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August 14, 2000

Opinion No. 00-129

Ouster of Officials for Engaging in Legalized Gambling Outside of Tennessee and Compulsion of Testimony Regarding Ouster

QUESTIONS

1. Does a city attorney have a conflict of interest in investigating an ouster complaint against a commissioner for a city which employs the attorney?

2. Does the ouster law provide for ouster of officers for engaging in legal gambling outside the state of Tennessee?

3. Does the fact the officer's official status is unknown by a witness who saw the officer gambling outside the state of Tennessee have any effect upon the development of reasonable cause in such an investigation?

4. Can an officer who is subpoenaed to give testimony pursuant to the ouster statute refuse to testify on grounds that his testimony would incriminate him or her?

OPINIONS

1. No statute prohibits a city attorney from investigating an ouster complaint against a commissioner for a city which employs the attorney. Questions concerning whether such activities by a city attorney are permitted by the ethical canons governing the practice of law should be addressed to the Board of Professional Responsibility.

2. No. Tenn. Code Ann. § 8-47-101 would not subject an officer as defined therein to removal for engaging in any form of legalized gambling outside the state of Tennessee.

3. No. The fact that a witness is unaware of an officer's status whom he sees gambling does not affect the development of reasonable cause under the ouster statute.

4. No. An officer who is subpoenaed to provide information concerning an act which would subject him to ouster is required to provide the information. However, such information could not be used against him in any criminal proceeding.

ANALYSIS

1. No statute provides that a city attorney would have a conflict of interest when investigating whether a city council member should be ousted. *See* Tenn. Code Ann. §§ 8-47-101, *et seq*. Tenn. Code Ann. § 8-47-102 provides that a city attorney is one of the appropriate individuals to institute ouster proceedings within his jurisdiction. The statutory scheme does not prohibit a city attorney from conducting an investigation of city council members to determine whether an ouster proceeding maybe warranted.[1]

2. Tenn. Code Ann. § 8-47-101 specifically provides the following grounds for ouster:

> [any officer] who shall knowingly or willfully commit misconduct in office, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state, or who shall in any public place be in a state of intoxication produced by strong drink voluntarily taken, or who shall engage in any form of gambling, or who shall commit any act constituting a violation of any penal statute involving moral turpitude, . . .

Courts previously have noted that the remedy of ouster of an official is a drastic remedy and "should not be invoked except in plain cases that can be certainly proved." *State ex rel. Wilson et al. v. Bush*, 141 Tenn. 229, 208 S.W. 607, 609 (1919). Ouster proceedings are not to be used as an inquisition or a fishing expedition. *Id*. Furthermore, "[p]ublic officials acting in good faith, who, through ignorance, error, or oversight, run counter to a charter provision or some law, do not subject themselves to indictment and removal from office at common law, and under similar circumstances could not be removed from office under the Ouster Law." *State ex rel. Citizens of Lawrenceburg v. Perkinson*, 159 Tenn. 442, 19 S.W.2d 254, 255 (1929).

In order to determine if a state officer can be ousted for engaging in legalized games of chance outside the State of Tennessee, the term "engages in any form of gambling"must be defined to determine if its prohibition includes legalized forms of gambling participated in out of state. The legislature did not provide a specific definition for which acts constitute "gambling" in Tenn. Code Ann. §8-47-101 *et seq*. The language of Tenn. Code Ann. § 8-47-101 does not specify that an officer can be ousted only for

[1]Questions concerning whether such activities by a city attorney are permitted under the ethical canons governing the practice of law should be addressed to the Board of Professional Responsibility.

engaging in acts of gambling which violate a criminal statute. Neither does the statute specifically confine its prohibitions to officers who committed these acts only inside the state of Tennessee. However, the legislature has specifically defined which acts would constitute "gambling" in Tenn. Code Ann. §39-17-502(a). In Tenn. Code Ann. § 39-17-502(a), the legislature has defined an act of "gambling" to exclude a "lawful business transaction." If the activity of gambling takes place entirely out of state in a jurisdiction where gambling is legalized then the activity would constitute a lawful business transaction. See Op. Tenn. Atty. Gen. 99-030 (February 18, 1999). (copy attached). Statutes which relate to the same subject or share common purposes should be read and construed together or "in pari materia " in order to advance their common purpose or intent. *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn.1997). A Court's goal and function "is to adopt a reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws." *Id*.

Therefore, a court would most likely interpret the term "gambling" in Tenn. Code Ann. § 8-47-101 to conform to the definition provided in Tenn. Code Ann. § 39-17-502(a) and exclude lawful business activities in which individuals participate in other states, provided that gambling is legalized in the state in question and no gambling activities occur in Tennessee.

3. The fact that witnesses are not aware of the officer's status does not affect the development of reasonable cause under the ouster statute. The statute does not limit its application to acts committed in the presence of witnesses who are aware of the officer's official status. Thus, the ignorance of witnesses regarding the officer's status would have no legal effect on investigation or prosecution under the ouster law.

4. The right against self incrimination contained in Art. I, § 9, of the Tennessee Constitution and the Fifth Amendment to the United States Constitution "privileges a person not to answer official questions put to him in any proceeding, civil or criminal, where the answers might incriminate him in future criminal proceedings." *State v. Van Smith*, 834 S.W.2d 915, 921 (Tenn. 1992). *See also Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141, 79 L. Ed. 2d 409 (1984). However, Tenn. Code Ann. § 8-47-107 provides that any testimony required to be given subject to a subpoena during the investigation of an ouster proceeding shall not be used against such person in prosecution for any crime or misdemeanor under the laws of this state. It further provides that no person shall be excused from testifying upon the grounds that such person's testimony may incriminate him or her. Tenn. Code Ann. § 8-47-107.

If a statute adequately safeguards an individual's right not to incriminate himself, the individual can be required to testify in a civil proceeding. *See State v. Carder*, 824 S.W.2d 174 (Tenn. Crim. App. 1991); *See also Murphy v. Waterfront Commission*, 378 U.S. 52, 79, 84 S.Ct. 1594, 1610, 12 L.Ed.2d 678 (1964), *questioned on other grounds in United States v. Balsys*, 524 U.S. 666, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998)(questioned as to its reasoning concerning the Fifth Amendment protection against self-incrimination when the potential exposure to criminal prosecution is in a foreign country); *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). In *Murphy*,

the United States Supreme Court held that while a state witness may not be compelled to give testimony incriminating under federal law, such testimony can be compelled if it cannot be used by federal officials in connection with a federal prosecution against the individual. *Id*. at 1609. The court then determined that the federal government would be prohibited from using such compelled testimony or its fruits. Thus the Fifth Amendment does not prohibit the states from compelling testimony where the state has in place statutory provisions which prohibit the testimony's use in a subsequent criminal investigation or trial. *Id.* Since the ouster statute's immunity provisions do prohibit the use of the official's compelled statement in any subsequent criminal investigation or trial, an officer cannot refuse to give such testimony on Fifth Amendment grounds.

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