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Opinion No. 02-062

Fundraising by Legislators under Tenn. Code Ann. § 2-10-310 and Tenn. Code Ann. § 3-6-108(i)

QUESTIONS

1. Under Tenn. Code Ann. § 2-10-310, may a legislator solicit or accept campaign contributions in even-numbered years before May 15 or the end of a regular annual session, whichever is earlier?

2. Under Tenn. Code Ann. § 3-6-108, in an even-numbered year, may a legislator accept campaign contributions from a lobbyist, employer of a lobbyist or multicandidate political campaign committee controlled by a lobbyist or employer of a lobbyist on or after May 15 but before the end of the session?

3. These statutes restrict the fundraising activities of incumbent members of the General Assembly, but not the fundraising activities of non-incumbent candidates for membership in the General Assembly. Is this differing treatment constitutional?

OPINIONS

1. Under this statute, in even-numbered years before May 15 or the end of the regular annual session, whichever is earlier, a member of the General Assembly may not solicit or accept campaign contributions for his or her legislative campaign for state office. A legislator may solicit or accept campaign contributions for his or her campaign for local office only under the narrow circumstances outlined in Tenn. Code Ann. § 2-10-310(a)(2), as recently enacted in 2002 Tenn. Pub. Acts Ch. 470. The statute does not apply to campaign contributions to a legislator's campaign for federal office.

2. It appears that a legislator would not violate any express statutory prohibition by accepting a contribution from any of the persons listed in Tenn. Code Ann. § 3-6-108, even though that person has violated subsection (i) of the statute in making it. The legislator, however, would be required to disclose the source and the date of the contribution under Tenn. Code Ann. §§ 2-10-101, *et seq.* Based on this disclosure, the person making the prohibited contribution would be subject to the statutory penalties for violating Tenn. Code Ann. § 3-6-108(i).

3. The differing treatment is constitutionally defensible because restrictions on fundraising by incumbent legislators are narrowly tailored to support the compelling state interest of avoiding corruption or the appearance of corruption in the legislative process.

ANALYSIS

1. Fundraising under Tenn. Code Ann. § 2-10-310

This opinion addresses several questions about fundraising by members of the General Assembly. The first question is whether, under Tenn. Code Ann. § 2-10-310, a legislator may solicit or accept campaign contributions in even-numbered years before May 15 or the end of a regular annual session, whichever is earlier. Tenn. Code Ann. § 2-10-310 was amended earlier this year by 2002 Tenn. Pub. Acts Ch. 470. As amended, subdivision (a)(1) provides:

> Except as provided in subdivisions (2) and (3), from the convening of the General Assembly in organizational session through the earlier of the last day of regular session or June 1 *in odd years,* and from the convening of the General Assembly in regular session to the earlier of *May 15 or the conclusion of the annual session in even years,* no member of the General Assembly or a member's campaign committee shall conduct a fundraiser or solicit or accept contributions for the benefit of the caucus, any caucus member or member or candidate of the General Assembly or Governor.

(Emphasis added). Subdivisions (2) and (3) allow a member of the General Assembly who is a candidate for local public office to engage in fundraising for that campaign in narrowly defined circumstances. Except in those narrow circumstances, Tenn. Code Ann. § 2-10-310(a)(1) prohibits a member of the General Assembly from soliciting or accepting contributions for his or her campaign for state or local public office. This Office has concluded that the statute does not apply to campaigns for federal office. Op. Tenn. Atty. Gen. 00-185 (December 13, 2000). A legislator may therefore solicit and accept campaign contributions for his or her campaign for federal office during the time periods specified in Tenn. Code Ann. § 2-10-310(a)(1).

2. Fundraising under Tenn. Code Ann. § 3-6-108(i)

The next question is whether, under Tenn. Code Ann. § 3-6-108, a legislator may accept campaign contributions from a lobbyist, employer of a lobbyist or multicandidate political campaign committee controlled by a lobbyist or employer of a lobbyist on or after May 15 but before the end of the session in an even-numbered year. Tenn. Code Ann. § 3-6-108(i) provides:

> No lobbyist, employer of a lobbyist or multicandidate political campaign

> committee controlled by a lobbyist or employer of a lobbyist shall make a contribution to a candidate for the office of governor, member of the general assembly or public service commission [now the Tennessee Regulatory Authority] during the time that the general assembly is in a regular annual legislative session.

This Office has concluded that this statute is unconstitutional when applied to non-incumbent candidates for Governor and membership in the General Assembly. Op. Tenn. Atty. Gen. 01-134 (August 29, 2001). The question is whether a member of the General Assembly may accept a contribution from any of the persons listed in the statute while the General Assembly is still in session, but the general ban on fundraising by legislators has expired. By its terms, Tenn. Code Ann. § 3-6-108(i) prohibits a lobbyist from making a contribution under certain circumstances; it does not prohibit any individual from accepting a contribution that a lobbyist has made in violation of the statute. A legislator or the legislator's campaign committee may not accept any contribution or make any expenditure in violation of the provisions of Tenn. Code Ann. §§ 2-10-301, *et seq.* Tenn. Code Ann. § 2-10-307. Of course, Tenn. Code Ann. § 3-6-108(i) is not part of that statutory scheme. Therefore, it appears that a legislator would not violate any express statutory prohibition by accepting a contribution from any of the persons listed in the statute, even though that person has violated Tenn. Code Ann. § 3-6-108(i) in making it. But the legislator would be required to disclose the source and the date of the contribution under Tenn. Code Ann. §§ 2-10-101, *et seq.* Based on this disclosure, the person making the prohibited contribution would be subject to the statutory penalties for violating Tenn. Code Ann. § 3-6-108(i).

3. Constitutionality of Ban on Legislative Fundraising by Incumbents but not Non-Incumbent Candidates

The last question is whether either of these statutes is unconstitutional because each restricts the fundraising activities of incumbent members of the legislature but not of non-incumbent candidates for the legislature. The United States District Court for the Eastern District of Tennessee has concluded that non-incumbent legislative candidates may not constitutionally be prohibited from campaign fundraising while the legislature is in session. *Emison v. Catalano,* 951 F.Supp. 714 (E.D.Tenn. 1996). The Court found that this limitation would restrict the exercise of the First Amendment rights of these candidates, and was not the least intrusive means of accomplishing the legislative goal of eliminating political corruption. This Office has concluded, based on the reasoning in *Emison,* that Tenn. Code Ann. § 3-6-108(i) may not constitutionally be applied to contributions to non-incumbent candidates for membership in the General Assembly. Op. Tenn. Atty. Gen. 01-134 (August 29, 2001). In reaching that conclusion, we distinguished two cases upholding similar bans on contributions to candidates and incumbents because the courts in those cases relied on reasoning that the Court in *Emison* expressly rejected. Since we issued that opinion, the United States District Court for the Eastern District of California upheld a statute that completely banned contributions by certain lobbyists to state elective officeholders or to candidates. *Institute of Governmental Advocates v. Fair Political Practices Commission,* 164 F.Supp.2d 1183 (E.D. Cal. 2001). Like the earlier opinions, the Court relied on reasoning that the Court in *Emison* expressly rejected.

Neither of the restrictions, therefore, may be applied to both incumbent legislators and non-incumbent candidates. The question remains whether incumbent members of the General Assembly alone may constitutionally be subject to these restrictions. The Court in *Emison* declined to address this issue. This Office recently addressed the constitutionality of Tenn. Code Ann. § 2-10-310(a) to the extent it also applied to incumbent legislators running for local office. Op. Tenn. Atty. Gen. 00-011 (January 24, 2000). There, this Office reiterated its conclusion that a ban on in-session fundraising by incumbent members of the General Assembly is constitutionally defensible because it furthers the State's compelling interest in preventing corruption or the appearance of corruption arising from fundraising while the legislature is in session. Research on developments since that time has found no reason to change this conclusion.

For the same reasons, we think Tenn. Code Ann. § 3-6-108(i) is defensible against a challenge on the grounds that it unconstitutionally discriminates against incumbent members of the General Assembly. Non-incumbent candidates for membership in the General Assembly are not in the same position as incumbent legislators to influence the legislative process. A ban on lobbyist contributions to legislators during the session, therefore, is narrowly tailored to further the State's compelling interest in preventing corruption or the appearance of corruption. *See Kimbell v. Hooper,* 164 Vt. 80, 665 A.2d 44 (1995) (a statute banning lobbyist contributions to legislators during the legislative session was constitutional).

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