S T A T E O F T E N N E S S E E
OFFICE OF THE
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March 28, 2006

Opinion No. 06-056

Service on Tennessee Ethics Commission

QUESTIONS

Is an individual who holds any of the following positions eligible also to serve as a member of the Tennessee Ethics Commission, created under 2006 Tenn. Pub. Acts Ch. 1 (Ex. Sess):

1. A member of a county election commission?

2. An attorney for the Shelby County Trustee?

3. Employee of a city?

4. Partner at a law firm with a lobbying practice?

OPINIONS

1. No.

2. No.

3. No.

4. Yes. Such a member might face a conflict of interest under certain circumstances when participating in the Commission's various duties respecting oversight of lobbyists.

ANALYSIS

This opinion concerns eligibility to be a member of the Tennessee Ethics Commission created under 2006 Tenn. Pub. Ch. 1 (Ex. Sess), the "2006 Ethics Act." This act deleted Tenn. Code Ann. §§ 3-6-101, *et seq.*, and substituted a new part.[1] The new Tenn. Code Ann. § 3-6-102 provides:

[1] The Ethics Commission is created in Section 26 of the 2006 Ethics Act. That section is effective immediately for purposes of appointing the members of the Ethics Commission. 2006 Ethics Act, § 54. The act also rewrote the laws governing lobbyists, new Tenn. Code Ann. §§ 3-6-301, *et seq.* These provisions appear in Section 35 of the act. Only portions of this part of the 2006 Ethics Act are now effective. Most of them do not take effect until October 1, 2006. 2006 Ethics Act, § 54. To the extent that Tenn. Code Ann. §§ 3-6-101, *et seq.*, governs lobbyists, therefore, it remains

> It is the intent of the general assembly that the integrity of the processes of government be secured and protected from abuse. The general assembly recognizes that a public office is a public trust and that the citizens of Tennessee are entitled to a responsive, accountable, and incorruptible government. The Tennessee ethics commission is established to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct.

New Tenn. Code Ann. § 3-6-103 provides in relevant part:

> (a) There is created as an *independent entity* of state government a Tennessee ethics commission. . . . No person shall be appointed to the commission if such person, or any member of such person's immediate family as defined in § 3-6-301, is announced as a candidate for public office, *holds public office*, or is a member of a political party's state executive committee.
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> * * * *
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> (h) No member of the commission or such member's immediate family, as defined in § 3-6-301, shall during such membership:
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> (1) Be allowed to hold or qualify for elective office to any state or local public office, as defined in § 2-10-102;
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> (2) Be an employee of the state or any political subdivision of the state;
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> (3) Be an officer of any political party or political committee;
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> (4) Permit such person's name to be used or make campaign contributions in support of or in opposition to any candidate or proposition, except that a member's immediate family may make campaign contributions in support of or in opposition to any candidate or proposition;
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> (5) Participate in any way in any election campaign;
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> (6) Lobby or employ a lobbyist; or

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in effect until the new laws become effective October 1. This opinion discusses the new statutes governing the Ethics Commission, not the lobbying statutes still in effect.

> (7) Be employed by any elected officeholder, either in an official capacity or as an individual, or be employed by any business in which an elected officeholder has any direct input concerning employment decisions.

New Tenn. Code Ann. § 3-6-103. Subsection (a) is framed as a disqualification; subjection (h) applies to any member of the Ethics Commission once appointed to office. We assume that your questions all concern whether an individual now serving in any of the listed positions may, upon appointment to the Ethics Commission, continue to serve in those offices.

As a general matter, the primary purpose of statutory construction is to ascertain and give effect, if possible, to the intention or purpose of the legislature as expressed in the statute. *Westinghouse Electric Corporation v. King,* 678 S.W.2d 19, 23 (Tenn. 1984), *appeal dismissed,* 105 S.Ct. 1830 (1984). The meaning of a statute is determined by viewing the statute as a whole and in light of its general purpose. *City of Lenoir City v. State ex rel. City of Loudon*, 571 S.W.2d 297, 299 (Tenn. 1978). Limitations on commission membership, therefore, should be construed to give effect to the legislature's intent that the Tennessee Ethics Commission be independent.

In addition, because of the broad authority accorded the Ethics Commission, membership on that body may be incompatible with holding other public positions or employment, even if the 2006 Ethics Act does not explicitly prohibit such dual office or position. Our Office has noted that an individual might be prohibited from holding two offices if they are incompatible under the common law doctrine prohibiting an individual from holding incompatible offices. Op. Tenn. Att'y 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.

Tenn. Code Ann. § 3-6-103(a) provides that no person may be appointed to the Ethics Commission if he or she "is announced as a candidate for public office, holds public office, or is a member of a political party's state executive committee." This subsection of the statute does not define the term "public office." By contrast, subsection (h) explicitly prohibits a member from being "allowed to hold or qualify for *elective office* to any state or local public office, as defined in § 2-10-102." (Emphasis added). Tenn. Code Ann. § 2-10-102(13) clearly defines public office to include local and state offices filled by the voters. Since, in subsection (a) the phrase "holds public office" immediately follows the phrase, "is announced as a candidate for public office," it appears that both (a) and (h) refer to elective public office. But the office of county election commissioner, while not

elective, is incompatible with the duties of the Ethics Commission. County election commissioners are appointed, and may be removed for cause, by the State Election Commission. Tenn. Code Ann. § 2-12-101. In addition, county election commissions are subject to the supervision of the Tennessee Coordinator of Elections in many aspects of the performance of their duties. Tenn. Code Ann. § 2-11-202.

The Ethics Commission is charged with enforcement of, among other statutory schemes, the disclosure requirements under Tenn. Code Ann. §§ 8-50-501, *et seq.* New Tenn. Code Ann. § 3-6-105 (a); new Tenn. Code Ann. § 3-6-107. The members of the State Election Commission and the State Coordinator of Elections are subject to these requirements. Tenn. Code Ann. § 8-50-501(a)(2) and (a)(12). Because these individuals supervise or appoint and are authorized to remove county election commissioners, that office is incompatible with membership on the Ethics Commission. Dual service would force the same individual as a member of the Ethics Commission to supervise state officials who supervise the individual as county election commissioner. For this reason, the offices are incompatible.

2. Part-Time County Attorney

The second question is whether an individual who works as an attorney for the Shelby County Trustee may be appointed to the Ethics Commission. This implicates two different disqualifying provisions. First, Under new Tenn. Code Ann. § 3-6-103(h)(2), no member of the Ethics Commission may also serve as an employee of the State or "any political subdivision of the state." The statute does not define the term "political subdivision." We think, however, that the General Assembly clearly intended to include local governmental entities like counties within this term. This Office has concluded that the term "political subdivision" refers to geographical governmental units smaller than the State, rather than a functional division of state government. *See,* Op. Tenn. Att'y Gen. 82- 390 (August 2, 1982). If the county trustee's attorney is an employee of the county, then new Tenn. Code Ann. § 3-6-103(h)(2) would prohibit a member of the Commission from serving in that capacity. Whether a particular individual is an employee of the county or an independent contractor would depend on the conditions of that individual's engagement. For example, if the individual receives fringe benefits such as medical insurance through the county, then he or she should be considered an employee of the county. Second, under new Tenn. Code Ann. § 3-6-103(h)(7):

> No member of the commission . . . shall during such membership:
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> (7) Be employed by any elected officeholder, either in an official capacity or as an individual, or be employed by any business in which an elected officeholder has any direct input concerning employment decisions.

The Shelby County Trustee is an elected officeholder. Tenn. Code Ann. § 8-11-101. Under new Tenn. Code Ann. § 3-6-103(h)(7), therefore, an attorney employed by the Shelby County Trustee, even as an independent contractor, may not continue to serve in that capacity while serving

as a member of the Ethics Commission.[2]

3. City Employee

The next question is whether a city employee may be appointed to the Ethics Commission. Under new Tenn. Code Ann. § 3-6-103(h)(2), no member of the Ethics Commission may also serve as an employee of the State or "any political subdivision of the state." As noted above, this Office has concluded that the term "political subdivision" refers to geographical governmental units smaller than the State, rather than a functional division of state government. Further, cities are routinely included within this term in other Tennessee statutes. *See, e.g.*, Tenn. Code Ann. § 6-33-107; Tenn. Code Ann. § 9-19-102(5); Tenn. Code Ann. § 9-22-103(3). For this reason, a city employee may not also serve as a member of the Ethics Commission.

4. Partner at a Law Firm with a Lobbying Practice

Finally, the last question is whether a partner at a law firm who practices with a partner that is a lobbyist may be a member of the Ethics Commission. The 2006 Ethics Act does not prohibit such an appointment.

Among the many duties of the Ethics Commission is the duty to police lobbyists' activities. Tenn. Code Ann. §§ 3-6-302 — 308. To that end, the Commission must collect certain information from both lobbyists and employers of lobbyists. Tenn. Code Ann. § 3-6-302. The Commission is empowered to enforce the information collection and disclosure provisions of the 2006 Ethics Act through the use of civil penalties. Tenn. Code Ann. § 3-6-306. In addition, Tenn. Code Ann. § 3-6-308 charges the Commission with administering the 2006 Ethics Act. This administration includes issuing advisory opinions concerning lobbyists' compliance with and responsibilities under the Act. *Id.* Finally, the Ethics Commission is charged with publishing guiding principles to govern the actions of lobbyists and employers of lobbyists. Tenn. Code Ann. § 3-6-106. Obviously, a partner in a law firm who serves on the Commission may have a conflict of interest whenever discharging any of these responsibilities would affect the lobbying practice of that firm.

[2] It is not clear whether the individual in question is employed by the Shelby County Trustee or selected as the delinquent tax attorney by the Country Trustee and the County Mayor under Tenn. Code Ann. § 67-5-2404. In either case, the prohibition on dual service would apply.

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