S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

June 8, 2009

Opinion No. 09-111

Conflict of Interest: UT-Martin Recruiting Expenses

QUESTIONS

The registrar at UT-Martin owns a restaurant in Martin. University administrators and faculty members frequently take prospective administrative or faculty recruits to the restaurant.

1. Does it violate Tenn. Code Ann. § 12-4-103, or any other law, for the university to reimburse faculty members and administrators for the cost of their meals at the restaurant as recruiting expenses?

2. Does it violate Tenn. Code Ann. § 12-4-103, or any other law, for the university to pay for the recruit's meal at the restaurant as a recruiting expense?

OPINIONS

1. We think a court would conclude that, under the facts as presented, reimbursing university personnel for the cost of meals at the registrar's restaurant is not prohibited under Tenn. Code Ann. § 12-4-103. The transactions do not involve a direct sale from the registrar's restaurant to the State. Further, the registrar does not have a prohibited conflict of interest under Tenn. Code Ann. § 12-4-101(a)(1) as a result of the university's reimbursement of faculty members and administrators for the cost of the meal at the registrar's restaurant. The registrar's indirect interest in the restaurant sales to the university personnel need not be disclosed under Tenn. Code Ann. § 12-4-101(b). No other state statute appears to prohibit the university from reimbursing administrators and faculty members. This opinion does not address whether the transactions might violate internal rules or procedures of the University of Tennessee.

2. Depending on the method used to pay for the recruit's meal, we think the same rationale applies. Any sale is from the restaurant to the recruit or the faculty member or administrator who directly pays for the meal and then is reimbursed by the university. The result is less clear where a member of the recruiting party uses a university credit card to pay for the meals. Again, however, we think a court would conclude that the transaction involves no direct sale to the university. Further, the registrar does not have a prohibited conflict of interest under Tenn. Code Ann. § 12-4-101(a)(1) as a result of the university's paying for the recruit's meal at the registrar's restaurant. The registrar's indirect interest in the restaurant sales to the recruit need not be disclosed under Tenn. Code Ann. § 12-4-101(b). No other state statute appears to

prohibit the university from paying for the recruit's meal at the registrar's restaurant. This opinion does not address whether the transactions might violate internal rules or procedures of the University of Tennessee.

ANALYSIS

This opinion addresses the following situation, as described in the request. The registrar of the University of Tennessee at Martin owns an off-campus, sit-down restaurant in the City of Martin. When recruiting prospective administrators or faculty members, a group of university administrators or faculty members may escort a prospective recruit to lunch or dinner at this restaurant as the guest of UT Martin. These are not catered events, and there is no special contract or other arrangement between the university and the restaurant regarding these occasions. Each group orders from the regular menu and pays the same price as all the other customers. The group receives no service or benefit other than the same services and benefits extended to all other customers of the restaurant.

The requests asks, first, whether it violates Tenn. Code Ann. § 12-4-103, or any other law, for the university to reimburse faculty members and administrators for the cost of their meals at the restaurant as recruiting expenses. This opinion does not address whether these transactions violate any university policy or any provision of the Governor's Executive Orders 1, 2, and 3 concerning conflicts of interest for executive branch employees. Tenn. Code Ann. § 12-4-103 provides:

> It is hereby declared unlawful for any state official or employee to bid on, sell, or offer for sale, any merchandise, equipment or material, or similar commodity, to the state of Tennessee during the tenure of such official's or employee's office or employment, or for six (6) months thereafter, or to have any interest in the selling of the same to the state.

Under Tenn. Code Ann. § 12-4-104(a), any person guilty of a violation of § 12-4-103 is liable to the State for sums paid out by the State, together with eight per cent interest. Under subsection (b) of this statute, a violation of § 12-4-103 is a Class E felony.

Our Office has concluded that notwithstanding Tenn. Code Ann. § 12-4-103, a sale by a state official is permissible if it is not prohibited by Tenn. Code Ann. § 12-4-101. Op. Tenn. Att'y Gen. 84-298 (November 7, 1984); Op. Tenn. Att'y Gen. U90-79 (April 11, 1990). We have found no statute indicating a registrar at a state university is an official or is appointed or elected for a specific term of years. This opinion, therefore, will assume that the registrar in question is an employee subject to Tenn. Code Ann. § 12-4-103. This statute is a criminal statute. Criminal statutes are not construed liberally but are construed narrowly in favor of the defendant and against the government. *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn. 1999).

We think a court would conclude that, under the facts as presented, reimbursing university personnel for the cost of meals at the registrar's restaurant is not prohibited under this statute. The transactions do not involve a direct sale from the registrar's restaurant to the State. University personnel choose to which restaurant they will take a prospective administrator or faculty member. Any sale of goods that takes place is from the restaurant to the individuals who

form the recruiting group. The university then reimburses the individual faculty members and administrators for the costs they incurred while conducting recruiting activities on behalf of the university. Any other conclusion would prohibit a state official who owns a hotel or a restaurant from serving a state employee who is engaged on state business. We do not think the statute was intended to be so broad in scope.

Depending on the method used to pay for the recruit's meal, we think the same rationale applies. Any sale is from the restaurant to the recruit or the faculty member or administrator who directly pays for the meal and then is reimbursed by the university. The result is less clear where a member of the recruiting party uses a university credit card to pay for the meals. Again, however, under the facts as presented, we think a court would conclude that the transaction involves no direct sale to the university.

The second question is whether these transactions violate any other provision of state law. The only applicable statute is Tenn. Code Ann. § 12-4-101, the general conflict of interest statute. Section (a)(1) of this 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.

Under this statute, an official whose duty it is to vote for, let out, overlook, or in any manner superintend a contract in which a governmental agency — in this case, the university — is interested, may not be directly interested in that contract. Here, the relevant contracts are between the individual faculty members, administrators, or recruits, who eat at the restaurant, and the restaurant. Because the registrar is the restaurant owner, he does have a direct interest in these contracts. But the university registrar does not vote for, let out, overlook, or in any manner superintend these contracts, either directly or through any supervisory authority he may have over the university personnel who eat at the registrar's restaurant.

The faculty members and administrators are entitled to reimbursement from the university, presumably, under their employment contracts with the university. Again, the registrar does not have a direct interest in any of these contracts and, even if he did, nothing in the facts indicates that the registrar votes for, lets out, overlooks, or in any manner superintends these contracts. In contrast, the registrar does have a direct interest in his own employment contract, but nothing in the facts indicates that he is receiving reimbursement from the university for eating at his own restaurant, and, furthermore, nothing in the facts indicates that the registrar votes for, lets out, overlooks, or in any manner superintends his own employment contract. Nor does the arrangement involve any contract between the recruit and the restaurant or the recruit and the university that the registrar superintends. For this reason, the registrar does not have a prohibited conflict of interest under Tenn. Code Ann. § 12-4-101(a)(1) as a result of the

university's reimbursement of faculty members and administrators for the cost of the meal at the registrar's restaurant or from paying for the recruit's meal.

Tenn. Code Ann. § 12-4-101(b) requires disclosure of indirect interests. This section provides:

> 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 contracts 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.

As discussed above, these transactions do not appear to involve a contract that the registrar votes for, lets out, overlooks, or superintends. For this reason, Tenn. Code Ann. § 12-4-101(b) does not require the registrar to disclose his or her indirect interest in restaurant sales to the administrators and faculty members and the recruit. No other state statute appears to prohibit the university from reimbursing administrators and faculty members or from paying for the recruit's meal at the registrar's restaurant.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Roy Herron
State Senator
7 Legislative Plaza
Nashville, Tennessee 37243-0024