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Opinion No. 08-02

City Commissioner Serving as City Police Officer

QUESTION

May a city commissioner hold the position of a city police officer?

OPINION

A definitive answer to this question would depend on the city charter and applicable private acts. Under general law, a city commissioner may be an employee of the city but may not vote on matters in which he or she has a conflict of interest arising from the employment if the employment began after the commissioner's term of office. Further, under Tenn. Code Ann. § 7-51-1501, a city commissioner who is also a city police officer may not run for re-election to the commission unless the city charter or a city ordinance authorizes a city employee to run for that office. Depending on the facts and circumstances, a police officer may also be subject to the limits on political activity under Tenn. Code Ann. § 38-8-310.

ANALYSIS

This opinion concerns whether a city commissioner may also hold the position of a city police officer. The request indicates that the city manager hires police officers. The city manager is appointed by the city commission. Police officers work under the direct supervision of the city police chief. The city manager hires and fires police officers. Of course, a definitive answer to this question depends on the city charter and other applicable private acts. This opinion will address relevant statutes of general applicability. Both Tenn. Code Ann. § 6-54-107(a) and Tenn. Code Ann. § 12-4-101(a) prohibit a city commissioner from being directly interested in a contract that he or she has the duty to supervise or let out. Each of these statutes, however, implicitly recognizes that a member of a local governing body may also be an employee of that local government. Tenn. Code Ann. § 12-4-101(c) provides:

> (c)(1) Any member of a local governing body of a county or a municipality who is also an employee of such county or municipality and whose employment *predates* the member's initial election or appointment to the governing body of the county or municipality *may* vote on matters in which the member has a conflict of interest if the member informs the governing body immediately prior to the vote as follows: "Because I am an employee of (name of governmental unit), I have a conflict of

> interest in the proposal about to be voted. However, I declare that my argument and my vote answer only to my conscience and to my obligation to my constituents and the citizens this body represents." The vote of any such member having a conflict of interest who does not so inform the governing body of such conflict shall be void if challenged in a timely manner. As used in this subdivision (c)(1), "timely manner" means during the same meeting at which the vote was cast and prior to the transaction of any further business by the body.
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> (2) Any member of a local governing body of a county or a municipality who is also an employee of such county or municipality *and whose employment began on or after the date on which the member was initially elected or appointed* to serve on the governing body of the county or municipality shall *not* vote on matters in which the member has a conflict of interest.
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> (3)(A) In the event a member of a local governing body of a county or a municipality has a conflict of interest in a matter to be voted upon by the body, such member may abstain for cause by announcing such to the presiding officer.
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> (B) Any member of a local governing body of a municipality who abstains from voting for cause on any issue coming to a vote before the body shall not be counted for the purpose of determining a majority vote.

Tenn. Code Ann. § 12-4-101(c) (emphasis added). Tenn. Code Ann. § 6-54-107(c) contains similar provisions. To the extent the two statutes are inconsistent, Tenn. Code Ann. § 12-4-101(c) controls. Op. Tenn. Att'y Gen. 98-132 (July 27, 1998).

Under these statutes, a city commissioner, who is also an employee of the city and whose employment predates his or her election or appointment to the commission, may vote on matters in which he or she has a conflict of interest if the member makes the statement required in Tenn. Code Ann. § 12-4-101(c)(1). Under Tenn. Code Ann. § 12-4-101(c)(2), a city commissioner who is also a city employee and whose employment began after the date when the member was elected or appointed to serve on the council may not vote on matters in which he or she has a conflict of interest by reason of the employment contract.

Whether a city commissioner has a conflict of interest by reason of his or her employment as a police officer that prevents him or her from voting on an issue will depend on particular facts and circumstances, especially his or her responsibilities as an employee and how deeply the member, as an employee, has been involved in a particular transaction on which the city commissioner must vote. A member might also have a conflict of interest, for example, if the matter to be voted on will have an impact on his or her salary.

There is also a common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 316 (1905). This prohibition is generally applied when an individual occupies two inherently inconsistent offices.

63C Am.Jur.2d *Public Officers and Employees* § 62 (1997). The question of incompatibility depends on the circumstances of each individual case, and the issue 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* § 27 at 279-80 (1978). For example, an inherent inconsistency exists where one office is subject to the supervision or control of the other. *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). 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, and no statute then in effect permitted the same individual to hold these offices.

The request indicates that the city manager hires and fires police officers. The city manager also hires and fires the police chief, who directly supervises police officers. The city commission is authorized to hire and fire the city manager. Thus, the city commission directly supervises the official who has hiring authority over police officers. No Tennessee case has found a common law conflict of interest between two offices, one of which hires and fires the officer with hiring authority over the other position. In addition, Tenn. Code Ann. § 12-4-101(c) clearly permits a member of a local governing body to serve as an employee for the same governmental entity, provided he or she observes the limits in that statute. For this reason, we do not think a court would find that the positions of city commissioner and police officer for the same city are incompatible under the common law.

Other statutes would limit political activities of city employees, including a police officer. Tenn. Code Ann. § 7-51-1501 provides:

> Notwithstanding the provisions of any county, municipal, metropolitan, or other local governmental charter to the contrary, and notwithstanding the provisions of any resolution or ordinance adopted by any such county, municipality or other local governmental unit to the contrary, every employee of every such local governmental unit shall enjoy the same rights of other citizens of Tennessee to be a candidate for any state or local political office, the right to participate in political activities by supporting or opposing political parties, political candidates, and petitions to governmental entities; provided, further, that the city, county, municipal, metropolitan or other local government is not required to pay the employee's salary for work not performed for the governmental entity; and *provided, further, that unless otherwise authorized by law or local ordinance, an employee of a municipal government or of a metropolitan government shall not be qualified to run for elected office in the local governing body of such local governmental unit in which the employee is employed.*

Tenn. Code Ann. § 7-51-1501 (emphasis added). This Office has stated that this statute effectively

overrules every local governmental charter provision or ordinance that purports to limit the listed political activities of its employees. *See* Op. Tenn. Att'y Gen. 96-106 (August 20, 1996). However, the second proviso, italicized in the quote above, prohibits a municipal employee from running for the city council in the city that employs him or her unless *otherwise authorized* to do so by law or local ordinance (the "Council Proviso"). Thus, under the Council Proviso, a city employee may not run for election to the city council of the city that employs him or her unless a statute or local ordinance expressly authorizes its city employees to do so. Under this statute, a city commissioner who is also a city police officer may not run for re-election to the commission unless the city charter or a city ordinance authorizes a city employee to run for that office. Depending on the facts and circumstances, city police officers may also be subject to the limits on political activity set forth in Tenn. Code Ann. § 38-8-310.

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