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Opinion No. 07-141

Bank Officer and Shareholder as County Commissioner

QUESTIONS

1. a. May an individual who is an officer of a bank with which the county conducts business serve as a member of the county legislative body in a county that operates under Tenn. Code Ann. §§ 5-12-101, *et seq.* (the County Budgeting Law of 1957); Tenn. Code Ann. §§ 5-13-101, *et seq.* (the County Fiscal Procedure Law of 1957); and Tenn. Code Ann. §§ 5-14-101, *et seq.* (the County Purchasing Law of 1957)?

b. If the answer to Question 1.a. is yes, may such person serve on the county budget committee formed under Tenn. Code Ann. § 5-12-104 and the county purchasing commission formed under Tenn. Code Ann. § 5-14-106?

2. a. May an individual who is a director and shareholder of a bank with which the county conducts business serve as a member of the county legislative body in a county that operates under Tenn. Code Ann. §§ 5-12-101 through 5-14-116?

b. If the answer to Question 2.a. is yes, may such person serve on the county budget committee formed under Tenn. Code Ann. § 5-12-104 and the county purchasing commission formed under Tenn. Code Ann. § 5-14-106?

OPINIONS

1. Tenn. Code Ann. § 45-2-405 authorizes any officer, director, or employee of any bank to serve in any local office, so long as he or she discloses the position to the bank and the local government. This statute applies "notwithstanding the provisions of any law to the contrary." Under the statute, therefore, a bank officer, director, or employee may serve in any local office, including on the county commission, the county budget committee, or the county purchasing commission.

2. Conflicts of interest arising from an individual's interest as a shareholder in a bank are not covered under Tenn. Code Ann. § 45-2-405. Those conflicts, therefore, are governed by general state laws on conflicts of interest. If a commissioner, member of the budget committee, or member of the purchasing commission has a duty to vote for, let out, or supervise the contract between the county and the bank in which he or she is a shareholder, the relationship is prohibited

if the shareholder holds a "controlling interest" as defined under Tenn. Code Ann. § 12-4-101(a)(1). If the shareholder does not hold a controlling interest in the bank, he or she has an indirect interest in the contract that must be disclosed under Tenn. Code Ann. § 12-4-101(b). Tenn. Code Ann. § 5-14-114 of the County Purchasing Law of 1957 prohibits a shareholder of a bank that conducts business with the county from serving as a county commissioner, or as a member of the county budget committee or the county purchasing commission. While the Tennessee Court of Criminal Appeals has concluded that this statute is unconstitutional to the extent it imposes criminal penalties, we think it may still constitutionally serve as the basis for an ouster action under Tenn. Code Ann. §§ 8-47-101, *et seq.*

ANALYSIS

1. Bank Officer on County Commission

This opinion addresses whether an officer or a shareholder of a bank with which the county conducts business may serve as a member of the county commission, the county budget committee, or the county purchasing commission in a county operating under Tenn. Code Ann. §§ 5-12-101, *et seq.* (the County Budgeting Law of 1957); Tenn. Code Ann. §§ 5-13-101, *et seq.* (the County Fiscal Procedure Law of 1957); and Tenn. Code Ann. §§ 5-14-101, *et seq.* (the County Purchasing Law of 1957). These laws apply in counties where the county commission has adopted them. The County Budgeting Law creates a county budget committee under Tenn. Code Ann § 5-12-104. The County Purchasing Law creates a county purchasing commission under Tenn. Code Ann. § 5-14-106. We assume the expression "conducts business" means the bank provides banking services to the county under a service contract. Applicable statutes governing conflicts of interest in counties operating under the County Purchasing Law of 1957 are Tenn. Code Ann. §§ 2-10-124, 12-4-101, and 5-14-114. With respect to the individual's status as a bank officer, Tenn. Code Ann. § 45-2-405 clearly authorizes any officer, director, or employee of any bank to serve in any local office, so long as he or she discloses the position to the bank and the local government. This statute applies "notwithstanding the provisions of any law to the contrary." The statute provides:

> *(a) Notwithstanding the provisions of any law to the contrary,* any officer, director, or employee of any bank may serve in any capacity in state or local government, except in any capacity with the department, or on any board, commission, or other agency of such governmental unit; provided, that such officer, director, or employee has:
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> (1) Disclosed to the chief executive officer of the bank and the board of directors of the bank the capacity in which such officer, director or employee is serving with such governmental unit; and
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> (2) Disclosed to the chief executive officer of the governmental unit and to the appropriate board, commission or other agency the relationship to the bank.

> (b) Where there has been compliance with this section, the existence of such dual relationship shall not invalidate, or adversely affect, any sale, contract or other business transaction between such bank and such governmental unit.
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> (c) As used in this section, "bank" includes any state or national bank, or state or federal savings and loan association, or credit union established pursuant to chapter 4 of this title.

(Emphasis added). None of the conflict of interest statutes cited above provides that it controls over any other law. Because Tenn. Code Ann. § 45-2-405 applies "notwithstanding the provisions of any law to the contrary," it controls over any of these conflict of interest statutes. As used in the statute, "department" refers to the Tennessee Department of Financial Institutions. Tenn. Code Ann. § 45-1-103(8). Under the statute, therefore, a bank officer, director, or employee may serve in any local office, including on the county commission, the county budget committee, or the county purchasing commission.

2. Bank Shareholder on County Commission

Tenn. Code Ann. § 45-2-405 does not apply to a bank shareholder. We think a court would conclude that the statute only applies to an individual's status as director or employee and does not immunize an individual who is both a director and shareholder of a bank from all conflicts of interest. For example, the Tennessee Court of Appeals has noted that Tenn. Code Ann. § 12-4-101, the general conflict of interest statute, was enacted to protect the public from official corruption and oppression and should be liberally construed so as to effectuate the object sought. *State ex rel. Abernathy v. Robertson*, 5 Tenn. Civ. App. 438 (5 Higgins) (1914). Thus, conflicts of interest arising from a bank director's status as shareholder must be analyzed separately from conflicts arising from his or her status as director. A bank shareholder's authority to serve as a county commissioner or member of the two county committees is governed by the applicable conflict of interest statutes.

a. "Consulting Services" under Tenn. Code Ann. § 2-10-124

Under Tenn. Code Ann. § 2-10-124, it is an offense for a county commissioner to receive a fee for "consulting services" from a non-governmental entity. The term "consulting services" is defined as follows:

> "Consulting services" with respect to an elected municipal or county official, including a member-elect of a municipal or county legislative body, 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 the municipality or county represented by that official. "Consulting services" with respect to an elected municipal or county official, including a member-elect of a municipal or county legislative body, also means services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the municipality

> or county represented by that official. "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(2).

Ordinarily, a person who is only a shareholder of a corporation would not receive compensation for services. Tenn. Code Ann. § 2-10-124(a), therefore, ordinarily would not prohibit a shareholder of a bank from serving as county commissioner for a county with which the bank conducts business.

b. General Conflict of Interest Statute: Tenn. Code Ann. § 12-4-101

The general provision on conflicts of interest concerning public officers, Tenn. Code Ann. § 12-4-101, pertains to contracts. Under subsection (a)(1) of the statute, a public official may not be directly interested in a contract the official has a duty to vote for, let out, overlook, or superintend. Under subsection (b), a public official must disclose any indirect interest in such contracts. The statute provides in relevant part:

> (a)(1) 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 (a)(1) 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) (emphasis added). A person who becomes unlawfully interested in a contract under this statute must forfeit all pay and compensation for the contract. Tenn. Code Ann. § 12-4-102. Further, the person must be dismissed from office and remain ineligible for the same or a similar position for ten years. *Id.*

Section 12-4-101 prohibits officials from being directly interested in a contract that they have a duty to award or supervise. An individual is "directly interested" in a contract only if the contract is with that individual personally or with a business in which the individual owns the controlling

interest. We assume the county has a contract with the bank in which the individual is a shareholder. If the county commission has a duty to vote for, let out, or supervise the contract between the county and the bank in which the individual is a shareholder, the relationship is prohibited if the shareholder holds a "controlling interest" as defined under Tenn. Code Ann. § 12-4-101(a)(1). If the shareholder does not hold a controlling interest in the bank, he or she has an indirect interest in the contract that must be disclosed.

c. County Purchasing Law of 1957, Tenn. Code Ann. § 5-14-114

Finally, the request indicates that the county has adopted Tenn. Code Ann. §§ 5-12-101, *et seq.* (the County Budgeting Law of 1957); Tenn. Code Ann. §§ 5-13-101, *et seq.* (the County Fiscal Procedure Law of 1957); and Tenn. Code Ann. §§ 5-14-101, *et seq.* (the County Purchasing Law of 1957). Tenn. Code Ann. § 5-14-114 provides:

> (a) Neither the county purchasing agent, nor members of the county purchasing commission, nor members of the county legislative body, *nor other officials of the county, shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in any contract or purchase order for any supplies, materials, equipment or contractual services used by or furnished to any department or agency of the county government.*
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> (b) Nor shall any such persons accept or receive, directly or indirectly, from any person, firm or corporation to which any contract or purchase order may be awarded, by rebate, gift or otherwise, any money or anything of value whatsoever, or any promise, obligation or contract for future reward or compensation.
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> (c) A violation of this section is a Class D felony.

(Emphasis added). The Tennessee Court of Criminal Appeals has concluded that section (c) of this statute is unconstitutional because it arbitrarily imposes criminal sanctions in the counties that have adopted the County Purchasing Law of 1957. *State v. Whitehead,* 43 S.W.3d 921 (Tenn. Crim. App. 2000), *p.t.a. not filed.* But the Court did not address the constitutionality of the statute to the extent it makes an official subject to removal under an ouster action. Tenn. Code Ann. §§ 8-47-101, *et seq.* We think the statute is defensible in this respect. The statute addresses the qualification for office of local government officials. An official takes office subject to the conditions imposed by the terms and nature of the political system in which he operates. *Gordon v. Leatherman,* 450 F.2d 562, 565 (5th Cir. 1971). Further, this statute is part of the County Purchasing Law of 1957, which any county may adopt. Such legislation does not suspend the general law within the meaning of the state equal protection provision, Article XI, Section 8, of the Tennessee Constitution, because it is in itself a general law in that such legislation is open to adoption by all the counties in the State. Op. Tenn. Att'y Gen. 05-017 (February 3, 2005); Op. Tenn. Att'y Gen. 81-197 (March 26, 1981).

The Tennessee Court of Criminal Appeals also considered, and rejected, a claim that Tenn. Code Ann. § 5-14-114 is unconstitutionally vague. The Court noted that the statute prohibits a

county official, "from having *any personally favorable interest in a county contract*, regardless of whether that interest is direct or circuitous." 43 S.W.3d at 929 (emphasis added). We think a court would conclude that a shareholder of a bank has a personally favorable interest in a contract between the bank and the county for banking services. This statute, therefore, prohibits a shareholder of a bank that conducts business with the county from serving as a county commissioner, or as a member of the county budget committee or the county purchasing commission.

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