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December 6, 2007

Opinion No. 07-159

One Person Simultaneously Serving as Fentress County Deputy Sheriff and Bus Driver for Fentress County Board of Education

QUESTION

May an individual serve as a Fentress County deputy sheriff and be simultaneously employed as a bus driver by the Fentress County Board of Education?

OPINION

It is the opinion of this office that there is no constitutional, statutory, or common law prohibition against an individual serving as a Fentress County deputy sheriff and being simultaneously employed as a bus driver by the Fentress County Board of Education. Therefore, such dual service is permissible as long as such service is not prohibited by Fentress County personnel policies or rules, including any civil service policy or rule that may be found to apply, or by any contractual provision between Fentress County and the individual.

ANALYSIS

In considering whether an individual may serve as a Fentress County deputy sheriff and be simultaneously employed as a bus driver by the Fentress County Board of Education, we first consider whether the Tennessee Constitution prohibits such service. There are two provisions of the Tennessee Constitution that prohibit dual service. Article VI, Section 7, of the Tennessee Constitution prohibits certain judges from holding "any other office of trust or profit," and Article II, Section 26, prohibits "any person in this State [from] hold[ing] more than one lucrative office at a time." Since your query does not pertain to a judge, Article VI, Section 7, clearly does not apply. As for Article II, Section 26, this provision has been interpreted to forbid a person from holding more than one lucrative office in the state government at the same time, and not to apply to local government office holding. *Phillips v. West*, 187 Tenn. 57, 65-66, 213 S.W.2d 3 (1948); *Boswell v. Powell*, 163 Tenn. 445, 447-49, 43 S.W.2d 495 (1931). While the Tennessee Supreme Court has found that the office of deputy sheriff is a "lucrative state office" for the purposes of Article II, Section 26,[1] an individual employed as a bus driver by the Fentress County Board of Education does

[1] *State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 326, 327 (Tenn. 1905); *but see Spurlock v. Sumner County*, 42 S.W.3d 75, 82 (Tenn. 2001) (sheriff, when acting in a law enforcement capacity, acts as a county official under Tennessee law).

not hold a state office. First, such an individual is employed by the county board, not the State. *See* Tenn. Code Ann. § 49-6-2101(d). Second, as discussed later in this opinion, we conclude that a bus driver employed by the Fentress County Board of Education does not hold an "office" as that term has been defined by our courts. Accordingly, Article II, Section 26, does not prohibit a Fentress County deputy sheriff from being simultaneously employed as a bus driver for the Fentress County Board of Education.

We next consider whether any private act of Fentress County or any state statute prohibits the dual service in question. Having reviewed the private acts of Fentress County, we find no provision that prohibits such service. Similarly, we find no statutory prohibition against the dual service in question.

Finally, we consider whether the common law prohibits an individual from serving as a Fentress County deputy sheriff and being simultaneously employed as a bus driver by the Fentress County Board of Education. There is a well recognized common law prohibition against a public officer holding two incompatible offices at the same time. *Slagle*, 115 Tenn. 336, 89 S.W. 316 at 327 (citing *State ex rel. Bergshicher v. Grace*, 113 Tenn. 9, 82 S.W. 485 (1904)). This common law prohibition generally applies when an individual occupies two inherently inconsistent offices. 63C Am.Jur.2d *Public Officers and Employees* § 62 (2007). The question of incompatibility of necessity depends on the circumstances of the individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. *Officers* § 38 (2007).

As an initial consideration, we examine the application of this common law prohibition since our courts have stated that this prohibition applies to "offices" and "officers." *See Slagle*, 115 Tenn. 336, 89 S.W. 316 at 327. While the Tennessee Supreme Court has found that the position of deputy sheriff is an "office" and a deputy sheriff is an "officer,"[2] no Tennessee court has considered whether the same is true with respect to a school bus driver. Nevertheless, we are guided by our courts' definitions of "office" and "officer" in making that determination.

In *Frazier v. Elmore*, 180 Tenn. 232, 173 S.W.2d 563, 565 (1943), the Tennessee Supreme Court examined the meaning of "office," stating: "Webster defines 'office' as an 'assigned duty or function.' Synonyms are post, appointment, situation, place, position; and 'office commonly suggests a position of (especially public) trust or authority.'" Similarly, a "public officer" has been defined as "an incumbent of a public office; an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law." *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (citing 67 C.J.S. *Officers*, § 2).

In short, the most important characteristic in determining whether an individual is a public officer is the exercise of some portion of the sovereign power. A person must have an independent

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[2] *Slagle*, 115 Tenn. 336, 89 S.W. at 327.

governmental duty that the person is required to undertake by virtue of his or her position, and not solely as an instrumentality directed by another. 67 C.J.S. *Officers*, § 2 (2007). A school bus driver does not exercise a county's sovereign power; he or she performs only those duties that are directed by the local board of education. Accordingly, we are of the opinion that a school bus driver is not an "officer"and does not hold an "office."

Returning to the common law principle of incompatible offices, we find no Tennessee decision addressing whether this principle applies when only one governmental office is involved. We also note that other jurisdictions' decisions on this issue are not uniform. In some jurisdictions, the application of the common law principle of incompatible offices has been restricted to two public offices and has been found to have no application when one of the positions is an employment rather than a public office. S*ee, e.g., Eldridge v. Sierra View Local Hosp. Dist.*, 224 Cal.App.3d 311, 273 Cal.Rptr. 654, 659-60 (1990). Other jurisdictions, however, have found the common law principle to apply even when only one governmental office is involved. *See, e.g., Dupras v. County of Clinton*, 213 A.D.2d 952, 624 N.Y.S.2d 309, 309-10 (1995); *Tarpo v. Bowman Public School District*, 232 N.W.2d 67, 71 (N.D. 1975); *Haskins v. State ex rel. Harrington*, 516 P.2d 1171, 1175-78 (Wyo. 1973).

While only a Tennessee court of competent jurisdiction could determine whether the common law principle of incompatible offices applies when only one governmental office is involved, we will assume for the purposes of this opinion that this principle would be found to apply. As stated above, the crucial question in determining incompatibility 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* § 38 (2007). In considering an individual serving as a deputy sheriff and being simultaneously employed as a school bus driver, we know of no inherent inconsistency, incompatibility, or conflict in these two positions. The only potential incompatibility issue that could possibly arise is the physical ability to discharge the duties of both positions. If the individual cannot perform the obligations of both positions or if the individual has to choose the obligations of one position over the other, the positions may be found to be incompatible. *See Cleveland ex rel. Kay v. Reibe*, 46 Ohio Misc. 47, 348 N.E.2d 156 (Ohio Com.Pl. 1975), *rev'd on other grounds*, 1976 WL 190965 (Ohio App. 1976).

In sum, we are of the opinion that there is no constitutional, statutory, or common law prohibition against an individual serving as a Fentress County deputy sheriff and being simultaneously employed as a bus driver by the Fentress County Board of Education. Therefore, such dual service is permissible as long as such service is not prohibited by Fentress County personnel policies or rules, including any civil service policy or rule that may be found to apply, or by any contractual provision between Fentress County and the individual.

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