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Opinion No. 06-114

Conflict of Interest in a Member of the Tennessee Commission on Fire Fighting Personnel Standards and Education also serving as an Instructor at the Tennessee Fire Service and Codes Academy

QUESTIONS

1. Is it unethical, a conflict of interest, a violation of any provision of the state ethics law, or otherwise impermissible for a part-time state employee serving as an instructor at the Tennessee Fire Services and Codes Academy ("the Academy") to also serve on the Tennessee Commission on Fire Fighting Personnel Standards and Education ("the Commission"), which approves curricula offered by the Academy?[1]

2. If the answer to any portion of the first question is yes, would recusing oneself on any training issue to be voted on by the Commission allow a part-time state employee serving as an instructor at the Academy to serve on the Commission and avoid any unethical practice or conflict of interest?

3. Is it permissible for a full-time state employee (not necessarily an instructor at the Academy) to serve on the Commission; and is there any circumstance in which it would be considered unethical, a conflict of interest, or a violation of any provision of the state ethics law to do so?

OPINIONS

1. No. It does not present any conflict of interest for an instructor at the Academy to serve on the Commission.

2. Since the answer to your first question is no, it is unnecessary to answer your second question.

3. We cannot answer your third question because its answer in any given instance would depend upon the facts.

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[1]To the extent this question references the "Comprehensive Governmental Ethics Reform Act of 2006" recently passed by the legislature, we have reviewed the act and do not believe it is implicated by this question.

ANALYSIS

You ask whether a part-time state employee who serves as an instructor at the Tennessee Fire Service and Codes Academy can serve on the Tennessee Commission on Fire Fighting Personnel Standards and Education. This question arises because one of the duties of the Commission is to approve the curricula ordered by the Academy.

Three sources inform the answer to this question: (1) the specific statutes relating to the Commission and the Academy; (2) the general conflict of interest statute, codified at Tenn. Code Ann. § 12-4-101; and (3) the common law doctrine of incompatible offices. Each of these is discussed below.

We could discover no language in the statutes governing the Commission and the Academy that would create a conflict of interest in the situation you proposed. For instance, the statute listing the criteria and procedures for Commission membership does not exclude any individual on the basis of a conflict of interest. *See* Tenn. Code Ann. § 4-24-104.

However, a more general statute does address conflicts of interest for members of entities such as the Commission, providing, in relevant part:

> It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract.

Tenn. Code Ann. § 12-4-101(a)(1).

It has been held that this statute should be liberally construed to effectuate the legislative purpose of protecting the public from official corruption. *State ex rel. Abernathy v. Robertson,* 5 Tenn. Civ. App. (5 Higgins) 438 (1914). It has also been held that a person must have a pecuniary interest in a contract in order to fall within the prohibition of Tenn. Code Ann. § 12-4-101. *Savage v. Mynatt,* 299 S.W. 1043, 1043 (Tenn. 1927).

Under the circumstances that you outline, i.e., a Commission member voting on curricula used at the Academy where the Commission member is employed as an instructor, there does not appear to be any conflict of interest as defined in the statute. You do not point to any pecuniary

interest held by the member in the decision to approve curricula. Nor do you point to any contract between the Commission and the Academy.[2]

In addition to statutory prohibition against conflict of interest, Tennessee has a common law conflict of interest doctrine prohibiting an individual from holding incompatible offices. *State ex rel. v. Thompson*, 246 S.W.2d 59, 61 (Tenn. 1952); Op. Tenn. Att'y Gen. No. 00-159 (Oct. 17, 2000); Op. Tenn. Att'y Gen. No. 01-084 (May 23, 2001). The question of incompatibility depends on the circumstances of each individual case and is implicated when the occupancy of two offices by the same person is detrimental to the public interest or when the duties of one office interfere with those of the other. 67 C.J.S. Officers § 27 at 279-80 (1978). For example, an inherent inconsistency exists when one office is subject to the supervision or control of the other. *Thompson*, 246 S.W.2d at 61.

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. 246 S.W.2d at 59. Your question presents no such conflict. Nor does your question present any detriment to the public interest. To the contrary, the public interest would appear to be well served when an instructor who is the end user of the curricula is involving in selecting the curricula.

It should be noted that an Academy instructor who also sits on the Commission may not be permitted to accept *per diem* expenses available to Commission members under Tenn. Code Ann. § 4-24-105. Under Tenn. Code Ann. § 8-23-201(a)(1)(C):

> No officer or employee in the several departments and agencies of the state government, employed at fixed compensation shall be paid for any extra services, in an ex officio or other capacity, except:
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> * * *
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> When such officer's or employee's total annual income, including overtime payment, derived from the primary employment is less than eight thousand dollars ($8,000), that officer or employee may hold a part-time position that requires no more than four (4) hours of active duty per working day.

Thus, if the part-time instructor earns more than $8,000.00, the instructor may be prohibited from accepting any further compensation, such as *per diem* expenses.

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[2]We note, however, that one of the duties of the Commission is to certify fire training instructors. Tenn. Code Ann. § 4-24-106 (1). While this does not involve a contract or a direct pecuniary interest and, therefore, does not create a conflict under Tenn. Code Ann. § 12-4-101, we believe it would be appropriate for the Commission member to recuse him or herself from any proceedings involving his or her certification.

Finally, you ask whether any full-time state employee could serve on the Commission. There is no fixed answer to that question, except to say that the analysis would depend upon whether a conflict of interest or some other impairment existed, not upon whether the employee was full-time or part-time. Each case would have to be assessed in light of its facts.

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