

PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION

**OFFICE OF INTERNAL AUDIT AND RISK ASSESSMENT
ADMINISTRATIVE DIRECTIVE 1991-06.01**

Procedures for Conducting Investigations

I. Purpose

The purpose of the administrative directive is to communicate the State System's responsibilities for the investigation of alleged fraudulent or irregular activities and provide specific instructions regarding appropriate action in cases of suspected improprieties.

In addition, the procedures outlined in the directive will be used to investigate allegations of employee conflicts of interest or ethics violations involving the use of one's public position for personal gain or advantage. The directive does not apply to members of the State System's Board of Governors, Councils of Trustees, or external board members of affiliated organizations who are not employees of the State System.

The directive will help ensure investigations are conducted in a fair manner, both to the System and the employee; actions taken are consistent from case to case; investigations are completed and actions taken in a timely manner; and appropriate personnel are adequately informed on the status of ongoing investigations.

Investigations shall be conducted and reported in a manner that:

- Fulfills the State System's legal and fiduciary responsibilities;
- Minimizes loss and promotes recovery of System resources;
- Identifies controls that should be strengthened to reduce future vulnerability regarding misuse of System resources;
- Protects the rights of the accused, the interests of those making allegations, and the public trust;
- Provides confidentiality compatible with an effective response and applicable reporting requirements; and
- Guards against real or apparent conflicts of interest.

II. Definitions

Fraudulent or Irregular Activities

Fraudulent or irregular activities represent instances where a university or Office of the Chancellor employee intentionally uses or abuses their position to obtain or withhold property of the Commonwealth, the State System or an affiliated organization.

Examples of fraud or misappropriation of assets include, but are not limited to: theft or embezzlement of cash, equipment or supplies; falsification of official records such as time sheets, travel expense reports, student records, etc.

Examples of irregular activities that may be considered a misuse of resources are: performing or directing employees to perform non-System work on System time; and using System facilities or property for personal gain or any unauthorized use.

Affiliated Organization

An affiliated organization may be an incorporated or unincorporated entity associated with a State System university or the Office of the Chancellor under the policies set forth by the Board of Governors, including 1985-04, *University External Financial Support*, 1986-02-A, *Investment*, and others as may be added.

Examples of affiliated organizations include charitable foundations, student associations, bookstores, childcare centers, alumni associations, external booster groups, and similar entities to the extent they receive university funds or support.

III. Scope

The directive covers university and Office of the Chancellor operations and affiliated organizations where State System or Commonwealth resources apply. Agreements or memorandums of understanding that do not address the review of or access to records of affiliated organizations by university or Office of the Chancellor personnel should be modified to allow for this involvement, to the extent university or Commonwealth resources are used to support the operations, on an as-needed basis. The directive is applicable in instances where either the dollar amount or type of conduct warrants an investigation.

This directive shall not supersede present campus procedures related to the investigation of fraudulent or irregular activities. Universities, however, are encouraged to develop their own guidelines (or adopt the System's administrative directive by analogy) if they do not have formal local procedures for conducting investigations.

IV. Responsibility

University and Office of the Chancellor administrators are responsible for safeguarding State System resources by (1) establishing and maintaining sound business controls designed to deter and detect potential misuse; (2) taking action to minimize financial loss when misuse occurs; and (3) correcting abuses. Each administrator should be familiar with different types of possible improprieties and alert for any indication that a defalcation, misappropriation or irregularity is or was in existence in their area. As soon as an impropriety is suspected, it must be promptly reported.

The fiscal vice president and vice chancellor for finance and administration shall be the administrator to whom such improprieties are reported. They, in turn, will report the matter to the University President and Chancellor, respectively. If a suspected impropriety involves the President, the fiscal vice president in consultation with university legal counsel will report the details to the Chancellor. If the Chancellor is suspected of an impropriety, the vice chancellor for finance and administration in consultation with chief legal counsel will report the matter to the chairperson of the Board of Governors. If the fiscal vice president or vice chancellor for finance and administration is under suspicion, the University President will report the matter to the Chancellor and the Chancellor to the chairperson of the Board of Governors, respectively.

If a suspected impropriety involves a member of the Office of Internal Audit and Risk Assessment, the Chancellor will report the matter to the chairperson of the Board of Governors. In the event a complaint involves an attorney other than chief legal counsel, referral will first go to chief counsel. If a complaint is lodged against chief legal counsel, the Chancellor will refer the matter to the Office of General Counsel, Commonwealth of Pennsylvania.

V. Notification

Investigations of known or suspected misuse of State System resources may arise because of a variety of reasons, e.g., questionable circumstances discovered by administrators, allegations made by employees, or facts disclosed during the course of routine audits. Allegations may also be received anonymously or otherwise from external parties, including individuals, public agencies or similar entities.

A University President has three alternatives under this directive in handling and reporting alleged misuse of State System resources or irregular activities. If the matter is considered minor in nature and can be handled through oral discussion, the University President may conclude resolution informally without a written report. Under more serious situations, the University President may either handle the investigation locally or refer the matter to the Office of the Chancellor. In both cases, a formal report shall be prepared.

V. Notification (continued)

When sufficient facts and circumstances exist to create a reasonable suspicion that fraud or irregular activities have occurred, the University President shall direct the fiscal vice president to complete a detailed “Incident Report” (*Exhibit A*).

The report must identify applicable rules, regulations and procedures suspected of being violated. The University President shall have the ability to receive the report and conduct a local preliminary investigation, in accordance with campus policies and procedures.

Only in the most adverse circumstances should the matter be referred to the Office of the Chancellor for investigation. Instances when referral may be necessary include (1) a conflict of interest at the campus level; (2) the issue is of such magnitude or complexity it is beyond the capacity of local administration; or (3) the matter could bring ill repute upon the entire State System. Any formal investigation conducted under the auspices of this directive, including those performed locally, shall be reported at the outset to the Chancellor, etc., as required by the “Incident Report.” Personnel in the Office of the Chancellor, while assuring campus investigations remain confidential, are in a position to assess whether the issue is significant enough to merit System-level intervention or advice.

If a University President or the Chancellor is the person alleged to have engaged in improper activity, he/she will be removed from the oversight process. In matters concerning the Chancellor, the System’s Director of the Office of Internal Audit and Risk Assessment will report directly to the chairperson of the Board of Governors.

At any point during the investigation, if it is deemed necessary, the Chancellor and chief legal counsel, in consultation with other System officials will make a decision on referral to the appropriate external agency.

The Office of the Chancellor’s press secretary or university’s public relations representative, in consultation with other appropriate System officials, will be responsible for handling all media inquiries and relations during the course of the investigation.

VI. Initial Review and Determination

Upon referral and review of suspected irregularities or improprieties, if the need exists, the Chancellor, in consultation with the University President, chief legal counsel and other appropriate System officials, will define the scope and nature of the allegations and decide whether the investigation should be conducted internally (by a special investigative team) or externally (by an independent auditor, consultant, or an outside law enforcement agency). University personnel will be involved in investigations relating to campus activities.

VI. Initial Review and Determination (continued)

When appropriate, immediate action shall be taken to secure and protect from destruction or alteration all pertinent accounting and administrative records. The Chancellor or University President may place an employee(s) involved in known or suspected misuse of State System resources on appropriate leave under the terms of the applicable collective bargaining agreement or Board of Governors policy during the investigation. Placing an employee on leave may be proper when there is evidence he/she is responsible for misuse of resources and his/her continued presence at work may interfere with the investigation or further expose State System property to loss through possible misuse.

VII. Internal Investigation Procedures

When authorized by the Chancellor or a University President, the System's Director of the Office of Internal Audit and Risk Assessment or the President's designee, for a campus investigation, will coordinate an investigative team. Depending on the particular situation, the composition of the team may include representation from the following areas or analogous positions on campus:

- Office of Internal Audit and Risk Assessment
- University Legal Counsel
- Office of the Chancellor Employee and Labor Relations
- University Personnel (Public Safety, etc.)
- Outside Experts

Following are the specific roles of each representative on the investigative team.

Office of Internal Audit and Risk Assessment

The Office of Internal Audit and Risk Assessment will coordinate overall management of the investigation to determine whether there is reason to believe fraud or irregular activities have occurred and, if so, identify individuals responsible for the improprieties. Internal Review will also provide expertise on financial matters, including recommendations to strengthen accounting and administrative controls to reduce future vulnerability regarding misuse of System resources.

University Legal Counsel

University attorneys will provide advice on legal matters and serve as liaison between the State System and external agencies. Legal counsel will be consulted when questions arise regarding the rights of an employee under investigation. They will also interpret the State's *Ethics Law*, *Adverse Interest Act*, and other statutes related to investigations. See **Exhibit B** for complete details on the "Role of Legal Counsel" within the State System of Higher Education. An attorney will be assigned to each case.

VII. Internal Investigation Procedures (continued)

Office of the Chancellor Employee and Labor Relations

Employee and Labor Relations personnel will provide technical expertise concerning the various responsibilities and obligations applicable in each case under the pertinent collective bargaining agreements and as appropriate for management employees. In particular, this office will provide specific information regarding interactions with bargaining unit employees and their representatives, such as but not limited to, disciplinary matters.

University Public Safety

Campus police will assist in fraud investigations by utilizing their contacts with local authorities, other law enforcement agencies, and area merchants to gather pertinent information. Public Safety will provide suggested criminal investigation procedures and, when necessary, obtain assistance from external law enforcement agencies.

Outside Experts

Outside experts will be called upon to provide expertise and assistance in specific situations as necessary or required.

VIII. Investigation

Representatives of the investigative team shall treat all matters pertaining to known or suspected misuse of State System resources in strict confidence. Each System employee involved in the conduct of an investigation shall inform individuals contacted to keep all information regarding a suspected fraud or irregular activity confidential. Any employee questioned in an investigation shall be bound by this confidentiality.

Internal investigations should proceed as follows:

- A. The System's charging official (Chancellor or University President) shall define in writing the scope and nature of the allegations involved in the investigation. An initial meeting of the investigative team will then be held to review and discuss the suspected fraud or irregularities and define the specific roles of each team member.
- B. Periodic meetings shall be scheduled to discuss progress on the investigation. If the investigative team believes the scope needs to be broadened, they will request the appropriate charging official to formally redefine it.
- C. The investigative team shall have authority to (1) interview System employees, contractors and students; (2) inspect facilities and records; and (3) request information they deem relevant and necessary to the completion of the investigation. Individuals who are interviewed by the investigative team, or a member thereof, shall have the opportunity to have an advisor present. The role of the advisor shall be to provide advice and counsel to the interviewee during the investigative meeting. The advisor shall not act as a representative or advocate for the interviewee, except where provided for under relevant collective bargaining agreements or law.
- D. Legal counsel will provide ongoing advice to investigators regarding the rights of employees, especially when individuals are at risk of self-incrimination.
- E. A draft report of the investigation's findings and recommendations shall be prepared and reviewed with the investigative team and other appropriate State System officials.
- F. The final report will be distributed to appropriate university and Office of the Chancellor officials, including chief legal counsel.

IX. Recommendations

A. External referral:

Upon completion of the investigation, the University President or Chancellor, in consultation with other System officials, will decide whether the review is conclusive and the findings warrant forwarding the matter to an appropriate law enforcement agency for further disposition. Chief legal counsel will make a recommendation through the Chancellor to the Board of Governors as to the appropriate referral entity and take the necessary steps to effect the referral.

B. Internal actions:

Appropriate corrective action or discipline may be taken in conformance with applicable personnel policies and collective bargaining agreements. Disciplinary procedures, under the labor agreements, shall be initiated by the proper university or Office of the Chancellor official. Such disciplinary actions should be initiated in consultation with the Office of Employee and Labor Relations.

X. Authority

The Office of Internal Audit and Risk Assessment's administrative directive 1991-06.01, *Procedures for Conducting Investigations*, is hereby approved.

James H. McCormick
James H. McCormick, Chancellor
State System of Higher Education
Commonwealth of Pennsylvania

12/23/97
Date

(Directive amended based on BOG policy 1991-06-A dated July 16, 2009)

**PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION
SUSPECTED FRAUDULENT OR IRREGULAR ACTIVITIES
INCIDENT REPORT**

University _____ Office/Program _____

Prepared by _____ Title _____ Date _____

Description of incident and related parties:

Were parties outside the University/Office of the Chancellor involved?

Was there financial loss? Yes No If yes, estimated \$ _____

Are System funds involved? Yes No If not, specify _____

Are System employees involved? Yes No If not, specify _____

Rules, regulations and procedures violated

Parties notified at the University/Office of the Chancellor (other than those required below)

Required distribution:

- Chancellor
- University President
- Chief Legal Counsel
- System Director of the Office of Internal Audit and Risk Assessment

**THE ROLE OF LEGAL COUNSEL
WITHIN THE PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION,
I.E., WHO IS THE CLIENT?**

The purpose of this statement is to address several issues regarding access to and representation by Legal Counsel within the State System of Higher Education. The questions have arisen from an interest on the part of the fourteen university presidents in clarifying the role of the Office of Internal Audit and Risk Assessment and Legal Counsel in the conduct of internal investigations of university programs.

The role of Legal Counsel within the State System is largely governed by constitutional and statutory law. The Commonwealth Attorneys Act, 71 P.S. §732-101 et seq., vests the authority to conduct legal affairs in the Office of General Counsel. The General Counsel appoints the Chief Legal Counsel, who administers legal affairs for the State System. State System attorneys and outside legal counsel are also appointed by the General Counsel, with the advice of the Chief Legal Counsel.

The Office of Attorney General also plays a role in State System legal affairs. The Attorney General reviews and approves all university and State System contracts for amounts in excess of \$1,500. In addition, the Attorney General represents the State System in civil and criminal litigation, as well as various other legal matters. On occasion the Attorney General will delegate a case to the State System for representation by agency counsel.

The State System's legal office is organized in a hierarchical and geographical matrix that reflects the complex set of duties and responsibilities that are vested in the State System by Act 188, 24 P.S. §20 -2001-A, et seq. Each attorney is assigned to represent two State System universities. The Chief Legal Counsel represents the Commission of Presidents, Office of the Chancellor, and the Board of Governors. In addition, the Chief Legal Counsel may at times work directly with presidents and Councils of Trustees, especially in matters involving the Ethics Act, 65 P.S. §401 et seq., or the Adverse Interest Law, 71 P.S. 776.1 et seq.

As a result of the hierarchical structure that represents State System governance, there are times when the client may become confused as to the role of Legal Counsel, especially in situations when one or more bodies may appear to have conflicting interests. This dilemma represents the classic case of "Who is the Client?" which has become familiar to those who practice in the corporate or government environment.

The general response to the question, “Who is the Client?” is the entity. When an attorney represents a corporate body, the corporation is the client, regardless of whether the attorney happens to report to or work with a branch manager, vice president or the Board of Directors. When the interests of parts of the corporation conflict, the attorney owes his/her duty to the highest authority within the corporate structure. The duty of loyalty will permit nothing less.

Likewise, in the State System, the duty of the attorney is to represent the State System, which is one body corporate and politic, 24 P.S. §20201-A. Regardless of the nature of the attorney’s assignment, i.e., to represent a university or board, the attorney represents the entity, i.e., the State System. When a university and a higher authority have a conflict of interests or positions, the attorney must always provide legal advice, which presents the best interests of the State System.

It must be recognized that the duty to represent the entity may at times create tension or difficulty between the attorney and the officer or authority within the entity that the attorney represents. This is a well-known problem for corporate lawyers and is, to some extent, unavoidable.

In the case of the State System, the university counsel is required to offer his/her best efforts to provide legal advice and representation to the client university and its president. When the Office of Internal Audit and Risk Assessment is asked to investigate a university officer or program, the university attorney may continue to provide advice regarding official matters to the president and university officers so long as such is consistent with the attorney’s duty to the State System and ultimately, the Commonwealth of Pennsylvania. In addition, the attorney cannot provide private advice or counsel to the president or university officials.

It is important that both attorney and client are candid with one another as they approach issues which may require an adjustment of their normal relationship. The university counsel should be alert to the possibility that a client could become a target of a State System or Commonwealth investigation. If the attorney identifies a situation where there may be a conflict between the interests of the State System and the official or employee, the attorney should, after consultation with Chief Legal Counsel, advise the official/employee of the potential conflict and of the employee’s legal rights in the situation.

Should a situation arise where a civil or criminal action is brought against a Commonwealth officer or employee, the rights of said individuals to legal representation, indemnification and reimbursement of private legal expenses are governed by regulations set forth in 4 Pa. Code §§ 39.1- 39.4. In summary, these regulations provide for the following:

I. Civil Suits

Unintentional Conduct

The Commonwealth of Pennsylvania provides legal counsel to defend officers/employees who are sued for negligence or other unintentional conduct while acting within the scope of their authority. The Commonwealth also provides indemnification for judgments in the amount of \$250,000 per officer/employee. Amounts in excess of \$250,000 are absorbed by the State System.

Intentional Conduct

In cases where malicious or intentional conduct is alleged, other than Federal civil rights suits, the Office of Attorney General will provide representation if it is determined that an officer/employee acted in good faith and within the scope of his/her authority. In such cases, indemnification will also be provided. On the other hand, if it is determined that an officer/employee acted outside of the scope of his/her authority, or acted in a bad faith or malicious fashion, then neither defense nor indemnification will ordinarily be provided.

Federal Civil Rights Suits

In suits involving alleged violations of Federal civil rights laws, the Commonwealth will ordinarily not provide defense nor indemnification to any officer/employee who acted outside the scope of his/her authority. Any officer/employee in such a situation should strongly consider securing private counsel, because the ground for defending the suit will be that he/she was not acting under color of state law. (This is to say that the officer/employee's acts were outside of the scope of his/her official authority.) The successful use of this defense in Federal court could be used against the officer/employee in any subsequent suit brought against him/her in state court, so that he/she would be estopped from denying that his/her actions were not within the scope of his/her official authority. The Commonwealth would not provide legal representation or indemnification in any subsequent state court action.

Other Reasons for Denial of Representation

Any officer/employee who is sued in his/her official capacity is required to forward whatever papers have been served immediately to the Chief Legal Counsel through the office of the president or the Office of the Chancellor. Failure to act immediately will result in a denial of representation and indemnification. Furthermore, regardless of the nature of a civil case, legal representation and indemnification will be denied if, prior to litigation, an officer/employee disregards and acts contrary to the advice of Legal Counsel. Finally, after litigation commences, representation will be terminated if an officer/employee refuses to cooperate with Legal Counsel. If this were to occur, the officer/employee would have to fund the costs of litigation, including the costs of any judgment.

II. Criminal Prosecutions

The Commonwealth does not provide nor fund legal representation to defend officers/employees against criminal charges for alleged official misconduct. This would include alleged violations of the penal provisions of the *Ethics Act* or the *Adverse Interest Law*.

III. Reimbursement of Fees When Representation Has Been Denied

When an officer/employee has been denied legal representation in civil or criminal cases and subsequently prevails in the action, said individual may apply for reimbursement of reasonable amounts of counsel's fees. The term "prevail" in civil matters means an entry of final order of judgment against the other party and in favor of the officer/employee. In criminal cases it means an acquittal by means of a jury verdict or a judicial finding. Requests for reimbursement are to be directed to the Chief Legal Counsel who acts as a representative of the General Counsel in such matters.

It is the purpose of the Legal Office of the State System to offer legal advice, representation and support to the State System and its officers and employees. If you should have any questions or concerns regarding your rights, duties or obligations as a State System employee, please direct them to your university attorney or the Chief Legal Counsel.

Robert A. Mulle
Revised 12/10/97

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