



OFFICE OF THE ATTORNEY GENERAL
CONNECTICUT

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Mitchell R. Harris
Chairman
Judicial Review Council
505 Hudson Street
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Dear Chairman Harris:

You have requested a formal legal opinion concerning the scope of the Judicial Review Council's authority when considering a judge's disability retirement application pursuant to Conn. Gen. Stat. § 51-49. Section 51-49(a) vests the Judicial Review Council ("Council") with responsibility for determining whether a judge should be retired because he or she "has become so permanently incapacitated as to be unable to fulfill adequately the duties of his [or her] office." You recognized that the Judicial Branch "obviously plays the primary role in determining the availability and feasibility of accommodations." Nonetheless, you note that "neither the statute nor the regulation addresses the interplay between the Council's obligations and the authority with respect to reasonable accommodations and those of the Judicial Branch." Prompted by the recent receipt of a judge's disability retirement application, you have asked the following questions:

- (1) Should the Council determine that a judge "has become so permanently incapacitated as to be unable to fulfill adequately the duties of his office" within the meaning of [Conn. Gen. Stat. § 51-49], must the Council also determine pursuant to Regulations of Connecticut State Agencies § 51-51k-10(j) "whether there is any reasonable accommodation which can be made for the incapacity so

that said person can perform all the essential functions of his or her position?”

(2) If the answer to question one is in the affirmative, how should the Council determine whether a reasonable accommodation that will permit the judge to perform all of his or her essential functions is available and feasible?

(3) May the Council hear testimony or receive other evidence from the Judicial Branch about the availability and feasibility of potential accommodations?

(4) Is the Council authorized or legally required to participate in discussions with the judge and the Judicial Branch to determine whether reasonable accommodations are available that would permit the judge to perform all of his or her essential functions?

(5) May the Council, upon a finding that a reasonable accommodation that would permit the judge to continue his or her work is available, require that such accommodations be provided?

We conclude that in determining whether a judge is permanently incapacitated and should be granted a disability retirement, the Council is required to consider whether there is a reasonable accommodation that could be made for the incapacity that would enable the judge to perform the essential functions of his or her position. To make this determination, the Council may conduct an investigation and hold a hearing at which it may solicit information from the judge, the Judicial Branch and other sources. The Council has no authority, however, to participate with the judge and the Judicial Branch in the interactive process required by the Americans with Disabilities Act (“ADA”) and the Connecticut Fair Employment Practices Act (“CFEPA”) to agree upon reasonable accommodations. It also has no authority to require that specific

reasonable accommodations be provided. Rather, it is up to the Judicial Branch to engage in the interactive process with the judge to determine what the judge needs in order to perform the essential functions of the job and to identify an appropriate reasonable accommodation.

BACKGROUND

The General Assembly created the Council to investigate and act on allegations of judicial misconduct and disability. *See* Conn. Gen. Stat. §§ 51-51k to 51-51u, 51-45b, 51-45c, and 51-49. The Council is within the Office of Governmental Accountability and consists of twelve regular members, including three judges, three attorneys, and six others, all of whom are appointed by the Governor and approved by the General Assembly. Conn. Gen. Stat. § 51-51k(a).

One of the Council's responsibilities is to consider judicial disability retirement applications. Pursuant to Conn. Gen. Stat. § 51-49, when any judge of the Connecticut Supreme Court, Appellate Court, or Superior Court "has become so permanently incapacitated as to be unable to fulfill adequately the duties of his office, he may be retired by the Judicial Review Council as hereinafter provided, upon application by him or upon its own motion." Conn. Gen. Stat. § 51-49(a). "If the Judicial Review Council finds that the . . . judge . . . is permanently incapacitated from adequately fulfilling his duties, the . . . judge . . . shall thereupon be retired with retirement pay to be determined as provided by section 51-50." Conn. Gen. Stat. § 51-49(b).

To carry out its statutory responsibilities, the Council has enacted regulations pursuant to Conn. Gen. Stat. §§ 4-167 and 51-51k(i). Regs., Conn. State Agencies ("RCSA") § 51-51k-10 governs disability retirements. Pursuant to RCSA § 51-51k-10, when the Council receives an application for disability retirement, it conducts a confidential investigation and holds a hearing that is closed to the public. *Id.* § 51-51k-10(b), (c) and (f). The judge who has filed the application must give the Council "access to any pertinent medical and physical records and reports

relevant to incapacity and shall submit to any independent medical examination requested by the Council.” *Id.* § 51-51k-10(d). The judge “may attend the hearing, be represented by counsel, may elect to testify, may call witnesses, present evidence and may examine or cross examine witnesses.” *Id.* § 51-51k-10(g). “After all evidence and arguments have been presented, the Council shall, in executive session, unless the person being investigated requests it be open, determine whether said person is so permanently incapacitated as to be unable to fulfill adequately the duties of his or her office, and should be retired or **whether there is any reasonable accommodation which can be made for the incapacity** so that said person can perform all the essential functions of his or her position.” RCSA § 51-51k-10(j) (emphasis added). It is this latter regulatory requirement that has prompted your questions.

ANALYSIS

Question One:

You ask whether the Council, if it determines that a judge “has become so permanently incapacitated as to be unable to fulfill adequately the duties of his office” within the meaning of Conn. Gen. Stat. § 51-49, must also determine, pursuant to RCSA § 51-51k-10(j), “whether there is any reasonable accommodation which can be made for the incapacity so that said person can perform all the essential functions of his or her position.” We conclude that the answer is “yes.”

It is well established that “the legislature may create a law designed to accomplish a particular purpose and may expressly authorize an administrative agency to ‘fill up the details’ by prescribing rules and regulations for the operation and enforcement of that law.” *State v. White*, 204 Conn. 410, 418-19 (1987) (quoting *State v. Stoddard*, 126 Conn. 623, 628 (1940)). “[A]n administrative agency’s regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute.” *Tannone v. Amica Mut. Ins. Co.*, 329 Conn. 665, 672 (2018).

Here, the legislature has charged the Council with determining whether a judge applying for a disability retirement “has become so permanently incapacitated as to be unable to fulfill adequately the duties of his office.” Conn. Gen. Stat. § 51-49. Although the term “permanently incapacitated” is undefined, the legislature has made clear that such incapacity requires the judge to be “unable to fulfill adequately the duties of his office.” *Id.* Consistent with this legislative intent, and pursuant to its statutory authority, the Council has enacted RCSA § 51-51k-10(j) to provide further guidance. By requiring the Council to determine whether the judge “is so permanently incapacitated as to be unable to fulfill adequately the duties of his or her office and should be retired, or whether there is any reasonable accommodation which can be made for the incapacity so that said person can perform all the essential functions of his or her position,” the regulation clarifies that a judge should not be considered permanently incapacitated if there is a reasonable accommodation that will enable him or her to perform the essential duties of his or her job. We see no basis for the Council not to comply with this regulation, and make this determination, when considering an application for a judicial disability retirement.

Having answered this question in the affirmative, we will address your remaining questions. In doing so, we note that the term “reasonable accommodation” is not defined by the Council’s regulations or governing statutes. It is a commonly used term, however, in the ADA, 42 U.S.C. § 12101 et seq., and the CFEP, Conn. Gen. Stat. § 46a-60 et. seq., both of which require employers to make “reasonable accommodations” for employees with disabilities. *See* 42 U.S.C. § 12112 (b)(5)(A); *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390, 415 (2008). For purposes of the ADA, “reasonable accommodation” is defined, in pertinent part, as “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.” 29 C.F.R. § 1630.2(o)(1)(ii). It is appropriate to look to this commonly applied

definition, which the state courts look to for purposes of CFEPa, as persuasive evidence of the meaning of “reasonable accommodation” in RCSA § 51-51k-10(j). *See* Conn. Gen. Stat. § 1-1(a).

Questions Two and Three:

Your second and third questions ask how the Council should determine whether there is an available and feasible reasonable accommodation that will permit the judge to perform all of his or her essential functions, and whether the Council may hear testimony or receive other evidence from the Judicial Branch on this issue.

Pursuant to its regulations, the Council has several tools for determining whether there is a reasonable accommodation that will permit a disabled judge to perform his or her essential functions. First, it may conduct an investigation. Pursuant to RCSA §§ 51-51k-10(b) through (e), the Council must investigate each disability retirement application. Each applicant being investigated must furnish the Council with access to “any pertinent medical and physical records and reports relevant to incapacity and shall submit to any independent medical examination requested by the Council.” RCSA § 51-51k-10(d). Through this investigatory process, the Council may collect information relevant to the determination whether there is a reasonable accommodation that would enable the judge to continue performing his or her job.

In addition to investigating, the Council is required to hold a hearing to determine incapacity. RCSA § 51-51k-10(f). The fact that the applicant may “examine and cross examine witnesses” at the hearing, *id.*, implies that the Council, as well as the applicant, may call witnesses. There is no reason that those witnesses could not include officials from the Judicial Branch or other individuals with information that could assist the Council in determining whether a reasonable accommodation could be made for the judge’s incapacity that would enable him or her to perform the essential functions of his or her position.

Question Four:

Your fourth question asks whether the Council is authorized or legally required to participate in discussions with the judge and the Judicial Branch to determine whether reasonable accommodations are available that would permit the judge to perform all of his or her essential functions. As we understand your question, you are asking whether the Council may or must participate in the interactive process mandated by the ADA and CFEPA to determine whether there is a reasonable accommodation for an employee's disability. We conclude that the answer is "no."

The ADA requires an employer to make "reasonable accommodations" for an employee with disabilities unless the accommodations would impose an undue hardship on the operation of the employer's business. 42 U.S.C. § 12112(b)(5)(A). As discussed above, such "reasonable accommodations" consist of "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of the position." 29 C.F.R. § 1630.2 (o)(1)(ii). The Connecticut Supreme Court has construed the CFEPA, Conn. Gen. Stat. § 46a-60, to include the same duty as the ADA to provide reasonable accommodations. *Curry*, 286 Conn. at 415.

Under the ADA, after an employee comes forward with a suggested reasonable accommodation, the employer must make a good faith effort to engage in an "informal, interactive process" with the employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). The same requirement applies under CFEPA. *Curry*, 286 Conn. at 415-418.

Your question whether the Council must engage in this interactive process with a judge who applies for a disability retirement. "It is well settled that an administrative agency possesses no inherent power." *Pereira*

v. State Board of Education, 304 Conn. 1, 41 (2012). Rather, “[i]ts authority is found in a legislative grant, beyond the terms and necessary implications of which it cannot lawfully function.” *Id.*

In the Council’s case, the General Assembly has authorized it to determine judicial disability but has made no mention of the Council having any authority to modify the working conditions of state court judges. Instead, the General Assembly has expressly vested the Judicial Branch’s Chief Court Administrator with the general authority to “assign, reassign, and modify assignments of the judges of the Superior Court,” among other powers. Conn. Gen. Stat. § 51-5a. In addition, when the Chief Court Administrator asks the Council to investigate a judge’s potential “mental infirmity or illness or drug dependency or addiction to alcohol” pursuant to Conn. Gen. Stat. §§ 51-45b, 51-45c(c), it is the Chief Court Administrator, not the Council, that is specifically charged with reassigning the judge or modifying his assignment. *Id.* Given the Council’s lack of any statutory authority to modify a judge’s working conditions, coupled with the Chief Court Administrator’s express authority and responsibility to make such modifications, we conclude that the Council is not legally required or authorized to participate in an interactive process between the judge and the Judicial Branch to determine whether there is a reasonable accommodation that would permit the judge to perform all of his or her essential functions. Rather, it is the role of the Judicial Branch, as the judge’s employer, to engage in that interactive process.

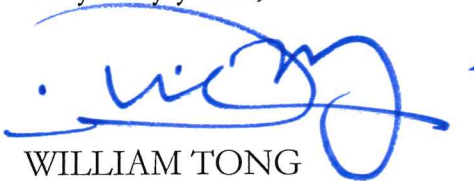
Question Five:

If the Council finds that a reasonable accommodation is available that would permit the judge to continue his or her work, you question whether the Council may require that it be provided. We conclude that it cannot.

As discussed in the prior question, an administrative agency “must act strictly within its statutory authority.” *Ethics Commission of Town of Glastonbury v. Freedom of Information Commission*, 302 Conn. 1, 8 (2011). Nothing in Conn. Gen. Stat. § 51-49 or the Council’s other governing statutes empowers it to require the Judicial Branch or any other entity to provide a reasonable accommodation. In a related context, if the Council finds that a judge is suffering from a temporary mental infirmity, mental illness, drug dependency or addiction to alcohol, it “shall request the judge . . . to seek appropriate treatment,” but it is not required to order that treatment. Conn. Gen. Stat. § 51-45c(c). Similarly, when the Council considers a judicial disability retirement application, it has no responsibility for providing a reasonable accommodation nor any authority to order that any other entity provide such an accommodation. Rather, the Judicial Branch, as the judge’s employer, is responsible for determining whether to offer any such accommodation.

We trust that the foregoing responds to your inquiries.

Very truly yours,



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