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Opinion No. 08-107

County Board of Education Member also serving as City Council Member and City Board of Education Member

QUESTION

An individual sits on the Rhea County Board of Education and, by virtue of being a member of the City of Dayton Council, also serves on the City of Dayton Board of Education. Is this service permissible?

OPINION

This arrangement appears to be permissible under state law.

ANALYSIS

In considering whether an individual may serve as a member of the Rhea County Board of Education and as a member of the City of Dayton Council and the City of Dayton Board of Education, we first consider whether the Tennessee Constitution prohibits such service. The Tennessee Constitution, Article II, Section 26, prohibits a person from "holding more than one lucrative office at the same time." The term "office" has been construed by Tennessee courts to mean "state office." *Phillips v. West*, 187 Tenn. 57, 213 S.W.2d 3 (1948); *Boswell v. Powell*, 163 Tenn. 445, 43 S.W.2d 495 (1931). The offices of county school board member, city council member, and city school board member are local offices and, therefore, are not covered by the prohibition of Article II, Section 26.

We next consider whether general state law prohibits the service in question. We note that Tenn. Code Ann. § 49-2-202(a) does prohibit a county commissioner from also serving on the county school board. While the individual at issue is a member of the City of Dayton Council, he is not a member of the Rhea County legislative body. Consequently, this statute places no restraint on the service in question. *See* Op. Tenn. Att'y Gen. 08-96 (April 23, 2008).

Additionally, we find no provision in the Rhea County private acts that prohibits an individual serving on the county school board from serving as a member of the City of Dayton Council or the City of Dayton Board of Education. Similarly, we find no provision in the City of Dayton's charter or municipal code that prevents an individual serving on the City of Dayton Council and the City of Dayton Board of Education from serving on the Rhea County Board of

Education.

We next consider whether the common law prohibits the service at issue. There is a well recognized 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, 327 (1905) (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). 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. In this case, the Rhea County Board of Education has no authority to appoint, remove, or supervise the members of the City of Dayton Council and the City of Dayton Board of Education. Similarly, the members of the City of Dayton Council and the City of Dayton Board of Education have no such authority over the members of the Rhea County Board of Education. Moreover, we are aware of no reason that an individual engaged in the service at issue could not do so in a manner that is in the public's best interest. While facts and circumstances could arise that would make such service detrimental to the public interest, we are currently not aware of such.

Finally, you specifically ask whether this particular individual has a conflict of interest. The general law pertaining to conflicts of interest appears in Tenn. Code Ann. § 12-4-101. This statute applies to public officers, which include school board members. *See State ex rel. Abernathy v. Anthony*, 206 Tenn. 597, 335 S.W.2d 832 (1960). It 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.
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> (b) 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.

As demonstrated above, this statute 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. In short, Tenn. Code Ann. § 12-4-101 generally prohibits an official from being directly interested in an agreement that the official has the power to supervise or the duty to vote for. Your question stems from a school board member's votes on sales tax issues, not from a contract in which the school board member is directly or indirectly interested. Tenn. Code Ann. § 12-4-101, therefore, does not apply.

Another conflict of interest provision applicable to school board members is Tenn. Code Ann. § 49-6-2003. Subsection (a) of this statute provides as follows:

> It is unlawful for any teacher, supervisor, commissioner, director of schools, member of a board of education or other school officer in the public schools to have any pecuniary interest, directly or indirectly, in supplying books, maps, school furniture and/or apparatus to the public schools of the state[.]

Tenn. Code Ann. § 49-6-2003(a). This statute focuses on the pecuniary interest of the school board member. If the school board member has a pecuniary interest in supplying books, maps, school furniture or apparatus to Tennessee public schools, his or her service would be unlawful. This statute is not applicable based on the facts you present.

We next consider the City of Dayton's Code of Ethics. It focuses on the "personal interest" of an official that would interfere with that official's ability to vote objectively on matters coming before him or her. *See* City of Dayton Code of Ethics, §§ 1-203, - 204. "Personal interest" is defined as follows:

> (a) Any financial, ownership, or employment interest in the subject of a vote by a municipal board not otherwise regulated by state statutes on conflicts of interest; or
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> (b) Any financial, ownership, or employment interest in a matter to be regulated or supervised; or
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> (c) Any such financial, ownership, or employment interest of the official's or employee's spouse, parent(s), stepparent(s), grandparent(s), sibling(s), child(ren), or stepchild(ren).

City of Dayton Code of Ethics, § 1-202(1). Based on the facts you present, the school board member does not have a "personal interest" as defined by the City of Dayton Code of Ethics.

Finally, we find no conflict of interest provisions in the private acts of Rhea County; however, the Rhea County ethics policy adopted under Tenn. Code Ann. §§ 8-17-101, *et seq.*, should be consulted to determine whether it contains any conflict of interest provisions that address the situation you raise. But, in general, there is not inherently a conflict of interest when an individual serves on the school boards of both a county and a municipality within that county.

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