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Opinion No. 00-064

Legislator as State Employee

QUESTIONS

1. May a state legislator be employed as a park ranger or an employee of the Tennessee Department of Transportation during his or her legislative term?

2. May the wife of a legislator be employed as the director for the Clinton office of the Tennessee Human Services Department?

OPINIONS

1. Under Article II, Section 10 of the Tennessee Constitution, a state legislator would be prohibited from serving in either position if is it an "office or place of trust," the appointment to which is vested in an executive officer, including the Governor, or the General Assembly. Under Article II, Section 26 of the Tennessee Constitution, a state legislator would be prohibited from serving in either position if it is a "lucrative office." But unless the position is an appointive office, the duties of which are described in a statute, serving in it is probably not prohibited under either of these provisions of the Tennessee Constitution. Under Tenn. Code Ann. § 12-4-101(a)(1), a legislator may serve as a state employee and may vote on the general appropriations bill, but may not vote on a specific amendment to the budget or a specific appropriation or resolution in which the legislator is directly interested because he or she is a state employee.

Statutes governing the particular agency where the legislator would serve should also be examined to determine whether they would restrict such service. In addition, federal law forbids a state employee whose principal employment is in connection with an activity financed in whole or in part by loans or grants made by the United States or a federal agency from being a candidate for partisan elective office.

2. No statute of general applicability would prohibit the wife of a state legislator from being employed as a director for the Clinton office of the Tennessee Human Services Department. If the legislator and his wife commingle their funds, or if the legislator derives a benefit from the funds, then the legislator has an indirect interest in his wife's employment contract that should be disclosed. If this employment is funded by or relates to federal grants or other contracts, those contracts should be examined to ensure that this arrangement complies with them, particularly with any conflict of interest provisions they may include or federal requirements they may incorporate.

ANALYSIS

1. Legislator serving as employee of Tennessee Department of Transportation or as a park ranger

The first question is whether a member of the General Assembly may, during his or her legislative term, also serve as a park ranger or as an employee of the Tennessee Department of Transportation. The request does not specify whether the position as park ranger would be with the State of Tennessee or with a United States agency. This opinion will address the legality under state law of a legislator serving in a state position during his or her term. If the position is with the federal government, the legislator should consult with the relevant federal agency to determine whether this employment is permitted under federal law. The legislator may also wish to consult with the Ethics Committee of the legislative house in which he or she serves in order to determine whether the employment would violate the rules of that house.

The Tennessee Constitution prohibits a legislator from serving in any "office or place of trust, the appointment to which is vested in the Executive or the General Assembly, except to the office of trustee of a literary institution" during the time for which he or she was elected. Tenn. Const. Art. II, § 10. A legislator therefore would be prohibited from serving in any position, including that of Department of Transportation employee or park ranger, if it falls within this provision. The Tennessee Supreme Court has stated that this provision should be narrowly construed so as to uphold the eligibility of the appointee wherever possible. *Wallace v. Grubb*, 154 Tenn. 655, 289 S.W. 530 (1926). An "office" within the meaning of this section is a public charge or employment, the duties of which are prescribed by law rather than by contract. *State ex rel. Carey v. Bratton*, 148 Tenn. 174, 253 S.W. 705 (1923) (membership on the State Election Commission is an "office" within the meaning of this provision); *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973), *two petitions to rehear denied and mod. on third petition to rehear*, 496 S.W.2d 495 (Tenn. 1973) (membership on the Appellate Court Nominating Commission is an "office or place of trust" within the meaning of this provision). Under Article II, Section 26 of the Tennessee Constitution, no person in the State may hold more than one "lucrative office" at the same time. Whether serving in a position is prohibited under these provisions would depend on the particular position. The concept of office "'embraces the idea of tenure, duration, and continuity, and the duties connected therewith are generally continuing and permanent.'" *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978), quoting 63 Am.Jur. 2d *Public Officers and Employees* § 10. Further, an individual who holds an office takes an oath. Tenn. Const., Art. X, § 1; Op. Tenn. Atty. Gen. U92-44 (April 10, 1992). But unless either position is an appointive office, the duties of which are described in a statute, serving in it is probably not prohibited under the Tennessee Constitution. *See* Op. Tenn. Atty. Gen. 82-515 (November 15, 1982) (employment by a state university is not an "office" within the meaning of Article II, Section 26 of the Tennessee Constitution).

The only statute of general applicability that appears to be relevant to a legislator's ability to serve as a state employee is the general conflict of interest statute at Tenn. Code Ann. § 12-4-101. Under subdivision (a)(1) of this statute, an officer whose duty it is to vote for, let out, overlook or

in any manner superintend a contract may not be directly interested in the contract. A state legislator who also works as a park ranger with a state agency or as an employee of the Department of Transportation would be directly interested in his or her employment contract with the State. Since a state legislator votes on the state appropriation bill, a legislator who works as a state employee would be in a position to vote for funding his or her employment contract. But the statute provides:

> The provisions of this subdivision shall not be construed to prohibit any officer, committeeperson, director, or any person, other than a member of a local governing body of a county or municipality, from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which such person is directly interested.

Tenn. Code Ann. § 12-4-101(a)(1). Under this provision, a legislator may serve as a state employee but may not vote on specific budget amendments or resolutions in which the legislator is directly interested. Op. Tenn. Atty. Gen. U90-152 (October 16, 1990) (an administrator of a state higher education institution may serve in the state legislature); Op. Tenn. Atty. Gen. U94-008 (January 6, 1994) (Tenn. Code Ann. § 12-4-101(a)(1) does not prohibit a legislator from selling parts and supplies to state agencies and department). Statutes governing the particular agency where the legislator would serve should also be examined to determine whether they would restrict such service. State legislators must disclose all financial interests as required under Tenn. Code Ann. §§ 8-50-501, *et seq.*

In addition, federal law may restrict the political activities of a state employee. The Hatch Act, 5 U.S.C. §§ 1501 — 1508, prohibits political activities of certain state and local employees whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency, subject to certain exceptions. 5 U.S.C. § 1501(2); 5 U.S.C. § 1502. One of the prohibited activities is running for partisan political office. 5 U.S.C. § 1502(a)(3). Thus, a state employee whose principal employment is in connection with an activity financed in whole or in part by loans or grants made by the United States or a federal agency may not be a candidate for partisan political office. Whether this provision of federal law applies to any particular state position would depend on whether that position is in connection with an activity financed in whole or in part by federal loans or grants.

2. Wife of legislator serving as director of Clinton office of Tennessee Department of Human Services

The second question is whether the wife of a legislator may legally serve as the director of the Clinton office of the Tennessee Department of Human Services. No state statute appears to prohibit such service. Under Tenn. Code Ann. § 12-4-101(a), a legislator would not be directly interested in an employment contract between the State and his wife. Under Tenn. Code Ann. § 12-4-101(b), it is unlawful for an officer whose duty it is to vote for, let out, overlook, or in any manner to superintend a contract to be indirectly interested in the contract unless the officer publicly

acknowledges the interest. A legislator would be indirectly interested in his wife's employment contract if they commingle funds or the legislator derives some benefit from his wife's compensation. Op. Tenn. Atty. Gen. U92-19 (January 28, 1992). In that case, the legislator should publicly acknowledge the interest. Again, Tenn. Code Ann. §§ 8-50-501, *et seq.*, would probably require the legislator to disclose the employment.

The federal Hatch Act does not appear to prohibit the wife of a member of the General Assembly from serving in this position. But if the wife's employment is funded by or connected with federal funds, then the contracts governing those funds should be consulted to determine whether this employment complies with them, particularly with any conflict of interest provisions they may include or federal requirements they may incorporate.

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