STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

DECLARATORY RULING ON THE PETITION OF CENTRAL CONNECTICUT STATE UNIVERSITY

I. INTRODUCTION

On March 10, 2003, Central Connecticut State University (CCSU) filed a petition for a declaratory ruling from the Commission on Human Rights and Opportunities (CHRO). Under the authority of CONN. GEN. STAT. § 4-176 and CONN. AGENCIES REGS. § 46a-54-122 (1993), CCSU seeks a ruling from CHRO on the interpretation and application of CONN. GEN. STAT. § 46a-54 (16) regarding diversity training for all state employees. Attached to the petition was a section of the collective bargaining agreement regarding academic freedom, and a February 21, 2003 e-mail message from Dr. Benjamin Sevitch to Pearl Bartelt (Academic Affairs) and Susan Pease (Dean, College of Arts and Sciences) stating his refusal to attend diversity training.

At its regularly scheduled meeting on April 10, 2003, the CHRO Commissioners voted to issue a declaratory ruling on the issues presented. By letter dated April 11, 2003, CHRO notified CCSU of the Commission's decision to issue a declaratory ruling and invited submission of further arguments, documents or other supplemental supporting materials. Also, on the same date CHRO sent certified letters to the state's Community and Technical Colleges, the other state universities, relevant union representatives, and Dr.

Sevitch. The letters invited any applications for party or intervenor status, and the submission of any written arguments and/or supporting documents.

On April 28, 2003, Dr. Sevitch wrote to the CHRO to explain the purpose of his e-mail to CCSU officials. He stated that he was in favor of affirmative action. He did not characterize his protest as an issue of exercising his right to academic freedom, but rather his criticism of CCSU's lack of diversity, particularly in higher paying positions. On May 2, 2003, Dr. Sevitch sent CCSU an email, copied to CHRO, containing similar content.

On May 13, 2003, the CHRO published notice of the declaratory ruling proceedings in the Connecticut Law Journal. It invited interested persons or organizations to apply for intervenor or party status. CHRO received no applications for party or intervenor status. Moreover, outside of letters from Dr. Sevitch and a letter from Professor Jay Bergman, CHRO received nothing further in this matter.

II. FACTS PRESENTED

The facts presented to resolve these issues are limited. For the most part, the facts are contained in the petition and Dr. Sevitch's correspondence. In its petition the CCSU provided the following factual background for CHRO to examine:

> Central Connecticut State University employs approximately 930 full time employees including 415 faculty and approximately 470 part-time faculty. Consistent with the above-cited statutory mandate [CONN. GEN. STAT. § 46a-54 (16)], CCSU annually offers diversity training to all new employees and employees who have not otherwise attended said training for various reasons.

> It has been brought to the Administration's attention that faculty members have been counseled by their Union representative(s) that they do not have to attend said training. It is the Union's interpretation of the statute that the University is merely obligated to provide the training, and it is within the discretion of the individual employee whether they avail themselves of such training. At least one faculty member has adamantly refused to participate in diversity training.

In response, Dr. Sevitch stated:

> In its petition the University presents the issue as one of "Academic Freedom." For me, my refusal is based upon the fact that in my 28 years as a faculty member at Central, I know how diversity is a sham here, how the University can by-pass compliance with the spirit, and possibly even the laws concerning affirmative action.
>
> …I refused to attend diversity training for the following reasons, which have NOTHING to do with Academic Freedom. First, and most important, I do not interpret the relevant statute mandating attendance. It mandates that state agencies must offer these courses. Nowhere in the statute are their [sic] penalties for non-attendance, which indicates to me that the legislature did not intend that every state employee had to attend. While I am a professor, I am not in any supervisory capacity. Second, I have served on many Search committees and have even chaired one, so I am fully aware of non-discriminatory policies required by the State of Connecticut. Third, I believe that Central doesn't even abide by its own Affirmative Action Statement.

(Original emphasis).

III. PARTIES

The party to this declaratory proceeding is:

Central Connecticut State University
1615 Stanley Street
P.O. Box 4010
New Britain, CT 06050-4010

IV. ANALYSIS OF THE ISSUES PRESENTED BY CCSU'S PETITION FOR DECLARATORY RULING

A. Introduction

In its petition for declaratory ruling, CCSU has asked CHRO to issue a declaratory ruling on the following:

1. Whether the statutory mandate is satisfied when the Agency offers the training, but does not compel or mandate its employees to attend?

2. Would mandating employee attendance infringe upon faculty members' academic freedom, and therefore, First Amendment rights?

3. What is the consequence, if any, to the State Agency for failing to require all employees to attend diversity training?

B. The Legislature Intended § 46a-54 (16) to Require That State Employees Attend Diversity Training

1. Introduction

CONN. GEN. STAT § 46a-54 (16) was enacted by legislature in 1999. The statute states in relevant part:

> The Commission shall have the following powers and duties:
>
> . . .
>
> To require each state agency that employs one or more employees to (A) provide a minimum of three hours of diversity training and education (i) to all supervisory and nonsupervisory employees, not later than July 1, 2002, with priority for such training to supervisory employees, and (ii) to all newly hired supervisory and nonsupervisory employees, not later than six months after their assumption of a position with a state agency, with priority for such training to supervisory employees.

Resolution of the first issue presented necessarily calls for a statutory construction analysis. The approach to statutory construction has been altered recently by the Connecticut Supreme Court in State v. Courchesne, 262 Conn. 537 (2003). The Courchesne court abandoned the plain meaning rule and adopted the so-called Bender Rule which provides that:

> The process of statutory interpretation involves a reasoned search for the intention of the legislature....In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.

Id. at 578, n. 20, quoting Bender v. Bender, 258 Conn. 733, 741 (internal quotation marks and citations omitted). Although recognized by Courchesne as important, the language of the statute is not the sole source for discerning legislative intent. As the Court explained:

> [I]n performing the process of statutory interpretation, we do not follow the plain meaning rule in whatever formulation it may appear. We disagree with the plain meaning rule as a useful rubric for the process of statutory interpretation....
>
> [T]he rule is fundamentally inconsistent with the purposive and contextual nature of legislative language. Legislative language simply cannot be divorced from the purpose or purposes for which it was used and from its context....
>
> [T]he plain meaning rule is inherently self-contradictory. It is a misnomer to say...that, if the language is plain and unambiguous, there is no room for interpretation, because application of the statutory language to the facts of the case *is interpretation* of that language....
>
> The point of the *Bender* formulation, however, is that it requires the court, in *all* cases, to consider *all* of the relevant evidence bearing on the meaning of the language at issue. Thus, *Bender's* underlying premise is that, the more such evidence the court considers, the more likely it is that the court will arrive at a proper conclusion regarding that meaning.

Courchesne, 262 Conn. at 570, 575 (original emphasis).

In keeping with Courchesne, CHRO will look to various sources to determine the legislature's intent in enacting CONN. GEN. STAT. § 46a-54(16).

2. Statutory Language

The logical starting point pre or post Courchesne is the statute's language. "As with any issue of statutory construction, our initial guide is the language of the statute itself." Williams v CHRO, 257 Conn. 258, 270 (2001) (citation omitted). Generally, in construing statutes, words are to be given their plain and ordinary meaning. Oller v. Oller-Chiang, 230 Conn. 828, 848 (1994). At first glance the word "provide" would seem to require only that the agency offer the training without necessarily mandating training. To apply the plain language analysis in a vacuum, however, would do violence to the statutory scheme. Resort to rules of construction complementary to the "plain meaning' rule show that the legislature intended to do more than just politely suggest that employees attend diversity training. In construing statutes, it is presumed that a rational result was intended. Windham First District v. Windham, 208 Conn. 543, 553 (1988); Zapata v. Burns, 207 Conn. 496, 507 (1988). Moreover, statutes are to be read as contemplating rational, not bizarre, results. LeConche v. Elligers, 215 Conn. 701, 713 (1990). Finally, statutes are also to be read consistently, and as a single body of law. Paige v. Town Planning and Zoning Commission, 235 Conn. 448, 455 (1995); Galvin v. FOIC, 201 Conn. 448, 456 (1986).

Other provisions in the statute provide important clues to the intended meaning. For instance, the statute goes to the trouble of specifying the content of the training. In addition, it requires agencies to submit an annual report to CHRO concerning the status of diversity training and CHRO shall review such information for the purpose of submitting an annual summary to the General Assembly. The built in reporting mechanism and CHRO oversight are strong indicators that the legislature was not leaving attendance to volunteers. It would serve no purpose to legislate such a requirement but leave it to the individual discretion of employees whether to attend. Mandating an educational program with teachers but no students would be an absurd result.

The language in the statute provides that the CHRO "shall" have the power and duty to "require" each agency employing one or more employees to provide diversity training. To unequivocally delegate to the CHRO the power to require such training without requiring attendance defies logic and common sense. "We do not leave our common sense at home when interpreting a statute. As Justice Holmes put it in Roschen v. Ward, 279 U.S. 337, 339 (1929): '[T]here is no canon against using common sense in construing laws as saying what they obviously mean.' " Starr v. Commissioner of Environmental Protection, 226 Conn. 358, 401-02 (1993)(Berdon, J., dissenting), quoting State v. Roque, 190 Conn. 143, 153 (1983).

Other statutory language further illuminates the obligatory nature of the training. For example, the law provides that training of all employees must occur "**not later than** July 1, 2002" and that all newly hired employees must

receive training "**not later than** six months after their assumption of a position with a state agency." CONN. GEN. STAT. § 46a-54(16) (emphasis added).

Because the legislature is always presumed to have created a harmonious and consistent body of law, the proper construction of any statute must take into account the mandates of related statutes governing the same general subject matter. Common Fund v. Fairfield, 228 Conn. 375, 381 (1994); Felia v. Westport, 214 Conn. 181, 187 (1990). Included in the enactment of P.A. 99-180 was the addition of a new subsection (17), which states:

> To require each agency to submit information demonstrating its Compliance with subdivision (16) of this section as part of its affirmative action plan and to receive and investigate complaints concerning the failure of a state agency to comply with the requirements of subdivision (16) of this section;

Thus the legislature attached sanctions to the failure to comply with the diversity training requirement by authorizing the CHRO to investigate complaints, and to supervise compliance through the affirmative action plan review and approval process. Therefore, if found not in compliance with the diversity training requirement, CHRO may opt to disapprove CCSU's affirmative action plan [1] and/or receive and investigate any complaints filed concerning the failure to comply with § 46a-54 (16).[2] Consequences for noncompliance are further evidence that the legislature expected all state employees to attend diversity training. See Angelsea Productions, Inc. v. CHRO, 236 Conn. 681, 695 (1996) (a "reliable guide in determining whether a statutory provision is

[1] CCSU's affirmative action plan is scheduled for review by CHRO this September Commission Meeting.

[2] This answers the third issue raised in the petition regarding the consequences to the Agency for not requiring attendance by all employees.

directory or mandatory is whether the failure…to comply with its provisions results in…a penalty").

3. Legislative History

If legislative intent is not apparent from the text, it is easily found when looking to the statute's legislative history. Section 46a-54(16) is the enacted substitute for HB 5986 - "An Act Concerning Diversity Training For State Employees," considered for passage during the June 1999 Special Session. On June 2, 1999, an amendment to the bill was introduced that proposed to reduce the number of attendance hours required from seven to three and to create a standardized statewide training program. When asked to comment, Representative Green, a bill sponsor, had the following to say about attendance:

> Mr. Speaker, this bill would **require all state employees to be given diversity training** and this training would inform those in the State about federal and state discrimination and hate law crimes.

House Session, Proceedings 1999, vol. 42, pt 12, 4200 (emphasis supplied). Representative Belden, a fellow sponsor, added: "I think it's a very good step to bring **all of our state employees** on board with regard to the issue of diversity in the workplace." Id. at 4202 (added emphasis). When asked whether commissioners, deputy commissioners and legislators would "be a part" of the training, Representative Green responded, "Yes, **all those individuals** and persons that [the Commissioner of Administrative Services] named **would be subjected to this training**." Id. at 4203-04 (emphasis added). Finally, to the question of how many hours of training were then-required of state employees, Representative Green responded that two hours of sexual harassment training

was the extent of required training and that the bill, as proposed, would require three hours of diversity training. Id. at 4213-14.

Earlier, in the 1999 Regular Session, Representative Green commented on the nature of the attendance intended under the bill at a Labor and Public Employees Committee hearing.

> The state would have until January 1, 2001, to complete these training programs with priority on educating supervisory employees. **All new employees would have to be trained** within six months of their date of hire.

Joint Standing Committee Session, Labor and Public Employees, pt 3, 799 (emphasis added). [3]

Collectively, these comments by the bill's proponents dispel any suggestion that diversity training was designed to be voluntary. Indeed, statements of the sponsors of a bill deserve special attention. Angelsea, 236 Conn. 695 n.10, Bridgeport Hospital v. CHRO, 232 Conn. 91, 102 (1995).

In addition, the standard for determining whether a statute is mandatory or directory offers further guidance on this issue:

> [t]he test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience.... If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words.

Williams, 257 Conn. at 268 (quoting Doe v. Statewide Grievance Committee, 240 Conn. 671, 680-81, 694 A.2d 1218 (1997)). Here we are concerned with a

[3] Later, P.A. 01-53 extended the date for completion of training from January 1, 2001, to July 1, 2002, illustrating that the General Assembly wanted to ensure that agencies had sufficient time to fully comply with its mandate.

matter of substance rather than convenience. It can hardly be argued that something as important as diversity training is merely a matter of convenience. Accordingly, it follows that state agencies must not only provide diversity training but also employees **must** attend.

Further support for this result can be found in the General Assembly's historically consistent support of civil rights issues. The legislature saw fit early on to establish CHRO, the oldest civil rights agency in the nation. Over the years the General Assembly has continually expanded the sweep of Chapter 814c by adding protected classes. See, P.A. 59-145 (age), P.A. 67-426 (sex), P.A. 73-279 (physical disability), P.A. 75-446 (marital status), P.A. 78-148 (mental retardation), P.A. 79-480 (present or past history of mental disorder), P.A. 80-285 (sexual harassment), P.A. 90-330 (learning disability), P.A. 91-58 (sexual orientation), P.A. 98-180 (genetic information). Moreover, our affirmative action statutes and regulations espouse the goal of promoting a diverse, inclusive state work force. Section 46a-54(16) is another extension of this formidable body of law. As a remedial statute, Chapter 814c is designed to provide the widest protection possible to the enumerated protected classes and, in like fashion, foster a state workforce that embraces diversity. "The principles of statutory construction direct us to construe remedial statutes liberally in order to effectuate the legislature's intent." CHRO v. Sullivan Associates, 250 Conn. 763, 781 (1999) (internal punctuation and citations omitted), Civil Service Commission v. Trainor, 39 Conn. Sup. 528, 532 (App. Sess. Sup. Ct. 1983), error in the form of judgment, 195 Conn. 226 (1985).

In sum, the text of the statute coupled with the legislative history and the overall statutory scheme points in one direction: state agencies **must** provide diversity training and state employees **must** attend.

C. CHRO Declines to Decide the Issue Whether Exercise of the Right to Academic Freedom is a Valid Excuse for not Attending Diversity Training

In its petition, CCSU invites the CHRO to decide the role academic freedom plays in this matter. The CHRO will not rule on the substance of this issue for several reasons. First, given the incompleteness of the record, the issue is not ripe for decision. In its petition, CCSU claims that it has been brought to its attention that unions have been counseling faculty members that they do not have to attend diversity training. According to the petition: "It is the Union's interpretation of the statute that the University is merely obligated to provide the training, and it is within the discretion of the individual employee whether they avail themselves of such training." Petition at p. 2. It is unclear if this position is based on the union's interpretation of the statute or on the notion of academic freedom. In fact, Dr. Sevitch expressly disclaims any reliance on academic freedom and instead relies primarily on the argument that the plain language of the statute does not require attendance. And the letter from Professor Bergman relies solely on the latter with no mention of academic freedom.

It is well settled that legal tribunals do not decide issues unless squarely before them. There must be "an actual bona fide and substantial question or

issue in dispute…which requires settlement between the parties." Hurley Manufacturing Co. v. Bankers Life & Casualty Co., et al., 1993 Conn. Super. LEXIS 2888, quoting former Practice Book § 390 (currently § 17-55) regarding declaratory judgments, see also, Wilson, et al. v. Kelley et al., 224 Conn. 110, 116 (1992) (cautioning against transforming a declaratory judgment action "into a convenient route for procuring an advisory opinion on moot or abstract questions"). The CHRO likewise will not provide advisory opinions.

Secondly, assuming academic freedom is a claimed reason for refusal to attend diversity training, it is more properly dealt with in the context of the collective bargaining agreement. The collective bargaining agreement between CCSU and its faculty recognizes the right to academic freedom. Thus, there are potential contractual issues involved beyond the jurisdiction of CHRO to adjudicate. Suffice it to say that CHRO has decided the issue within its purview—whether diversity training is mandatory under CONN. GEN. STAT. § 46a-54 (16). If an employee at CCSU refuses to attend training, raising academic freedom as the reason or any other reason for that matter, CCSU as the employer must determine what steps to take to compel attendance. It would seem that consistent resistance by an employee would presumably invoke the contract grievance process, which is the more appropriate forum to resolve the issue.

Thirdly, to the extent that the concept of academic freedom draws its existence from the United States Constitution, courts, not administrative agencies, should decide such issues whenever possible. Administrative

agencies such as CHRO are tribunals of limited jurisdiction, Castro v. Viera, 207 Conn. 420, 429 (1988) and, as such, are not empowered to decide whether a statute is unconstitutional on its face. Caldor Inc. v. Thornton, 191 Conn. 336, 344 (1983), see also, Cumberland Farms, Inc. v. Town of Groton, 262 Conn. 45, 64 (It is a "well established common-law principle that administrative agencies lack the authority to determine constitutional questions"). It is somewhat less clear if agencies can decide the constitutionality of laws as applied. Id., n. 6. Nonetheless, it is instructive to consider that even courts eschew constitutional issues unless absolutely necessary to the decision of the case. Pi v. Delta, 175 Conn. 527, 534 (1978). Furthermore, our state Supreme Court has advised lower courts of limited jurisdiction to leave constitutional questions to higher appellate courts. Thornton, 191 Conn. at 344. CHRO is simply not the forum for adjudicating issues involving conflicts under the state or federal constitution.

IV. CONCLUSION

Based on the foregoing, the CHRO finds that CONN. GEN. STAT. § 46a-54(16) mandates state employees to attend diversity training. CCSU's failure to comply may result in the disapproval of its affirmative action plan and/or subject it to defending a CHRO complaint.

ADOPTED BY A MAJORITY VOTE OF THE COMMISSIONERS PRESENT AND VOTING AT A COMMISSION MEETING HELD ON AUGUST 14, 2003 IN HARTFORD, CONNECTICUT.

Attest: _____

Amalia Vazquez Bzdyra, Chairperson
Or duly authorized commissioner