

SUBJECT: Report on higher education employees serving as expert witnesses

COMMITTEE: Higher Education — favorable, without amendment

VOTE: 9 ayes — Rangel, Cuellar, F. Brown, Farabee, Goolsby, J. Jones, Morrison, E. Reyna, Wohlgemuth
0 nays

WITNESSES: For — None

Against — Scott Polikov, Texas Faculty Association; Charles Zucker, Texas Faculty Association

On — Spencer Reid, Texas General Land Office

BACKGROUND: The General Appropriations Act for fiscal 1998-99, enacted by the Legislature in 1997, prohibits appropriations from being spent for salary, benefits, or expenses for state employees serving as expert witnesses in a lawsuit against the state unless doing so on behalf of a state agency in litigation with another state agency (HB 1, 75th Legislature, Article 9, Rider 2(5)).

A Texas A&M University professor and the Texas Faculty Association filed suit against the state challenging the rider and the university policy implementing it. A federal district court ruled that the rider violated free speech rights granted to citizens under the First Amendment to the U.S. Constitution. The 5th U.S. Circuit Court of Appeals upheld the decision, in *Hoover v. Morales*, No. 97-50734 (5th Cir., 1999).

DIGEST: HB 746 would require the Higher Education Coordinating Board to report names of professional staff and faculty members of higher education institutions who serve as consulting or testifying expert witnesses in suits against the state. The coordinating board would have to provide the list to the governor, lieutenant governor, and speaker of the House of Representatives by November 1 of each year for such actions during the previous fiscal year. The president of each institution of higher education and the attorney general would be responsible for collecting the data for the coordinating board's

report.

In the report, the coordinating board would have to specify the amount of time the employee spent on the case, as well as the names, cause numbers, and outcomes of the cases, including:

- ! any judgments entered against the state;
- ! any prejudgment or post-judgment interest awarded against the state; and
- ! any attorney's fees the state was ordered to pay.

HB 746 would define "member of the faculty or professional staff of an institution of higher education" as a full-time employee who was not under the institution's classification schedule, and whose duties included teaching, research, administration, or the performance of professional services, including professional library services.

HB 746 would take effect September 1, 1999, and would direct the coordinating board to adopt rules for its implementation within 90 days. The first report would be due on November 1, 2000.

**SUPPORTERS
SAY:**

The purpose of HB 746 is to collect statewide data on potential conflicts of interest arising from testimony or consulting services provided by university faculty and staff in lawsuits against the state. It would allow top state officials to determine the amounts of such activity that take place and the cost of those lawsuits to the state.

There is an inherent conflict of interest in allowing employees paid with state tax dollars to testify or consult in cases that might cost the state millions of dollars. The inherent conflict is demonstrated in this example: one plaintiff against the state argued that "even the state's own employee" admitted that the state was wrong. However, when the 1997 expert-witness rider was ruled unconstitutional, the federal courts found the state did not demonstrate the kind of compelling interest that would warrant overriding an employee's First Amendment right to free speech. This bill is needed to gather the kind of information that would demonstrate a compelling interest.

Based on this data, the Legislature could write a law that would pass constitutional muster. In addition, collecting this data could demonstrate a

correlation between judgments against the state and particular state experts who testified against the state. That link by itself may provide the compelling state interest required by the court.

The bill would require university presidents to collect the information and forward it to the Texas Higher Education Coordinating Board. The board would double check the report with information compiled by the attorney general and forward it to the governor and the Legislature.

HB 746 would not require a university employee to report the subject matter of a consultation. However, most universities already require professors to obtain written or verbal permission for outside activities from their immediate supervisor. If the permission is in writing, then it already is subject to the Open Records Act. However, that information is not reported to the university's central administration. Thus, during the interim, the House General Investigating Committee was unable to compile reliable data on such conflicts of interest.

Professors are sought as expert witnesses and consultants because of their credibility. That credibility is, in part, due to the prestige of the tax-supported university for which they work. Furthermore, many of professors establish their expert reputations as a result of research projects using staff and facilities paid for by the state.

**OPPONENTS
SAY:**

The information collected under HB 746 would have the effect of intimidating professors and preventing them from serving as experts or consultants. The bill would have a chilling effect on both freedom of speech and the right to privacy. Experts, private citizens, and corporations could be affected due to the type of information collected and the manner in which it would be disseminated.

The bill would require faculty or staff members to report more information than the law requires to be part of public record. Specifically, the bill would require expert witnesses to divulge all their consulting activities related to court cases. At present, unless consultants actually testify in court or their work is cited in court, their work is not required to be part of the court's public record.

Once this type of information was reported to the top officials of the state, it

would become public. Under the rules of civil procedure, lawyers do not have to reveal names of their consultants to opposing counsel or the court unless that consultant testifies directly or indirectly through another witness. By requiring this type of report, the state itself could gain an unfair advantage in litigation. While names of consultants for parties opposing the state would be public record, names of consultants for the state would not. In effect, this bill would change the rules of civil procedure to punish litigants.

The data collected under HB 746 would not demonstrate a state interest compelling enough to limit free speech rights. The appeals court clearly stated that the state's only compelling interest is as an employer. Employers may not restrict free speech rights of employees on public matters unless the activity affects job performance. No matter how strong the correlation between a professor's testimony and judgments against the state, that correlation still would not be a compelling state interest required by the court.

The requirement that professors report to university administration and top state officials on any consulting activities would have a chilling effect on the sharing of information. It is unclear how broadly the reporting requirements would apply and arguably could cover even informal conversations.

HB 746 is not needed because a mechanism already is in place to determine whether a direct conflict of interest exists. Professors already must obtain permission from supervisors to engage in various outside activities. This procedure ensures that outside activities do not conflict with job duties.

NOTES:

Article 9, Rider 24 in CSHB 1 by Junell, the general appropriations bill for fiscal 2000-01, would prohibit appropriations to be spent for salary, benefits, or expenses of any state employee serving as an expert witness or consultant in litigation against the state unless serving on behalf of a state agency in litigation against another state agency or while on annual leave, compensatory leave, or leave without pay and subject to the procedures established by the employee's agency of employment.