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May 23, 2001

Opinion No. 01-084

Conflict of Interest: Rutherford County Highway Commission

QUESTIONS

1. Is it legal for a Rutherford County Commissioner to be an employee of the Rutherford County Highway Commission?

2. It is legal for a Rutherford County Commissioner to be a member of the Rutherford County Highway Commission?[1]

OPINIONS

1. It appears to be legal for a Rutherford County Commissioner to be an employee of the Rutherford County Highway Commission, so long as he or she observes the voting rules set out in Tenn. Code Ann. § 12-4-101(c).

2. A court could conclude that holding these two positions is illegal because they are incompatible under the common law doctrine of incompatible offices. A definitive ruling on this issue could only be made by a court of competent jurisdiction after considering all the relevant facts and circumstances regarding the functions of the two positions.

We think a court would probably conclude that a Rutherford County Commissioner is not prohibited from also being a member of the Rutherford County Highway Commission under Tenn. Code Ann. § 5-5-102(c) because that office is not elected by a county-wide vote. No other statute appears to prohibit holding both offices.

ANALYSIS

1. County Commissioner as Employee of Rutherford County Highway Commission

[1] Question 2 refers to the "Rutherford County Road Board." We have been unable to find any public or private act creating such an organization. We assume that the question refers to the Rutherford County Highway Commission.

The first question is whether a Rutherford County Commissioner may legally be an employee of the Rutherford County Highway Commission. In general, under Tenn. Code Ann. § 12-4-101(a), an official may not be directly interested in any contract he or she has the duty to let out or oversee. This prohibition, however, must be interpreted together with statutes that specifically address the members of local legislative bodies. Tenn. Code Ann. § 5-5-102 provides in relevant part:

> (c)(1) Notwithstanding any provision of the law to the contrary, any county employee, otherwise qualified to serve as a member of the county legislative body, shall not be disqualified from such legislative office by reason of being a county employee.

In addition, Tenn. Code Ann. § 12-4-101(c), the general statute on conflicts of interest, provides:

> (c) (1) Any member of a local governing body of a county or a municipality who is also an employee of such county or municipality and whose employment predates the member's initial election or appointment to the governing body of the county or municipality may vote on matters in which the member has a conflict of interest if the member informs the governing body immediately prior to the vote as follows: "Because I am an employee of (name of governmental unit), I have a conflict of interest in the proposal about to be voted. However, I declare that my argument and my vote answer only to my conscience and to my obligation to my constituents and the citizens this body represents." The vote of any such member having a conflict of interest who does not so inform the governing body of such conflict shall be void if challenged in a timely manner. As used in this subdivision, "timely manner" means during the same meeting at which the vote was cast and prior to the transaction of any further business by the body.
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> (2) Any member of a local governing body of a county or a municipality who is also an employee of such county or municipality and whose employment began on or after the date on which the member was initially elected or appointed to serve on the governing body of the county or municipality shall not vote on matters in which the member has a conflict of interest.
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> (3) (A) In the event a member of a local governing body of a county or a municipality has a conflict of interest in a matter to be voted upon by the body, such member may abstain for cause by announcing such to the presiding officer.

> (B) Any member of a local governing body of a municipality who abstains from voting for cause on any issue coming to a vote before the body shall not be counted for the purpose of determining a majority vote. The provisions of this subdivision (c)(3)(B) shall in no way be construed to apply to any county having a metropolitan form of government and having a population in excess of five hundred thousand (500,000) according to the 1990 federal census or any subsequent federal census.

Tenn. Code Ann. § 12-4-101(c).[2]

The question, then, is whether an employee of the Rutherford County Highway Commission is a county employee within the meaning of Tenn. Code Ann. § 5-5-102 and § 12-4-101(c). The Rutherford County Highway Commission was created and operates under 1951 Tenn. Priv. Acts Ch. 55, as amended, read in conjunction with the Tennessee County Uniform Highway Law, Tenn. Code Ann. §§ 54-7-101, *et seq.* The County Highway Commission is vested with complete authority over the construction and maintenance of all county roads and the expenditure of all highway funds. 1951 Tenn. Priv.Acts Ch. 55, § 1. Each commissioner is elected to represent one of seven road districts. The commissioner is elected by a vote of the qualified voters within the road district the commissioner represents. 1951 Tenn. Priv. Acts Ch. 55, § 2. Funds for the county road system must be expended upon the warrant of the county trustee. 1951 Tenn. Priv. Acts Ch. 55, § 11; Tenn. Code Ann. § 54-7-113. The Uniform Highway Law also provides that expenditures of funds for the operation of the county road department must be made within the limits of the approved budget and the appropriations made for the department in accordance with law. Tenn. Code Ann. § 54-7-113(b). No relative of a district commissioner or county executive or the highway superintendent may be employed under the private act. 1951 Tenn. Priv. Acts Ch. 55, § 20.

Presumably, the salary for employees of the County Highway Commission is paid from county funds appropriated by the County Commission. We think a court would conclude that an employee of the County Highway Commission is an employee of the county within the meaning of Tenn. Code Ann. § 5-5-102 and Tenn. Code Ann. § 12-4-101(c). Op. Tenn. Atty. Gen. U96-017 (February 22, 1996) (an employee of the Henry County Medical Center was a "county employee" under Tenn. Code Ann. § 12-4-101(c)). For this reason, we think a court would conclude that a Rutherford County Commissioner may also be an employee of the Rutherford County Highway Department, so long as he or she observes the voting rules set forth in Tenn. Code Ann. § 12-4-101(c).

2. County Commissioner as Member of County Highway Commission

The second question is whether a Rutherford County Commissioner may also serve as a member

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[2] Tenn. Code Ann. § 5-5-102(c)(4) also contains provisions on voting by a county commissioner who is also an employee. But this Office has stated that, to the extent this statute conflicts with Tenn. Code Ann. § 12-4-101(c) quoted above, Tenn. Code Ann. § 12-4-101(c) controls. Op. Tenn. Atty. Gen. 93-73 (December 28, 1993).

of the Rutherford County Highway Commission. Our Office noted that an individual might be prohibited from holding the office of county commissioner and highway commissioner if the two offices were incompatible under the common law doctrine prohibiting an individual from holding incompatible offices. Op. Tenn. Atty. Gen. 00-159 (October 17, 2000); *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). The question of incompatibility depends on the circumstances of each individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. Officers § 27 at 279-80 (1978). For example, an inherent inconsistency exists where one office is subject to the supervision or control of the other. *State ex rel v. Thompson, supra.* In *Thompson*, the Tennessee Supreme Court concluded that the offices of city manager and member of the city council were incompatible because the council had the authority to appoint, remove, and supervise the city manager, and no statute then in effect permitted the same individual to hold these offices.

As discussed above, members of the Rutherford County Highway Commission are elected by the voters of the road district they represent. The county commission does not appoint, and cannot remove, members of the highway commission from office, nor does either office appear to be full-time. It could be argued that the offices are incompatible because the county commission must approve the highway commission budget and all expenditures by the highway commission from county funds. *See, e.g., Scannapieco v. Abate*, 258 N.J.Super. 506, 610 A.2d 432 (N.J. Super. Ct. Law Div. 1992) (the positions of member of a township planning board and member of a regional utility authority were incompatible because, as a member of the regional authority, the same individual would be called on to review recommendations made in his capacity as a member of the township planning board). We have found no Tennessee case law, however, addressing this issue. A definitive ruling could only be made by a court of competent jurisdiction after considering all the relevant facts and circumstances.

Tenn. Code Ann. § 5-5-102(c)(2) provides:

> (2) No person elected or appointed to fill the office of county executive, sheriff, trustee, register, county clerk, assessor of property, or any *other county-wide office filled by vote of the people* or the county legislative body, shall also be nominated for or elected to membership in the county legislative body.

(Emphasis added).

The question, then, is whether membership on the Rutherford County Highway Commission is a "county-wide office . . . filled by a vote of the people" within the meaning of this statute. We have found no Tennessee case that addresses this issue. In interpreting this statute, this Office noted that the term "county-wide" is defined as "extending over the whole county." Op. Tenn. Atty. Gen. 86-42 (February 24, 1986), citing *Webster's Third New International Dictionary* 521 (1971). Courts of other states have concluded that an office is county-wide when it covers the entire area within a county. *See Application of*

O'Hara, 42 Misc.2d 716, 248 N.Y.S.2d 535, 538 (1964). It can certainly be argued that membership on the Rutherford County Highway Commission is a "county-wide office" under this definition. The Rutherford County Highway Commission has authority to repair and maintain roads throughout the county. But under the private act creating the highway commission, each member is elected by the voters of a single road district, and not by a county-wide vote. The other offices listed in Tenn. Code Ann. § 5-5-102(c)(2) — county executive, sheriff, trustee, register, county clerk, assessor of property — are all elected by a county-wide vote. Tenn.Const.Art. VII, § 1. Under the rule of "ejusdem generis", where general words in a statute follow special words which limit the scope of the statute, the general words are construed as meaning only things similar to those things enumerated by the special words. *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994). Applying this rule of statutory construction, we think a court would conclude that Tenn. Code Ann. § 5-5-102(c)(2) applies only to county-wide officers either elected by a county-wide vote or appointed by the county commission. For this reason, we think a court would conclude that the same individual may serve as a Rutherford County Commissioner and as a member of the Rutherford County Highway Commission.

Your question does not indicate that the same individual serves as a county highway road commissioner and as an employee of the highway commission. We therefore do not address whether such dual service violates state law.

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