S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

October 9, 2006

Opinion No. 06-159

Conflicts of Interest: State and County Election Commissions

QUESTION

May commissioners, officials, and employees of the state or county election commissions legally receive fees, commissions, or other compensation from a person or entity doing business or seeking business with their agency, department, or entity, or for which such entity makes decisions, policy, or recommendations regarding contracts?

OPINION

The legality of this conduct will vary with the specific circumstances of the transaction. Acceptance of such payment is a crime under Tenn. Code Ann. § 39-16-102 if any of these officials accepts a payment with the understanding that the payment will influence his or her official exercise of judgment. Under Tenn. Code Ann. § 12-4-101(a), any state or local official or employee is prohibited from being directly interested in a contract that he or she has the duty to let out or superintend. This prohibition applies to any member, official, or employee of the State Election Commission or of any county election commission. An individual is directly interested in a contract with that individual personally or with an entity in which he or she has the controlling interest. Under Tenn. Code Ann. § 12-4-101(b), any state or local official or employee must disclose anytime he or she has an indirect pecuniary interest in a contract he or she has a duty to overlook. If, as a result of the payment, any of these individuals has a pecuniary interest in a transaction that he or she has a duty to overlook, then the individual must disclose the interest.

Under Tenn. Code Ann. § 2-10-123, members, officials, and employees of the State Election Commission are not prohibited from receiving compensation for "consulting services." Similarly, under Tenn. Code Ann. § 2-10-124, members, officials, and employees of county election commissions are not prohibited from receiving compensation for "consulting services." Legislation enacted in 2006 to amend state ethics laws did not change this result. Questions regarding the applicability and scope of disclosure requirements for any state officials and employees under this statutory scheme should be referred to the Tennessee Ethics Commission, which is charged with its implementation and enforcement beginning October 1, 2006.

ANALYSIS

This opinion addresses conflict of interest and other ethics rules that apply to members and employees of the state or county election commissions. The question is whether commissioners, officials, and employees of the state or county election commissions may legally receive fees, commissions, or other compensation from a person or entity doing business or seeking business with their agency, department, or entity, or for which such entity makes decisions, policy, or recommendations regarding contracts. The legality of this conduct will vary with the specific circumstances of the transaction.

The State Election Commission operates under Tenn. Code Ann. §§ 2-11-101, *et seq.* Three members of the state commission are members of the majority party, and two are members of the minority party. Tenn. Code Ann. § 2-11-103. Members are nominated by a joint senate-house party caucus and are elected by joint resolution of both houses. Tenn. Code Ann. § 2-11-103; Tenn. Code Ann. § 2-11-104. The Secretary of State appoints the Coordinator of Elections, whose duties are outlined in Tenn. Code Ann. § 2-11-202.

County election commissions operate under Tenn. Code Ann. §§ 2-12-101, *et seq.* Each commission has five members — three from the majority and three from the minority party. Majority party members are appointed by the majority party members of the State Election Commission, and minority party members are appointed by the minority party members of the State Election Commission. Tenn. Code Ann. § 2-12-203. Each county generally funds its county election commission. Tenn. Code Ann. § 2-12-109. Each commission is required to appoint an administrator of elections, who is responsible for hiring office personnel. Precinct registrars and assistants are appointed by majority and minority party members of the county election commission. Tenn. Code Ann. § 2-12-202. Under Tenn. Code Ann § 2-12-210:

> Nothing in Acts 1986, ch. 930 shall be construed as conferring upon any county election commission, administrator of elections or any other county election official, status as a state employee. All such persons shall be subject to all applicable purchasing and budgetary laws of such county.

A. Bribery

Of course, under Tenn. Code Ann. § 39-16-102, it is a crime for a public official to accept any payment "upon an agreement or understanding that the public servant's vote, opinion, judgment, exercise of discretion or other action as a public servant will thereby be influenced." Acceptance of such payment is a crime under Tenn. Code Ann. § 39-16-102 if any of these officials accepts a payment with the understanding that the payment will influence his or her official exercise of judgment.

B. Conflict of Interest Statutes

The general conflict of interest statute appears at Tenn. Code Ann. § 12- 4-101. That statute prohibits any official from being directly interested in a contract that he or she has a duty to vote for, let out, overlook, or superintend. An official is directly interested in a contract if it is with the official personally or with a business in which he or she has a controlling interest. With regard to direct and prohibited conflicts of interest, subsection (a)(1) provides 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. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation. The provisions of this subdivision shall not be construed to prohibit any officer, committeeperson, director, or any person, other than a member of a local governing body of a county or municipality, from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which such person is directly interested.

Tenn. Code Ann. § 12-4-101(a)(1). Under this statute, no official or employee of the State Election Commission or any county election commission may be directly interested in a contract that he or she has a duty to let out or supervise. An individual is directly interested in a contract with that individual personally or with an entity in which he or she has the controlling interest. Thus, this statute prohibits any payment that results in an official or employee of the State Election Commission or any county election commission being directly interested in a contract he or she has a duty to let out or supervise.

Subsection (b) of the same statute addresses indirect conflicts of interest:

> 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 indirectly interested in any such contract unless the officer publicly acknowledges such officer's interest.*** "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county.

Tenn. Code Ann. § 12-4-101(b) (emphasis added). Under this statute, an official has an indirect interest in a contract in which he or she is interested, but not directly so. This Office has indicated

in the past that the interest referred to under the statute is a pecuniary interest. Op. Tenn. Att'y Gen. U96-043 (June 4, 1996). Under this statute, any member, official, or employee of the State Election Commission or of any county election commission must disclose any indirect pecuniary interest in a contract with the county if he or she has a duty to vote for, let out, or superintend that contract. In the past, this Office has suggested that an official "should abstain from voting or any way participating in official acts or proceedings which directly affect" contracts with a relative. Op. Tenn. Att'y Gen. 00-137 (August 24, 2000); Op. Tenn. Att'y Gen. 93-73 (December 28, 1993). But the statute does not require abstention. Therefore, each of these officials and employees must disclose any payment that results in giving him or her a pecuniary interest in a contract he or she has the duty to let out or supervise.

C. Receiving a Fee for "Consulting Services"

Tenn. Code Ann. §§ 2-10-123, *et seq.*, regulate receipt and disclosure of fees for "consulting services" by various state and local officials. The General Assembly has recently amended these statutes. 2006 Tenn. Pub. Acts Ch. 1, §§ 29-34 (Ex. Sess). Among other provisions, the act amended the definition of "consulting services," but it did not change Tenn. Code Ann. §§ 2-10-123 and -124 relevant to this request.

Under Tenn. Code Ann. § 2-10-123(a), a member or member-elect of the General Assembly, the Governor, a member of the Governor's staff, the Secretary of State, the Treasurer, and the Comptroller of the Treasury are prohibited from knowingly receiving a fee, commission, or any other form of compensation for consulting services from any person or entity, other than compensation paid by the State, a county, or municipality. Members, officials, and employees of the State Election Commission are not among the officials covered under this prohibition. Under Tenn. Code Ann. § 2-10-124(a), a member of a municipal or county legislative body, member-elect of a municipal or county legislative body, or other elected county or municipal official may not receive a fee, commission, or other form of compensation for consulting services, other than compensation paid by the State, a county, or municipality. Members, officials, and employees of county election commissions are not elected county or municipal officials. Therefore, they do not fall within this prohibition. Questions regarding the applicability and scope of disclosure requirements for state officials and employees under this statutory scheme should be referred to the Tennessee Ethics Commission, which is charged with its implementation and enforcement beginning October 1, 2006.

MICHAEL E. MOORE
Acting Attorney General

ANDY D. BENNETT
Chief Deputy Attorney General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Michael L. Kernell
State Representative, Chair, Government Operations Committee
Suite 38, Legislative Plaza
Nashville, TN 37243-0193