OPINION NO. 75-044

Syllabus:

1. The personal liability of employees of a state university has not been changed by the enactment of R.C. Chapter 2743 (the Court of Claims Act).

2. The enactment of R.C. Chapter 2743 has not changed the qualified official immunity which public officers previously possessed under Ohio case law.

3. Members of a board of trustees and presidents, vice-presidents and deans of a state university, insofar as they exercise the authority of the board of trustees, possess a qualified immunity from personal liability for discretionary acts committed in good faith and within the scope of their employment.

4. In the absence of specific statutory authorization a state employee or officer against whom a judgment is found for his wrongful acts committed within the scope of his employment does not have a right of indemnification against the state and must himself pay the judgment.

To: Richard D. Ruppert, M.D., Vice-Chancellor for Health Affairs, Columbus, Ohio

By: William J. Brown, Attorney General, June 25, 1975

I have betore me your request for my opinion which reads as follows:

> "The recent passage of Amended Substitute House Bill 800, which creates the new Court of Claims, establishes the fact that state universities are no longer protected by the doctrine of sovereign immunity. Because of this newly-created liability of the institutions, I respectfully ask your formal opinion on the following questions.

"(1) Has the passage of the new legislation (Am. Sub. H. B. 800) resulted in any change in the liability of an individual employed by a state university? Is the individual more or less liable now, or is there no change in his status?

"(2) With the passage of the new legislation (Am. Sub. H. B. 800), what is the immunity of the members of the Boards of Trustees of a university or college as they act in good faith in discharging their duties as members of a board? Is there a doctrine of 'official immunity' in Ohio for the individual members of the Board of Trustees? If so, what is the immunity for presidents of institutions, vice-presidents of institutions, deans of institutions, etc.?

"(3) If a judgment is found against an individual while an employee of the state, does the individual have an action against the state for the amount of the judgment by way of indemnity or another mechanism?

"(4) If judgment is found against a supervisor and a student, will the state pay the claim or are the student and supervisor individually responsible for the claim?"

Your first question refers to whether the enactment of Amended Substitute House Bill No. 800 has changed the status of personal liability for individuals employed by a state university. I conclude that Amended Substitute House Bill 800 does not change personal liability of university employees under state law.

Your questions deal with the effect of the Court of Claims Act. This Act makes no mention of and does not change the liability of state universities and employees under federal laws, such as the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983. Liability of university employees under federal law is not addressed in this opinion.

As you have correctly stated, the doctrine of sovereign immunity is no longer a defense to a suit brought in the Court of Claims against a state university. Effective January 1, 1975, the General Assembly waived the state's immunity for certain actions brought against the state. Amended Substitute House Bill 800, as codified in R.C. 2743.02(A), provides:

> "The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability."

The term "state," within the meaning of Chapter 2743, is defined as the:

> "[s]tate of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions." § 2743.01(A), R.C.

A state university, as an institution or other instrumentality, is within the definition of the term "state." See also, Wolfe v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959).

There are certain instances where the personal liability of state employees may be determined in the Court of Claims, such as cases that are removed from other state courts to the Court of Claims pursuant to R.C. 2743.03(E). If the liability of a state employee is determined in the Court of Claims, the employee would have available any defenses or immunities that were available prior to the enactment of Chapter 2743, since the same rules of law apply in the Court of Claims as apply in other state courts. R.C. 2743.02(A). Accordingly, Chapter 2743 merely provides an additional forum where the personal liability of state employees in certain cases may be determined in the same manner as it would be in other state courts.

The first part of your second question refers to the effect of Chapter 2743 on the doctrine of so-called "official immunity" as it may apply to university officials, such as when the individual members of a board of trustees are sued in their personal or individual capacities for actions taken within the scope of their authority. The only waiver of immunity contained in Chapter 2743 is for those actions that are against the "state" as defined by R.C. 2743.01(A). Case law in Ohio has established a doctrine of official or governmental immunity to protect state employees and officials under certain circumstances from personal liability for actions within the scope of their employment. There is no waiver in Chapter 2743 for whatever immunity exists under prior case law for state officials or employees. I must caution, however, that prior judicial decisions in Ohio have not defined the doctrine of official immunity in detail.

Without judicial decisions to the contrary, it is my opinion that the defense of official immunity is available to governmental officials to the same extent now as it was before the enactment of Chapter 2743.

This conclusion is supported by decisions of courts in other jurisdictions that have held that a waiver of a state's sovereign immunity does not affect the official immunity of governmental employees. Smith v. Cooper, 475 P.2d 78 (Ore. 1970); Muskopf v. Corning Hospital, 55 Cal.2d 211, 359 P.2d 457 (1969).

The second part of your second question refers to the nature and extent of the doctrine of official immunity under Ohio law. I have previously considered the nature of the doctrine of official immunity in a previous opinion, Ohio Attorney General opinion 71-071 (1971). I reaffirm the position taken in that opinion:

> "The immunity from personal liability of a public officer who, acting within the scope of his authority and in good faith, fails to perform properly a duty involving judgment and discretion, was settled by Gregory v. Small, 39 Ohio St. 346 (1883), and Thomas

v. Wilton, 40 Ohio St. 516 (1884). In Gregory v. Small, supra, an ex-teacher sued the local directors of a school district for firing him in breach of contract. The court held that he had no right of action, even if there had been a valid employment contract and the firing was not for sufficient cause, unless the directors acted with 'corrupt intent.' In Thomas v. Wilton, supra, the plaintiff contended that the county commissioners had damaged his business by delay in reconstructing a bridge to which plaintiff's mill-dam was attached. The court held:

> "'County commissioners, who act in their official capacity in good faith and in the honest discharge of official duty, cannot be held to personally respond in damages.'"

The principle established in these early cases has been applied more recently. Weirzbicki v. Carmichael, 118 Ohio App. 239, 187 N.E.2d 184 (1963); Shade v. Bowers, 93 Ohio L. Abs. 463, 199 N.E.2d 131 (1962); Rowley v. Ferguson, 37 Ohio L. Abs. 531, 48 N.E.2d 243 (1943).

The immunity of public officers under Ohio law is not absolute, but is qualified. Immunity exists only for discretionary acts committed in good faith and within the scope of authority.

The remaining issue in your second question is to what extent the doctrine of official immunity under Ohio law applies to certain employees of a state university, specifically the individual members of a board of trustees and the president, vice-presidents and deans of a state university. The status of the officer or employee sued must be examined to determine whether the doctrine of immunity applies. The clearest case for application of official immunity occurs when the official or employee is determined to be a public officer. I again refer to Ohio Attorney General Opinion 71-071 (1971) where the definition of the term "public officer" has previously been considered:

> "The definition of 'public officer,' as opposed to other types of public employment, is widely discussed in Ohio case law. In Opinion No. 3171, Opinions of the Attorney General for 1938, my predecessor advised that membership on the Unemployment Relief Study Commission is a public office, under the general rule which he states as follows:
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> > "'There is no hard, fast rule by which it may be determined whether or not a given public employment may be a public office. The meaning of the term 'office' as used in the Constitution has been considered by the Supreme Court on numerous occasions. One of the clearest statements of what constitutes a public office is contained in the opinion of such court in the case of State, ex rel. v. Commissioners, 95 O.S. 157, wherein the Court said at pages 159 and 160:
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> > > "'The usual criteria in determining whether a position is a

> public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary. * * * The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment. * * * It is no longer an open question in this state that to constitute a public office, * * * it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law.'

"'The term, 'sovereignty of the state,' is explained in the case cited by my predecessor, State, ex rel. v. Commissioners, 95 Ohio St. 157, at pages 160-161 (1917), in the following language:'

> "'In all of these cases it is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state. But as stated by Spear, C. J., in The State, ex rel. Hogan, Atty. Gen., etc. v. Hunt, 84 Ohio St., at page 149, without a satisfactory definition of what is the 'sovereignty of the country' the term 'office' is not adequately defined. If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the

> latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.'
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> "'The Court held in that case that a clerk was a mere employee of a board of county commissioners, who themselves had the real "sovereign power of the state," and consequently that he did not have the independent power characteristic of a public officer.'
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> "'The fundamental difference between public officers and other public employees is clearly defined in Opinion No. 65-150, Opinions of the Attorney General for 1965. After quoting from State, ex rel. v. Commissioners, supra, State, ex rel. v. Jennings, 57 Ohio St. 415 (1898), and 44 O. Jur.2d 503-506, that Opinions says:'
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> > "'The basic philosophy apparent in the above quoted text is that certain positions in public employment, primarily because of the nature of the duties and the delegation of sovereign powers involved, are of such a character that they bear a direct trust relationship to the public; while other positions in public employment are nothing more than that because there is lacking sufficient authority to exercise sovereign power independent of supervision and control. In other words, public officers are responsible directly to the public, but public employees are answerable directly to their ultimate superiors, who are the public officers.'
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> "'A further example of a mere public employee is provided by Scofield v. Strain, 142 Ohio St. 290, 270 Ohio Op. 236 (1943), which holds that a health commissioner appointed by a board of health of a city health district is not a public officer, because he is supervised and directed by the board of health, which appoints him and gives him most of his powers. In contrast, the powers of a public officer are statutory and exercised independently.'"

The members of a state university board of trustees in Ohio are appointed by the governor with the advice and consent of the senate. They are charged by statute with the government, control and supervision of the various state universities. E.g., R.C. 3335.01, et seq. In Thomas v. Ohio State University, 195 U.S. 207 (1904), the United States Supreme Court held that the Board of Trustees of the Ohio State University are holders of public office. Therefore, I find and you are so advised that members of a board of trustees of a state university are public officers.

Although the duties of the president, vice-presidents and

deans of a state university are not directly prescribed by statute, the realities of their positions in a modern university lead me to conclude that they are also public officers. A board of trustees is vested by statute with the responsibility of governing a state university. The trustees, however, serve without compensation. E.g., R.C. 3335.02. Where the actual control and administration of a university is dependent upon the day-to-day decisions rendered by the university's executive and administrative officers, these officers are entrusted with the actual government of the university. Cf. West v. Miami University, 41 Ohio App. 367, 181 N.E. 144 (1931). Insofar as these officers are entrusted with the actual government of the university, they are acting for the board of trustees. As a result, they are exercising powers of sovereignty pursuant to the direction of the trustees. It is therefore my opinion that where presidents, vice-presidents and deans of state universities in Ohio function as the administrative officers of the universities, they are public officers of the state and may assert the defense of qualified official immunity.

I must caution that the availability of the defense of "official or governmental immunity" is dependent on the individual facts established in each case. In each case, to determine the applicability and scope of the qualified defense of official immunity, it may be necessary to determine: (1) what wrong is complained of; (2) whether the officer has discretion to act in that area; (3) whether the officer exercised his discretion in that area, while acting within the scope of his employment with the state; and (4) whether the officer has acted in good faith.

The third and fourth questions in your request address the problem of whether the state, as the employer, will pay a judgment entered against a university employee in his personal or individual capacity, when no wrongdoing has been alleged against the state. The answer to both of these questions is no.

It is a settled matter of law in Ohio that an employee is liable for his own wrongdoings. The employer may be vicariously liable for the wrongdoings of the employee committed within the scope of his employment, but such liability is merely secondary. Stated another way, an employer may be liable to third persons injured by his employee's actions by reason of the employer-employee relationship. However, the fact that the employer may be liable secondarily does not relieve the employee of his own liability which is primary. Paragraph one of the syllabus in Losito v. Kruse, 136 Ohio St. 183 (1940), states as follows:

> "When under the doctrine of respondeat superior, a master becomes liable in damages for personal injuries caused solely by the negligent act of his servant, the latter is primarily liable and the former secondarily liable to the injured party; and if the master is obliged to respond in damages by reason of such liability, he will be subrogated to the right of the injured party and may recover his loss from the servant, the one primarily liable."

Where the employer has himself committed no wrong and is liable for the wrongdoings of his employee under the doctrine of respondeat superior, he may recover from the actual wrongdoer, the employee, the one primarily liable. However, the employee, the actual wrongdoer and the one primarily liable, cannot recover from the employer, the person only secondarily liable. See also, 28 Ohio Jur. 2d. Indemnity §12 (1958).Indemnity in such a situation

is a right which enures to a person who, without active fault has been compelled by reason of some legal obligation to pay damages occasioned by the wrongdoing of another and for which he himself is only secondarily liable. Indemnity, in such a situation then, applies in favor of the employer as against the employee, but does not apply in favor of the employee as against the employer.

The reasoning behind these rules of law is stated in Corpus Juris Secundum.

> "Generally it is not the servant's contract with his master which exposes the servant to, or protects him from, liability to third persons, and liability does not arise from the existence of the relation of master and servant; the servant's liability arises from his breach of a duty owed to a third person under the law; or as otherwise stated, from the servant's common law obligation so to use that which he controls as not to injure another." 57 C.J.S. Master and Servant § 577 (1948).

The employee's liability arises from the fact that he actually committed the wrong involved. In such a situation, the employee, in the absence of specific statutory authority, does not have a right to recover the amount of any judgment against him from the state. No such specific statutory authorization presently exists.

Thus a university employee himself, and not the state, must pay any judgment against him individually arising out of the employee's work for the state.

Accordingly, in specific answer to your questions, it is my opinion and you are so advised that:

1. The personal liability of employees of a state university has not been changed by the enactment of R.C. Chapter 2743 (the Court of Claims Act).

2. The enactment of R.C. Chapter 2743 has not changed the qualified official immunity which public officers previously possessed under Ohio case law.

3. Members of a board of trustees and presidents, vice-presidents and deans of a state university, insofar as they exercise the authority of the board of trustees, possess a qualified immunity from personal liability for discretionary acts committed in good faith and within the scope of their employment.

4. In the absence of specific statutory authorization, a state employee or officer against whom a judgment is found for his wrongful acts committed within the scope of his employment does not have a right of indemnification against the state and must himself pay the judgment.