STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 08-15

Conflict of Interest: Health Care Network Arrangement

QUESTIONS

Based on the facts presented below, does a Blount County Commissioner who is a health care professional have a prohibited conflict of interest:

1. In a contract between the county and the Blount Physician Hospital Organization, Inc., doing business as Highlands Health System (PHO) ("Highlands"); or

2. In providing health care to a county employee?

OPINION

1. Unless, based on all facts and circumstances, including the agreement between Highlands and the county, a physician has a direct contract with the county health care plan and the plan is directly operated by the county, the arrangement does not violate Tenn. Code Ann. § 12-4-101(a). But the commissioner must disclose his or her interest in the contract. The arrangement violates Tenn. Code Ann. § 5-14-114 because, under these circumstances, a commissioner would have an indirect personally beneficial interest in the contract between the county and Highlands.

2. Whether this activity violates Tenn. Code Ann. § 12-4-101(a) depends on the structure of the arrangement under which a health care professional provides services to county employees. If the professional has a contract directly with the county to provide these services, then the arrangement is a direct interest prohibited under Tenn. Code Ann. § 12-4-101(a). If, on the other hand, the professional has no contract directly with the county, then the arrangement is not prohibited. Similarly, whether the activity violates Tenn. Code Ann. § 5-14-114 depends on the arrangement under which a county employee receives health care services. If these services are furnished directly to the county or a county agency, then the arrangement violates Tenn. Code Ann. § 5-14-114. If, on the other hand, the services are not furnished directly to the county or a county agency, the arrangement does not violate Tenn. Code Ann. § 5-14-114.

ANALYSIS

This opinion is based on facts presented in material included with the request. Two Blount County Commissioners are health care professionals. One is a licensed clinical social worker, and

the other is a pediatrician. Each of these commissioners has entered into a Physician Agreement with the Blount Physician Hospital Organization, Inc., doing business as Highlands Health System (PHO) ("Highlands"). A copy of the Physician Agreement is included with the request. Blount County has a contract with Highlands to provide the county a list of doctors for use in the county's health benefit package for county employees. The two commissioners appear on the list. A listed doctor accepts a lower fee for treating a county employee under the county's employee health benefit plan. County employees do not have to use a listed doctor, but they must pay a higher co-payment if they do not use a listed doctor. Highlands does not directly pay any doctors with whom it has a contract.

Blount County does not contract with an insurance company to provide medical insurance for its employees. The county uses an agent to process claims and make payments to doctors.

1. Contract Between the County and Highlands

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:

> 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.*

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).

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 is the sole proprietor, a partner, or the person having the controlling interest. This office has taken the view that those who vote on budgets and appropriations superintend the contracts paid for by those budgets and appropriations. Op. Tenn. Att'y Gen. 98-188 (October 2, 1998).

The first question is whether either commissioner has a prohibited conflict of interest in the contract between Highlands and the county. The facts present no such direct conflict. The request includes a copy of the contract between Highlands and a participating physician. The contract in question is not between the county and the commissioners, but between the county and a network of which the commissioners are members. Material included with the request refers to the arrangement between Highlands and participating physicians as a "partnership." But the Physician Agreement does not create a partnership relationship between Highlands and a participating physician. *See* Part IV, Paragraph E ("None of the provisions of this Agreement are intended to create nor shall be deemed or construed to create any relationship between the parties hereto other than that of independent entities contracting with each other hereunder solely for the purpose of effecting the provisions of this Agreement.") Thus, the two commissioners are not partners in Highlands as that term is used in Tenn. Code Ann. § 12-4-101(a). Nor does it appear from the materials provided with the request that either commissioner is a sole proprietor or a person having a controlling interest in Highlands.

Under Part IV, Paragraph E. of the agreement, Highlands is authorized to enter into agreements with health care plans "on behalf of" participating physicians and providers. Physicians Agreement, Part IV, ¶ E. But while the physician is subject to the terms of a plan with which Highlands has contracted, the physician is prohibited from contracting with such a plan directly. Physician Agreement, Part IV, ¶ I. Unless, based on all facts and circumstances, including the agreement between Highlands and the county, a physician has a direct contract with the county health care plan and the plan is directly operated by the county, the arrangement does not violate

Tenn. Code Ann. § 12-4-101(a). Each commissioner, however, benefits indirectly from the contract with Highlands because he or she is a member of the Highlands network. Therefore, each should disclose his or her interest in the agreement in accordance with Tenn. Code Ann. § 12-4-101(b).

Research indicates that Blount County also operates under the County Purchasing Law of 1957, which is a local option act that becomes effective in a particular county upon adoption by a two-thirds vote of the county commission or on a majority vote in a countywide election. Tenn. Code Ann. § 5-14-102. The statutory scheme provides for a county purchasing agent and county purchasing commission to handle county purchases. Tenn. Code Ann. § 5-14-114(a) provides in relevant part:

> 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.

(Emphasis added). This office recently discussed the scope of this provision. Op. Tenn. Att'y Gen. 07-141 (October 10, 2007). There, we noted that the Court of Criminal Appeals found section (c) of this statute imposing criminal penalties for its violation to be unconstitutional. *State v. Whitehead*, 43 S.W.3d 921 (Tenn. Crim. App. 2000), *p.t.a. not filed*. We concluded, however, that this statute is constitutionally defensible to the extent it makes an official subject to removal pursuant to an ouster action. The Court of Criminal Appeals in *Whitehead* noted that this 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). Under the facts presented, the two commissioners have a personally favorable interest in the contract between Highlands and the county because each is listed as a provider under that contract. For that reason, the statute prohibits the commissioners' interest in the contract between Highlands and the county.

2. Providing Health Care Services to County Employees

As material included with the request notes, each commissioner is paid by the county for services he or she provides county employees under the county health care plan. The county health care plan is part of the county budget. Therefore, the commissioners "superintend" the health care plan within the meaning of Tenn. Code Ann. § 12-4-101(a). But this statute, by its terms, applies to contracts. Whether a county commissioner who is also a doctor has a prohibited conflict of interest under these circumstances, therefore, depends on the structure of the plan. If a doctor who treats a county employee has a contract with the county for payment for those services, then the commissioners who treat county employees have a prohibited direct conflict of interest in the health care plan. If a doctor

who treats a county employee has no contract with the county, then the arrangement does not present a prohibited conflict of interest.

The next question is whether a commissioner who is a health care provider would violate Tenn. Code Ann. § 5-14-114 by providing health care services to a county employee. By its terms, subsection (a) of this statute prohibits a commissioner from having a beneficial interest "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.*" (Emphasis added). Again, a definitive answer would depend on the arrangement under which a county employee receives health care services. If these services are furnished directly to the county or a county agency, then the arrangement violates Tenn. Code Ann. § 5-14-114. If, on the other hand, the services are not furnished directly to the county or a county agency, then the arrangement does not violate Tenn. Code Ann. § 5-14-114.

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