STATE OF TENNESSEE
OFFICE OF THE
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November 6, 2009

Opinion No. 09-175

County Commissioner Employed by the County

QUESTIONS

Tenn. Code Ann. § 12-4-101(c) contains conflict of interest rules for a member of a city council or county commission who is also a city or county employee.

1. Assume an individual is elected to the office of county commissioner. The same person is then employed as a school psychologist for the county school system after being elected county commissioner. Does Tenn. Code Ann. § 12-4-101(c)(2) prohibit that commissioner from voting on the county budget or any matter related to the school system solely because of his or her status as a school system employee?

2. Assume the same individual was not reelected to a second term as county commissioner but continued his or her employment as a school psychologist. While so employed, the individual again became a county commissioner. Does Tenn. Code Ann. § 12-4-101(c)(2) prohibit that individual from voting on matters in which the commissioner has a conflict of interest during his or her later term of office as county commissioner?

3. Under Tenn. Code Ann. § 12-4-101(c)(1), a county employee subsequently elected to the county commission may vote on matters in which the commissioner has a conflict of interest after disclosure. Under Tenn. Code Ann. § 12-4-101(c)(2), a county commissioner employed by the county after his or her initial election to the commission may not vote on matters in which the commissioner has a conflict of interest. The same disparate treatment continues even after both individuals are reelected to later terms. Does this different treatment violate the Equal Protection Clause of the United States or Tennessee Constitutions?

OPINIONS

1. Under these circumstances, the commissioner may not vote on the county budget if it includes his or her salary as a school psychologist, and may not vote on other county matters in which he or she is directly interested or has an indirect pecuniary interest because of his or her employment with the county.

2. Under these circumstances, the individual's employment began before the date when the commissioner assumed that later term of office. For this reason, the commissioner would be

subject to the restrictions under Tenn. Code Ann. § 12-4-101(c)(1), and not the restrictions under Tenn. Code Ann. § 12-4-101(c)(2).

3. No, Tenn. Code Ann. § 12-4-101(c)(1) and (c)(2) do not violate the Equal Protection Clause of the United States or the Tennessee Constitution.

ANALYSIS

This opinion concerns Tenn. Code Ann. § 12-4-101, the general conflict of interest statute and, more specifically, subsection (c) imposing restrictions on city council members and commissioners who are also city and county employees. Tenn. Code Ann. § 12-4-101(a)(1) 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 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.

(Emphasis added). Tenn. Code Ann. § 12-4-101(b) 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 contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the solely supplier of goods or services in a municipality or county.

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).

Tenn Code Ann. § 12-4-101(c)(1) and (2) address the authority of a county commissioner or a city council member who is also a county or city employee to vote on matters in which he or she may have a conflict of interest. These sections provide:

> (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.

Tenn. Code Ann. § 5-5-102(c)(4) is another statute that addresses voting by a county commissioner who is also an employee. But this Office has previously concluded that Tenn. Code Ann. § 12-4-101(c) controls over Tenn. Code Ann. § 5-5-102(c)(4) to the extent the statutes conflict. Op. Tenn. Att'y. Gen. 93-73 (December 28, 1993). This conclusion was based on the reasoning that the current version of § 12-4-101(c) was enacted in 1989 by Public Chapter 366, which was later than amendments to Tenn. Code Ann. § 5-5-102(c)(4). Research indicates that, while Tenn. Code Ann. § 5-5-102 has been amended a number of times since 1989, these amendments have not affected Tenn. Code Ann. § 5-5-102(c)(4). To the extent the statutes conflict, therefore, Tenn. Code Ann. § 12-4-101(c) still controls over Tenn. Code Ann. § 5-5-102(c)(4). The rest of this opinion, therefore, will discuss only Tenn. Code Ann. § 12-4-101(c).

1. Scope of Prohibition under Tenn. Code Ann. § 12-4-101(c)(2)

The first question concerns an individual elected to the office of county commissioner and then employed as a school psychologist for the county school system. The question is whether Tenn. Code Ann. § 12-4-101(c)(2) prohibits that commissioner from voting on the county budget or any matter related to the school system solely due to his or her status as a school system employee. Under the statute, a county commissioner hired by the county after he

or she was initially elected or appointed to serve on the county commission "shall not vote on matters in which the member has a conflict of interest." This Office has stated in the past that the prohibition applies to direct and indirect conflicts of interest by reason of the county commissioner's employment by the county. Op. Tenn. Att'y Gen. U93-17 (February 26, 1993); Op. Tenn. Att'y Gen. U90-40 (March 2, 1990). Thus, the commissioner may not vote on the county budget if it includes his or her salary as a school psychologist, and may not vote on other county matters in which he or she may have a direct or indirect pecuniary interest because of his or her employment with the county.

2. Meaning of term "date on which the member was initially elected or appointed"

The second question concerns the meaning of the term "date on which the member was initially elected or appointed" to office under Tenn. Code Ann. § 12-4-101(c)(2). The question concerns an individual elected to the county commission and then employed as a school psychologist. The individual then is not reelected to another term as commissioner, but remains a county employee. Later, the individual is again elected or appointed to serve on the county commission. The opinion asks whether, during the later term, the individual is still subject to the limitations in Tenn. Code Ann. § 12-4-101(c)(2).

The answer to this question depends on whether that individual's employment still began "on or after the date on which the member was ***initially*** elected or appointed to serve on the governing body of the county" within the meaning of the statute. (Emphasis added). Legislative history of the 1989 amendment does not address this issue. Our Office has stated that the term "date on which the member was initially elected or appointed" under this statute means the date on which the commissioner was first elected to his current uninterrupted period in office. Op. Tenn. Att'y Gen. U96-017 (February 22, 1996). Under the facts above, the individual's employment began before the date when the commissioner was first elected to his current uninterrupted period in office. For this reason, the commissioner would be subject to the restrictions under Tenn. Code Ann. § 12-4-101(c)(1), and not the restrictions under Tenn. Code Ann. § 12-4-101(c)(2).

3. Equal Protection Analysis

The last question points out that, under Tenn. Code Ann. § 12-4-101(c)(1), a commissioner elected to office after he or she was hired by the county may vote on matters pertaining to his or her employment contract, even after he or she is reelected to another term; but a commissioner elected to office before he or she was hired by the county may not vote on such matters, even after he or she has been reelected to another term. The question is whether this different treatment violates an individual's right to equal protection under the United States or the Tennessee Constitutions. Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Article XI, Section 8, of the Tennessee Constitution provides in relevant part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

The standards governing the validity of legislative classifications are the same under Article XI, Section 8, of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution. *Calaway v. Schucker,* 193 S.W.3d 509, 518 (Tenn. 2005); *Brown v. Campbell County Board of Education*, 915 S.W.2d 407, 412 (Tenn. 1995), *cert. denied*, 116 S.Ct. 1852 (1996); *State v. Price*, 124 S.W.3d 135, 137-38 (Tenn. Crim. App. 2003), *p.t.a. denied* (2003). These provisions guarantee that "all persons similarly circumstanced shall be treated alike." *State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000); *Tennessee Small School Systems v. McWherter,* 851 S.W.2d 139, 153 (Tenn. 1993) (both quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed.2d 989 (1920)).

All classifications that do not affect a fundamental right or discriminate as to a suspect class are generally subject to the rational basis test. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Under this test, the classification will be upheld "if any state of facts may *reasonably be conceived* to justify it." *Tester,* 879 S.W.2d at 828 (emphasis added) (citing *Tennessee Small School Systems v. McWherter,* 851 S.W.2d 139, 153 (Tenn. 1993)); *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). There is no fundamental right to hold public office, *Bullock v. Carter*, 405 U.S. 134, 142-43, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), or for a public official to vote on matters pertaining to his or her employment while in office. Therefore, the different treatment of a commissioner, depending on whether he or she was hired by the county before or after his or her initial election or appointment to office, is valid if any facts may reasonably be conceived to justify it. The legislative history of the 1989 amendments contains no discussion of the reason for this provision. We think the different treatment prevents members of the legislative body from receiving preferential treatment in seeking county employment because of the influence they might otherwise exercise in favor of their employing department. Extending the prohibition to the commissioner's entire uninterrupted period in office furthers this purpose. A classification having some reasonable basis does not offend equal protection merely because the classification is not made with mathematical nicety, or because in practice it results in some inequality. *Wyatt v. A-Best Products Company, Inc.*, 924 S.W.2d 98, 105 (Tenn. Ct. App. 1995), *as modified on rehearing, p.t.a. denied* (Tenn. 1996). For this reason, Tenn. Code Ann. § 12-4-101(c)(1) and (c)(2) comply with the requirements of the Equal Protection Clause of the United States and the Tennessee Constitution. .

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