Recent legislation and case law developments have enhanced the possibility that legal actions may be brought against University administrators, as individuals, in connection with their official duties. While a comprehensive analysis would be impractical, the risk of personal liability justifies an effort to identify and explain the major areas of concern.

New Article 7A of the State Finance Law allows any citizen, whether or not specially aggrieved, to bring an action against an "officer or employee of the State who in the course of his or her duties has caused, is now causing, or is about to cause, a wrongful expenditure, misappropriation, misapplication or any other illegal or unconstitutional disbursement of State funds" or property.

The statute permits the court to require the offending employee to make restitution to the State for the value of the funds or other property unlawfully expended. The tenor of the language "misapplication" does not exclude the possibility that a negligent mistake of law regarding what is "illegal or unconstitutional" may be sufficient to incur liability. There are simply no decided cases from which definitive conclusions may be drawn. Clearly, however, mere mistakes of judgment within the range of permissible official discretion will not create personal liability.

An example may be helpful: assume that a campus official enters into a "contract" on behalf of the University for goods or services but fails to perfect the agreement by securing the appropriate State approvals. The agreement is void and any expenditure of public funds in connection with the contract may constitute a "misapplication" within the meaning of Article 7A. The goods or services may have conferred a benefit upon the University but the expenditure of University funds on a void "contract" is not among the official duties of any University officer. Consequently, there may be liability for restitution under the State Finance Law and, for precisely the same reasons, no protection may be available to the employee under Section 17.
Civil rights issues involving students, faculties and staffs have also generated new law and new liabilities for the unwary administrator and faculty member who pass official judgments, of one kind or another, upon other members of the University community.

The property and liberty interests of faculty members were discussed and defined by the Supreme Court of the United States in the companion Roth and Sinderman cases of 1974. A previously issued advisory memorandum on these cases is attached. More recently, the Supreme Court decided Wood v. Strickland (1975) involving students. This decision changed an ancient rule regarding the common law immunity of public officials against personal liability for damages arising out of official acts or omissions.

Wood v. Strickland involved the expulsion of students who confessed to a prank in violation of school rules. The intermediate appellate court found that a violation of substantive due process of law had occurred in the school board's adjudication of guilt under the facts and circumstances presented to them.

The Supreme Court held that "good faith" was not an absolute defense to personal liability for damages. Henceforth, a school official "... must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." The Court continued: "Therefore, in the specific context of school discipline, we hold that ... [an official] ... is not immune ... if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." The Court admonished, however, that "A compensatory

* Copies of Article 7A of the State Finance Law, Section 17 of the Public Officers Law, and our June 27, 1974 Memorandum to Presidents (Vol. 74, No. 25) regarding correct contract procedures are attached for your fuller information.
award will be appropriate only if the school board members had acted with such an impermissible motivation or with such disregard of the students' clearly established constitutional rights that this action cannot reasonably be characterized as being in good faith."

Several cases subsequent to Wood have resulted in judgments against public school administrators for violating the constitutional rights of students based upon the newly modified rule. A college president in Florida, for example, was required to pay compensatory damages to student newspaper editors who had been summarily discharged because the president disapproved the quality of their journalistic work. The United States Court of Appeals for the Fifth Circuit held that the president's action infringed upon the students' right to freedom of speech, in violation of the First Amendment, and affirmed a judgment for damages even though the Court found no actual malice.

The court remarked that if the president had sought legal advice, the illegality of his proposed actions would have been made apparent to him. While I'm not entirely sure that all lawyers would have correctly anticipated the judicial result in this case, it seems probable that reliance on the advice of counsel would defeat any contention that an official act had been taken in disregard of clearly established rights. Where legal advice had been sought and followed, the plaintiff would have to establish bad faith or actual malice, a much higher threshold of proof.

As in the case of lawsuits brought pursuant to Article 7A of the State Finance Law, willful acts which invade constitutionally protected rights may preclude indemnification under Section 17 of the Public Officers Law. Courts are not likely to permit State employees to be protected from the consequences of actions which "cannot reasonably be characterized as being in good faith." Moreover, since Section 17 applies only to "officers and employees of the State", students serving on Judicial Boards and in most other capacities, except that of resident hall advisor, would probably not be indemnified under this statute in any circumstance.

The indemnity, or insurance, provided by the Public Officers Law contains several important exclusions; incidents outside the scope of official duty, intentional or willful acts and those involving gross negligence. The Law Revision Commission, in part at our instigation, is conducting a major study of this statute. While intentional torts would not be covered by any revisions which are now in contemplation, a dramatic improvement in the protections afforded to all public officers and employees may be in prospect. We will keep you advised of these developments.
Insurance is available, in some situations, for intentional torts such as libel, slander, and false arrest. However, the payment of punitive damages by an insurer on behalf of a judgment debtor is contrary to public policy in the view of the New York courts which have considered the question. This conclusion follows from the premise that punitive damages, in this State, are not considered as compensation but, rather, as punishment for morally culpable conduct. Indemnification, therefore, would defeat the intended deterrent effect. Accordingly, there are persuasive arguments against the use of public funds to pay judgments of this kind under Section 17 or to pay premiums to an insurer for the same purpose.

Examples of lawsuits in which administrators have been found personally liable under civil rights law should not obscure the fact that an opposite result is reached in the vast majority of cases. The Wood case should foster reasonable precautions, but not an overreaction which would paralyze administrative discretion. The Supreme Court has recognized that administrators are not charged with "predicting the future course of constitutional law" and that "the imposition of monetary costs for mistakes which are not unreasonable . . . would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interests of the school and students."

The vindication of "undoubted" rights has become immensely popular. Nevertheless, a careful adherence to established University practices and procedures regarding contracts, employment, promotion, tenure, student discipline, and other areas involving legally protected interests will insure our continued ability to administer a complex institution with efficiency and courage. As always, this office will be glad to advise regarding specific problems.

This memorandum addressed to: Walter J. Belihan, Jr.

Presidents, State-operated campuses

Copies for information to:

Presidents, Community Colleges
Vice Presidents for Student Affairs, State-operated campuses
Deans, Statutory Colleges
President Rose
Vice President Cook
MEMORANDUM

July 18, 1972

TO: Presidents, State University of New York

FROM: Walter J. Relihan, Jr.

SUBJECT: Non-Renewal of Term Appointments

In companion cases*, the Supreme Court has rendered important opinions regarding the non-renewal of term appointments. The present rules and practices of State University are not affected.

In both, faculty members had argued that the failure or refusal by a college to renew a term appointment without a statement of reasons or an opportunity for a hearing had denied rights protected by the 1st and 14th Amendments.

FIRST AMENDMENT

We're well familiar with the doctrine that a faculty member may lawfully criticize the administration of his college or university on a matter of public concern. A termination or failure to renew on this basis, obviously, would violate a protected interest in free speech and press under the First Amendment. This would be so even though the faculty member enjoyed no vested interest or property right to continued employment under the terms of his appointment.

Nevertheless, the Supreme Court disagreed with the lower court's view that a prior statement of reasons for non-retention was required in order to prevent the occurrence of impermissible non-renewal decisions based, for example, upon the lawful exercise of the right of free speech.

*Board of Regents of State Colleges v. Roth
(Sup. Ct. June 29, 1972)

Perry v. Sindermann (Ibid.)
Following notification of non-renewal, of course, a faculty member might contend that the unfavorable decision represents an unlawful act of retaliation and not a judgment of academic qualifications. In that event, a statement of reasons for non-renewal may be appropriate, together with an opportunity for rebuttal. This could be done informally and, ordinarily, without the necessity of full scale adversary procedures. The proper handling of each such case would largely depend upon its own facts. In certain instances, the case might fall within the SPA contract and be treated under its grievance procedures. We invite your further inquiry if such a situation presents itself.

**FOURTEENTH AMENDMENT**

Procedural due process (notice and hearing) may be required in the event of a State deprivation of valued interests which, in constitutional contemplation, amount to "liberty" or "property".

The lower court in Roth erroneously assumed that its duty involved balancing the professor's legal interest in continued employment against the college's interest in perpetuating its right of summary and unexplained termination. On that basis, the trial judge ordered the college to provide the professor with reasons and a hearing.

The Supreme Court observed that weighing equities had nothing to do with the threshold question of whether or not a "property" right is involved. In Roth, the contract had expired of its terms at the end of the academic year. The professor's unilateral and subjective expectation that his employment would continue absent some intervening good cause to the contrary was held insufficient to bind the college. This, of course, is basic contract law and one wonders that the question ever assumed constitutional dimensions.

In Sindermann, the court found a further question of fact and law which it returned to the lower court for determination. There, Sindermann will be permitted to offer evidence that a quasi-contract for continued employment may have existed. That is, under the circumstances obtaining at his college, a tenured appointment status may have been implied in fact, arising out of custom, usage, and the express language of certain of its regulations.

No such quasi-contract could be inferred under the Policy governing the State University of New York which (Art. XI, Title C, Sec. 4) explicitly covers the point and leaves no room for implication.
Finally, it should be noted, a non-renewal for the kind of "cause" which would justify a misconduct proceeding under Article XIV, Title D might require a notice and hearing if the effect of such a decision adversely affected the individual's good name and reputation or foreclosed his freedom to take advantage of other available academic employment.
§ 123-b

ARTICLE 7-A—CITIZEN-TAXPAYER ACTIONS [NEW]

Sec.
123. Legislative purpose.
123-b. Action for declaratory and equitable relief.
123-c. Pleadings and procedure.
123-d. Security for costs.
123-e. Relief by the court.
123-f. Termination of action.
123-g. Costs and fees.
123-h. Citizen and taxpayer suit fund.
123-i. Existing rights and remedies preserved.
123-j. Separability.

Library References
States c=1634.
C.J.S. States § 191 et seq.

§ 123. Legislative purpose

It is the purpose of the legislature to recognize that each individual citizen and taxpayer of the state has an interest in the proper disposition of all state funds and properties. Whenever this interest is or may be threatened by an illegal or unconstitutional act of a state officer or employee, the need for relief is so urgent that any citizen-taxpayer should have and hereafter does have a right to seek the remedies provided for herein.

Added L.1975, c. 827, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 827, § 2.

§ 123-a. Definitions

1. Citizen. A "citizen" is any person who is a resident of the state.
2. Taxpayer. A "taxpayer" is any citizen who has paid or is paying state income or state sales taxes.
3. Person. A "person" is any individual, public or private corporation, political subdivision, department or agency of the state or any local government, the attorney general, an association, or any other legal entity whatsoever.

Added L.1975, c. 827, § 1.

Effective Date. Section effective Sept. 1, 1975 pursuant to L.1975, c. 827, § 2.

§ 123-b. Action for declaratory and equitable relief

1. Notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, except that the provisions of this subdivision shall not apply to the authoriza-
§ 123-b  STATE FINANCE LAW

1. An action, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation.

2. A plaintiff in such an action may join as a party defendant the recipient or intended recipient of such a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.

Added L.1975, c. 827, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 827, § 2.

§ 123-c. Pleadings and procedure

1. An action pursuant to this article shall be brought in the supreme court in any county wherein the disbursement has occurred, is likely to occur, or is occurring, or in the county in which the state officer or employee has his or her principal office.

2. The complaint in such action shall be either verified or supported by affidavits.

3. Where the plaintiff in such action is a person other than the attorney general, a copy of the summons and complaint shall be served upon the attorney general.

Added L.1975, c. 827, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 827, § 2.

§ 123-d. Security for costs

At any stage of the action, upon motion by the defendant, or upon its own initiative, the court may order the plaintiff to give an undertaking for costs and taxable disbursements not to exceed the sum of twenty-five hundred dollars. If plaintiff shall not have given such undertaking at the expiration of sixty days from the date of service of the order upon him or her, the court may, upon motion of the defendant, dismiss the action and award costs to the defendant. This section shall not apply to any action commenced by the attorney general in the name of and on behalf of the people of the state.

Added L.1975, c. 827, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 827, § 2.

§ 123-e. Relief by the court

1. The court may grant equitable or declaratory relief, or both, including, but not limited to: enjoining the activity complained of; restitution to the state of those public funds disbursed or public property alienated; in the case of public property wrongfully alienated, compelling payment of the full market value; a declaration that a proposed disbursement or alienation of property would be illegal; and such other and further relief as to the court may seem just and proper.

2. The court, at the commencement of an action pursuant to this article, or at any time subsequent thereto and prior to entry of judgment, upon application by the plaintiff or the attorney general on behalf of the people of the state, may grant a preliminary injunction and impose such terms and conditions as may be necessary to restrain the defendant if he or she threatens to commit or is committing an act or acts which, if committed or continued during the pendency of the action, would be detrimental to the public interest. A temporary restraining order may be granted pending a hearing for a preliminary
injunction notwithstanding the requirements of section six thousand
two hundred thirteen of the civil practice law and rules, where it
appears that immediate and irreparable injury, loss, or damage will
result unless the defendant is restrained before a hearing can be had.
Added L.1975, c. 827, § 1.

Effective Date. Section effective
Sept. 1, 1975, pursuant to L.1975, c.
827, § 2.

§ 123-f. Termination of action

No action brought pursuant to this article shall be compromised,
discontinued or dismissed by consent, default, or neglect to prosecute,
except with approval of the court.
Added L.1975, c. 827, § 1.

Effective Date. Section effective
Sept. 1, 1975, pursuant to L.1975, c.
827, § 2.

§ 123-g. Costs and fees

1. The court shall have the authority to fix a reasonable sum to
reimburse the plaintiff for costs and expenses, including attorney fees
in an action wherein judgment was rendered for the plaintiff. Such
attorney fees shall only be paid from the fund established under sec-
tion one hundred twenty-three-h of this article to the extent of money
available therein.
2. No intervenors, unless they are necessary parties, shall be award-
ed attorney fees.
Added L.1975, c. 827, § 1.

Effective Date. Section effective
Sept. 1, 1975, pursuant to L.1975, c.
827, § 2.

§ 123-h. Citizen and taxpayer suit fund

A special fund is hereby established in the custody of the state com-
troller, to be known as the citizen and taxpayer suit fund, to consist
of all moneys recovered as a result of suit or suits brought under this
article, provided, however, in no case shall an amount from a single
recovery under this article in excess of one hundred thousand dollars
be paid into the fund. Any amount in excess of one hundred thousand
dollars shall be paid into the general fund of the state.
Added L.1975, c. 827, § 1.

Effective Date. Section effective
Sept. 1, 1975, pursuant to L.1975, c.
827, § 2.

§ 123-i. Existing rights and remedies preserved

Nothing in this article shall abridge or alter rights of actions or rem-
edies now or hereafter existing.
Added L.1975, c. 827, § 1.

Effective Date. Section effective
Sept. 1, 1975, pursuant to L.1975, c.
827, § 2.

§ 123-j. Separability

If any provision of this article is held invalid, such invalidity shall
not affect other provisions which can be given effect without the in-
valid provision.
Added L.1975, c. 827, § 1.

Effective Date. Section effective
Sept. 1, 1975, pursuant to L.1975, c.
827, § 2.
§ 17. Indemnification of officers and employees of the state

1. The state shall save harmless and indemnify all officers and employees of the state from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act by such officer or employee provided that such officer or employee at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the willful and wrongful act or gross negligence of such officer or employee and provided further that such officer or employee shall, within five days of the time he is served with any summons, complaint, process, notice, demand or pleading, deliver the original or a copy thereof to the attorney general.

2. Upon such delivery the attorney general may assume control of the representation of such officer or employee. Such officer or employee shall cooperate fully with the attorney general's defense.

3. This section shall not in any way impair, limit or modify the rights and obligations of any insurer under any policy of insurance.

4. The benefits of this section shall inure only to officers and employees of the state and shall not enlarge or diminish the rights of any other party.
Memorandum to Presidents

Date: June 27, 1974
From: Office of the University Counsel and Vice Chancellor for Legal Affairs
Subject: Contract Procedures

A number of recent lawsuits and audit reports have reflected upon the University's contract procedures and suggests the need for clarification.

As you know, Section 112 of the State Finance Law provides that any contract requiring the expenditure of more than $1,000 in state funds or any obligation by a state agency to give a consideration other than money (viz: goods, services, use of facilities) must be approved by the State Comptroller as a condition precedent to the formation of a valid contract.

Internally, our University procedures for contract handling are described in letters dated April 17, 1972 and May 18, 1972. Both are attached for your information and files.

The lawsuits mentioned above have involved vendors, suppliers, or other "contractors" seeking payment or the performance of some other obligation by the University under an agreement which the complainant assumes to be binding. Unless Section 112 has been satisfied, however, no legal duty has been created and the supposed contractor has no remedy even though he may have fully performed his side of the bargain. In some cases, this performance may have involved a considerable expense or other detrimental change of position.

In at least one extraordinary recent case, a claim for money damages was brought against University officials in their personal capacity, growing out of the plaintiff's inability to recover on a contract cause of action against
the state itself. Where correct contractual procedures have been followed, it cannot be argued that the individual official acted outside the scope of his lawful authority, and, arguably, outside the relation of principal and agent in which only the state, as principal, is the responsible party.

Without laboring the legal technicalities, it suffices to note that improper handling of an agreement which the parties intend as a binding obligation may result in a serious injustice to the putative contractor as well as quite unnecessary difficulties for the University and even those individual University Employees who may be involved in the transaction.

Walter J. Relihan, Jr.

Enclosure

This memorandum addressed to:

Presidents, State-operated Campuses
Dear

As the result of our letter of April 17, 1972, describing changes in contract processing procedures, several questions have been raised. The purpose of this letter is to explain the application of these procedures in greater detail.

The revised procedure will apply to all agreements in which the University is obligated to expend a sum greater than one thousand dollars and any agreement in which the consideration from the State University is something other than money, as for example, the use of State facilities. In both cases, the State Finance Law requires the approval of the State Comptroller as a condition precedent to the formation of a valid contract. Thus, revocable permits between State and outside parties, or similar agreements, should also be processed through the Office of the Vice Chancellor for Finance Management and Business. Agreements with other State Agencies, in which the State University provides educational services, would also come under the revised procedure.

Agreements involving the Faculty-Student Associations, Student Governments, or the Research Foundation do not generally come under this revised procedure unless such agreements are directly between the State University and such organizations. Agreements between Student Associations and outside organizations or individuals are not considered "State Contracts", nor do they involve the expenditures of State funds. In regard to such contracts, please note the accounting and fiscal procedures prescribed by the Chancellor under the Trustees Student Activity Fee regulations. Thus, they would also fall outside this revised processing procedure.

If any further problems arise, please do not hesitate to contact us.

Very truly yours,

Walter J. Relihan, Jr.

Harry K. Spindler
Dear

One of the findings of the recent consultant survey of campus legal needs was that contract processing, as presently handled, lacks both consistency and speed. In an attempt to improve these procedures, a new system of handling University contracts is being implemented.

Effective immediately, all proposed contracts and leases, including maintenance and service agreements, should be sent directly to the Office of the Vice Chancellor for Finance, Management and Business. Upon receipt, the necessary University approvals will be obtained. Thereafter, the proposal or agreement, if a formal one exists, will be sent to the Office of the University Counsel for drafting, if necessary, and review. Upon completion, the formal agreement will be returned to you, for execution on behalf of the party with which the University is contracting. After execution, the agreement should be returned to the Office of the Vice Chancellor for Finance, Management and Business, for execution on behalf of State University, and the completion of necessary processing.

Hopefully, this procedure will enable University contracts to be completed within a considerably shorter time than at present. Your cooperation in this matter will be greatly appreciated. We are looking forward to a much improved system of serving your needs.

Very truly yours,

Walter J. Relihan, Jr.

Harry K. Spindler