Md. 446, 165 A.2d 475, 478 (1960). This is because the determination of officer status is a question of fact to be reached in light of the facts and Connecticut's specific legal requirements. Murach, 196 Conn. at 197-199.

A review of the facts which you supplied also provides insight into whether those designated are independent contractors or common law employees. The common law employee standard is relevant because e4-141 refers to "every person…employed." Your office mails tax warrants to those persons designated to make service of the warrants. No instructions or training are provided as to when, where and how the services are to be performed.[2]

There are no set hours for doing this work and there is no order or sequence in which the work is to be done. The work requires substantially less than a full-time commitment. The work is not performed on your premises. No office space,

supplies or materials of any kind are furnished by your office, except for an identification card.

Remuneration for the services of the serving officer is charged to the delinquent employer. Expenses are also charged to the employer. The serving officer receives nothing if the attempted service is unsuccessful. Monies collected are mailed to your office for deposit. Agency funds are not used for compensation.

Your office does not supervise those designated since they only report the results of their attempted service of the warrants to you. No regular or written reports are required, although serving officers do note the results of their efforts to collect and their charges on the returned warrants. They also appear at your Delinquent Accounts Unit once per month to discuss matters such as old tax warrants. You do not regulate and direct the serving officer's business activities. The relationship is a continuing one only to the extent that work is available and the parties agree that they want it to continue. Those designated are free to perform services for others and render no other services for your office. However, they may not refer a warrant assigned to them to another person. There is no written agreement between you and those designated other than your letter of appointment which advises of the designation.[3]

These facts lead us to conclude that these persons are independent contractors. The determination of their status is a question of fact. F.A.S. International, Inc. v. Reilly, 179 Conn. 507, 513, 427 A.2d 392 (1980). The key to this determination is that those designated agree to do some work according to their own methods and without being subject to your control except as to the result of the work. Id.; Spring, 168 Conn. at 573. A concern only for the result or end product together with an absence of control over the individuals are consistent with an independent contractor

relationship. F.A.S. International, Inc., 179 Conn. at 513.

Such a determination is also consistent with federal authority. I.R.S. Revenue Ruling 87-41 identifies factors similar to those cited above to be considered as guides in determining the presence of sufficient control so as to establish an employment relationship. I.R.S. Revenue Ruling 70-574 dealt with the question of whether sufficient control was exercised by a company which retained the services of process servers to serve legal papers so as to establish an employment relationship. Based upon facts very similar to those presented here, the I.R.S. concluded that the process servers were not common law employees. These Revenue Rulings are useful in that they use the common law rules for determining the existence of a common law employment relationship as does Connecticut. See F.A.S. International, Inc., 179 Conn. at 512.

The statutory definition of "employee" used in e 4-141 includes every person appointed to any post in state government. This would, in itself, seem to have an application even for some independent contractors. Spring, 168 Conn. at 571-572.

Nevertheless, our Connecticut Supreme Court in Spring ruled that in spite of this broad definition, an independent contractor is not a state employee for the purpose of determining entitlement to e 4-165 immunity. The court construed the language of e 4-141 together with e 4-160(a). Conn. Gen. Stat. e 4-160(a) authorizes suit against the state in those cases in which the state, were it a private person, could be liable. The court noted that as a result the policy of the state is that the state shall not be liable to any greater extent than a private party in like circumstances. This prohibits state liability for the acts of independent contractors because a private party would not be liable in such a case. The term "employee" as used in e 4-141 was sufficiently ambiguous so as to require the court's

construction of that term. That construction clarifies that the General Assembly did not intend that the immunity statute cover independent contractors. Id. at 570-572.

Therefore, the issue of whether serving officers are entitled to immunity is specifically addressed and resolved in Spring. The General Assembly did not intend that they be entitled to immunity because, as with the public defenders under consideration in Spring, they are independent contractors.

Legislative action subsequent to the Spring case did not change the court's ruling that independent contractors are not considered state employees for the purpose of determining qualification for immunity. Following the Spring decision the statutory definition of state employees contained in e 4-141 was amended to include public defenders as opposed to independent contractors in general. Conn. Gen. Stat. e 4-165 was also amended after Spring to include a public defender's services as being within the scope of employment. When the legislature acts, it is presumed to know the state of the law, including judicial precedent. State v. Dabkowski, 199 Conn. 193, 201, 506 A.2d 118 (1986). There is also a presumption that an amendatory act does not change the law further than expressly declared or necessarily implied. Federal Aviation Administration v. Administrator, 196 Conn. 546, 556-557 (Healey, J, dissenting) 494 A.2d 564 (1985). Therefore, Spring is still the law concerning independent contractors and immunity.

The serving officers are also not entitled to indemnification. This is because e 5-141d uses the same e4-141 definition of "employees" as does e 4-165. As a result, indemnification is unavailable for the same reason as immunity. Providing indemnification for such an independent contractor is contrary to e 4-160(a). This is because the state cannot be liable for the acts of its independent contractors just as a private party cannot be liable. A contrary interpretation regarding indemnification would be inconsistent with the reasoning of

the supreme court in Spring.[4]

This interpretation is also consistent with principles of statutory construction. Both e 4-165 and e 5-141d must be read together and consistently with respect to their scopes of coverage in that they both refer to the same definition of "employee." Statutes should be considered as a whole, reconciling separate parts so that a reasonable overall interpretation is achieved. University of Connecticut Chapter, UUAP v. Governor, 200 Conn. 386, 399, 512 A.2d 152 (1986). Statutes which are in derogation of the common law principle of sovereign immunity must be strictly construed. Mahoney v. Lensink, 213 Conn. 548, 555, 569 A.2d 518 (1990); Spring, 168 Conn. at 570. Statutes which create a claim against the state are subject to the rule requiring strict statutory construction. Spring, 168 Conn. at 570-571.

Therefore, we conclude that there is no statutory right to indemnification from financial loss and expense for a serving officer designated by you to collect taxes.

Very truly yours,

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

Thadd A. Gnocchi
Assistant Attorney General

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[1] We express no opinion herein whether sheriffs, deputy sheriffs, constables or classified Labor Department employees would be entitled to a statutory right of indemnification.

[2] In less than ten per cent of tax warrants issued a garnishment lien is also provided to the serving officer. A

garnishment lien may be sent at the request of the serving officer upon his learning of the identity of a third party holding assets of the delinquent tax payer. In some cases the portion of the garnishment lien identifying the party holding the assets sent to the serving officer will be left blank. The blank portion will be filled in by the serving officer upon his learning of the third party. In other cases your agency already has such information and provides it to the serving officer specifically for service on a named party.

The facts in a given case can give rise to a common law right of indemnification. Your request specifically asks if there is a statutory right. Note, however, that if you were to provide directions to a serving officer, the serving officer may have a just claim as to a common law right of indemnification if you were to mistakenly direct levy on a particular property.

'Where a creditor in an execution directs the officer to levy it on certain property shown to him, claiming it to belong to the debtor, if the property should prove to belong to some other person, and the officer should be subjected to pay for it in an action brought against him by the owner, he would have a claim of indemnity against the creditor.'

Higgins v. Russo, 72 Conn. 238, 243, 43 A. 1050 1899). (Citations omitted.)

[3] The letter cited in your materials does refer to an indoctrination session given upon the designation. I am advised that this is simply a communication as to what the serving officer is to do as opposed to instruction as to how work is to be performed.

[4] Since Conn. Gen. Stat. e 5-141d was not enacted until 1983, the Spring decision did not address the issue of indemnification. However, the reasoning of the court in that case is directly applicable to the indemnification issue.