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March 26, 2007

Opinion No. 07-36

State Representative on Board of Tellico Reservoir Development Agency

QUESTION

Is it a conflict of interest under state law for a member of the Tennessee House of Representatives to serve on the Board of the Tellico Reservoir Development Agency?

OPINION

This service would not violate the Tennessee Constitution or Tenn. Code Ann. § 12-4-101, the general conflict of interest law.

Other state laws could be applicable if the legislator's duties as a TRDA director include influencing state legislative or administrative activity. Under Tenn. Code Ann. § 2-10-123(a), a legislator is prohibited from receiving a fee for consulting services from an entity other than "the "state, a county or municipality." Although the Tellico Reservoir Development Agency is a public agency, it is not clear whether it is a "municipality" within the meaning of this statute. In the event a court concluded that TRDA is not a "municipality" under the statute, then a legislator receiving payments from TRDA for influencing state administrative or legislative activity would be guilty of violating Tenn. Code Ann. § 2-10-123(a). These activities, however, would not subject the legislator to registration under state lobbying laws.

Finally, service as a director of TRDA should be disclosed in accordance with Tenn. Code Ann. § 2-10-128 and §§ 8-50-501, *et seq.*

ANALYSIS

This opinion concerns whether a state representative would violate Tennessee conflict of interest laws by serving on the Board of the Tellico Reservoir Development Agency ("TRDA"). TRDA was established and operates under Tenn. Code Ann. §§ 64-1-701, *et seq.* Three county mayors serve as directors, and each is authorized to appoint an additional two directors from each county with the consent of the county commission. Tenn. Code Ann. § 64-1-701(a). This Office addressed a number of issues concerning TRDA in 1984. Op. Tenn. Att'y Gen. 84-113 (April 4, 1984). In that opinion, this Office concluded that a legislator is not barred from serving on the TRDA Board of Directors under either Article II, Section 10, or Article II, Section 26, of the Tennessee Constitution. This conclusion is based on the reasoning that neither the General

Assembly nor the executive branch appoints the directors, and that the position is a local and not a state office. The statutes upon which this conclusion was based have not been materially amended since that time. For this reason, there is no constitutional impediment for a Tennessee state representative to serve as a director of TRDA.

The 1984 opinion does not address whether this dual service would violate state conflict of interest laws. Under Tenn. Code Ann. § 12-4-101, a public official may not be directly interested in a contract between that official and an agency if he or she has the duty to vote for, let out, or supervise the contract. But the term "directly interested" refers to a personal pecuniary interest. Op. Tenn. Att'y Gen. U96-043 (June 4, 1996). An official would not be "directly interested" in an agreement between the State and TRDA simply because he or she serves as a state legislator and as a director of TRDA. In any case, the statute does not prohibit a state legislator from having a direct interest in a contract with the State where the legislator merely votes on the general appropriations act that funds the contract. Op. Tenn. Att'y Gen. 03-034 (April 1, 2003).

The question then becomes whether the dual service would violate any provisions of the recently enacted ethics laws. Tenn. Code Ann. § 2-10-123 (a) provides in relevant part:

> It is an offense for any member of the general assembly . . . to knowingly receive 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.

A violation of this provision that would also constitute the offense of bribery under Tenn. Code Ann. § 39-16-102 is a Class C felony. Tenn. Code Ann. § 2-10-123(c)(1)(A). Any other violation of this section is a Class A misdemeanor. Tenn. Code Ann. § 2-10-123(c)(2). Any person convicted of violating the statute is forever disqualified from holding any office under the laws or Constitution of Tennessee. *Id.*

The term "consulting services" is defined as follows:

> (1) "Consulting services" with respect to an official in the legislative branch or an official in the executive branch means services to advise or assist a person or entity in influencing legislative or administrative action, as that term is defined in § 3-6-301, relative to Tennessee state government. "Consulting services" with respect to an official in the legislative branch or an official in the executive branch also means services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the State of Tennessee. "Consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure[.]

Tenn. Code Ann. § 2-10-122(1).

The Board of TRDA may provide that directors be compensated for attendance at board and committee meetings. Tenn. Code Ann. § 64-1-702. Directors are also entitled to be reimbursed for travel expenses and other necessary expenses incurred in the performance of their official duties. Assuming the Board has authorized compensation, therefore, a legislator acting as a board member would be entitled to compensation "for attendance at meetings." The legislator's duties as director of TRDA should also be examined to determine whether his or her duties as a director include assisting or advising TRDA in influencing legislative or administrative action, or in applying for a contract with the State of Tennessee. If so, then the legislator is receiving a fee for consulting services within the meaning of Tenn. Code Ann. § 2-10-123(a).

The question then becomes whether TRDA is a person or entity other than the State, a county, or municipality under this statute. The statutory scheme does not define the term "state," "county," or "municipality" as used in Tenn. Code Ann. § 2-10-123(a). The next statute penalizing similar activity by certain municipal or county officials, however, suggests that the General Assembly intended to limit the term "municipality" to a city. Tenn. Code Ann. § 2-10-124(a) and (b) provide:

> (a) It is an offense for any member of a municipal or county legislative body, member-elect of a municipal or county legislative body, or other elected county or municipal official to knowingly receive a fee, commission or any other form of compensation for consulting services, *other than compensation paid by the state, a county, or municipality.*
>
> (b) It is an offense for any person or other entity, other than the state, a county, or a municipality, to pay a fee, commission or any other form of compensation for consulting services *relating to a municipality or county* if such person or entity knows the person to whom the compensation is paid *is a member of the municipal or county legislative body, a member elect of the municipal or county legislative body, or other elected municipal or county official in the county or municipality in which the consulting services are to be performed.*

(Emphasis added). It could be argued that, under this statute, the term "municipality" refers to a city rather than to any public agency, since cities have elected municipal legislative bodies while other public agencies do not. This statute does not necessarily furnish guidance in interpreting the term "municipality" as used in Tenn. Code Ann. § 2-10-123(a), however, since the statute clearly applies to county and city officials.

Obviously, TRDA is not a city. Under the statutes creating it, TRDA is a "public body corporate and politic." Tenn. Code Ann. § 64-1-701(a). Its powers and authorities are declared to be public and corporate purposes and matters of public necessity. Tenn. Code Ann. § 64-1-701(c). Among its other powers, TRDA may "enter into contracts with *municipalities, other public agencies* or political subdivisions of any kind, corporations, public or private, or with others" for development services. Tenn. Code Ann. § 64-1-706(a) (emphasis added). These statutes suggest that TRDA is a "public agency" but not a "municipality."

Notwithstanding the language cited above, it is not clear whether a court would find that TRDA is a "municipality" under Tenn. Code Ann. § 2-10-123(a). Criminal statutes must be strictly construed in favor of any person who may be charged with violating their provisions. *State v. Williams*, 623 S.W.2d 121, 124 (Tenn. Crim. App. 1981), *p.t.a. denied* (1981). Any reasonable doubt as to the intended meaning of a criminal statute must be resolved in favor of the defendant. *State v. Henderson*, 623 S.W.2d 638, 640 (Tenn. Crim. App. 1981), *p.t.a. denied* (1981). In the event the court concluded that TRDA is not a "municipality" under the statute, then a legislator receiving payments from TRDA for influencing state administrative or legislative activity would be guilty of violating Tenn. Code Ann. § 2-10-123(a).

Another question is whether a legislator who, as a director of TRDA, is paid to influence legislative or administrative action on behalf of TRDA is subject to registration as a "lobbyist" under state law, Tenn. Code Ann. §§ 3-6-301, *et seq.* The statute specifically excludes "communications with officials of the legislative or executive branches *by an elected or appointed public official* performing the duties of the office held" from the definition of "lobby." Tenn. Code Ann. § 3-6-301(15)(B) (emphasis added). The statute provides no further definition of an "elected or appointed public official." As noted above, the TRDA Board of Directors consists of three county mayors and directors appointed by the mayors. All the TRDA directors, therefore, appear to be elected or appointed public officials under this statute. Under this exclusion from the definition of "lobby," therefore, a legislator who is also a director of TRDA and who, in that capacity, is paid to influence governmental activity, is not subject to registration as a lobbyist.

Finally, Tenn. Code Ann. § 2-10-128 and §§ 8-50-501, *et seq.*, require state legislators to file a disclosure statement regarding income and activities. Service as a director of TRDA should be disclosed in accordance with these statutes.

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