STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 13, 2015

Opinion No. 15-19

Funding Requests for Public Higher Education

Question

Would the adoption of a policy pursuant to Tenn. Code Ann. § 49-7-1002 by the Tennessee Board of Regents (TBR) violate Tenn. Code Ann. § 8-50-602 or any other provision of law?

Opinion

The proposed TBR policy would not violate Tenn. Code Ann. § 8-50-602. It may, however, be susceptible to challenge under the First Amendment to the United States Constitution.

ANALYSIS

Tenn. Code Ann. § 49-7-1002 was enacted to "protect and maintain the integrity of current prioritization and strategic planning processes established to best use limited state funds for public higher education toward greatest need and opportunity and to ensure prudent fiscal policy." Tenn. Code Ann. § 49-7-1001 (added by 2014 Tenn. Pub. Acts, ch. 538, § 1). It provides in part:

> All legislative proposals or requests for state funding toward public higher education capital projects, maintenance, new academic programs, public service, research activities and engagement opportunities or operational support coming before the general assembly shall first be considered and acted upon through established processes and procedures to review such requests; . . . .

Tenn. Code Ann. § 49-7-1002(a). If, however, consideration through established processes is not possible, then the legislative proposal or request "shall be made with the knowledge of the chancellor of the board of regents or the president of the University of Tennessee and the chief executive officer of the institution for which the proposal or request for state funding is made." *Id.* "The chancellor and the president shall be accountable for ensuring that the established processes for considering and evaluating such requests are followed to the greatest extent possible." *Id.*

Subsection (b) of the statute further provides that "[a]t no time shall an employee of a board of regents or University of Tennessee member institution, campus or unit advance state legislative funding requests without the knowledge of the chancellor or president of the respective system for which the request is made and the chief executive officer of the institution, campus or unit." The chancellor and president "are expected to advance such policies or proposals through existing processes and procedures established in the spirit to maximize the state's ability to strategically plan, execute and maintain the state's public higher education obligations." *Id.* § 49-7-1002(c).

In order to fulfill the requirements of Tenn. Code Ann. § 49-7-1002(a) and (b), the legislature expressed its intent to have both the TBR and the University of Tennessee make § 49-7-1002 "a formal part of" their respective policies and procedures. *Id.* § 49-7-1003. Pursuant to that expression of intent, TBR has drafted a proposed policy, and that policy has been presented to this Office. Paragraphs I and II of the proposed policy incorporate the provisions of Tenn. Code Ann. § 49-7-1002(a) and (b); Paragraph III of the proposed policy provides as follows:

> In order to maximize the state's ability to strategically plan, execute and maintain the state's public higher education obligations, all legislative proposals or requests for state funding toward public higher education capital projects, maintenance, new academic programs, public service, research activities and engagement opportunities or operational support must be submitted to the TBR Office of Government Relations for consideration for inclusion in the system's proposals to the legislature. Each year, the Office of Government Relations will publish a schedule for making such submittals prior to the opening of the legislative session. Such legislative proposals or requests that arise after the opening of the legislative session shall be submitted to the Office of Government Relations prior to being presented to the general assembly.

This proposed policy would not violate Tenn. Code Ann. § 8-50-602, which provides that "[n]o public employee shall be prohibited from communicating with an elected public official for any job-related purpose whatsoever." Even assuming that the policy conflicts with § 8-50-602 by effectively prohibiting an employee's communication with a member of the General Assembly, the two provisions would be construed to work in harmony. The legislature is presumed to have knowledge of its prior enactments and to know the state of the law at the time it passes legislation, *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995), and a court would likely conclude that the language of Tenn. Code Ann. § 49-7-1002 works as a specific limitation to the more general grant of protection found in § 8-50-602. *See Luehrman v. Taxing Dist. of Shelby Cnty.*, 70 Tenn. 425, 444 (1879) (if a right is granted by the Legislature "it necessarily follows, as a corollary, that the Legislature may at pleasure, whenever in its opinion the public exigency requires, withhold the grant, and exercise the power itself."). Moreover, when two statutes are in conflict with one another the "more specific statutory provision takes precedence over the more general provision." *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010). Thus, § 49-7-1002, the more specific and more recently enacted statute, would take precedence over § 8-50-602, and would be read to carve out a limited exception to that earlier, more general statute. The proposed policy, which implements § 49-7-1002, would accordingly not be violative of § 8-50-602.

The proposed policy may, however, be susceptible to challenge under the First Amendment to the United States Constitution, which protects the freedom of speech and the right to petition the government. A government employee has the right to speak on matters of public concern provided that he is doing so as a private citizen. *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Pickering v. Bd. of Educ. of Twp High Sch. Dist. 205*, 391 U.S. 563, 575 (1968); *see Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2495 (2011) (considerations shaping application of Speech Clause to public employees apply equally to claims under Petition Clause). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48.

In *Pickering*, however, which involved a public-school teacher who had sent a letter to a local newspaper addressing issues such as funding policies, the Supreme Court concluded that such statements were matters of public concern upon which "free and open debate is vital to informed decision-making by the electorate." 391 U.S. at 571-72.

But "even employee speech addressing a matter of public concern is not protected if made pursuant to the employee's official duties." *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007) (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). *See Garcetti*, 547 U.S. at 421 ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes"). At the same time, though, the mere fact that an employee's comments concern the subject matter of their employment is not sufficient to establish that the employee is speaking "pursuant to [his] official duties," and *not* as a private citizen. Indeed, in *Pickering*, the Supreme Court specifically acknowledged that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S. at 572. The key question is whether the employee was speaking in his *official* capacity as a public employee or in his *personal* capacity as a private citizen. *See Garcetti*, 547 U.S. at 421; *see also Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, 605 F.3d 345, 348 (6th Cir. 2010) (quoting *Weisbarth*, 499 F.3d 538 at 544) ("Speech by a public employee made pursuant to ad hoc or de facto duties not appearing in any written job description is nevertheless not protected if it 'owes its existence to the speaker's professional responsibilities.'").

Furthermore, even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically protected by the First Amendment. A government employer "must have authority, in appropriate circumstances, to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve." *Guarnieri*, 131 S.Ct. at 2495. Courts balance the speech or petition interests of the employee against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Guarnieri*, 131 S.Ct. at 2493.

In *Barnett v. Wis. Ethics Bd.*, 817 F. Supp. 67 (E.D. Wisc. 1993), an associate professor at the University of Wisconsin challenged under the First Amendment a Wisconsin statute prohibiting public employees from presenting to the state legislature any request for appropriations that exceeded the amount requested by the employee's state agency. The court found that school funding is a matter of public concern and that the statute prohibited a public employee from communicating with the legislature regardless of whether the employee was speaking in their official capacity or his personal capacity. *Id.* at 70-71. The court further found that the state had failed to advance adequate reasons to justify the law's prohibition and thus held that the statute violated the First Amendment. *Id.* at 71.

The proposed TBR policy likewise fails to limit its application to legislative funding requests advanced by an employee in his or her official capacity as a public employee. It could be argued that while the statute at issue in *Barnett* prohibited an employee from presenting legislative funding requests, the proposed policy merely requires that an employee not advance a funding request without the knowledge of the chancellor or chief executive officer. But other parts of the

policy, such as Paragraph III's requirement that "*all* legislative proposals or requests for state funding toward public higher education . . . must be submitted to the TBR Office of Government Relations" (emphasis added), could cause a court to reject such an argument.

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