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Opinion No. 12-37

Human Resource Agency Board Member Conflict of Interest

QUESTION

A member of the board of a human resource agency is applying to be employed as the agency's executive director. This member serves on the board by virtue of his or her elected office. Under the statutes creating human resource agencies, the agency board must create a policy council, which need not consist of board members. Tenn. Code Ann. § 13-26-104 authorizes the policy council to "appoint persons to senior staff positions." The policy council's decision is then subject to ratification by the board. Tenn. Code Ann. § 13-26-103(a) allows the board to appoint an executive committee.

Based on these facts, is the member required to resign from the board and, therefore, his or her elective office since the member serves on the board only by virtue of his or her elective office: a) before the policy council votes on whether to employ that member as the executive director; b) before the executive committee if necessary votes to employ that member as the executive director; and c) before the board votes on whether to ratify the policy council's decision to hire the member?

OPINION

Once a board member of a human resource agency decides to pursue appointment as the executive director of the agency, the member must not only resign from the board but also must resign from his or her elected office, given that one of the elected official's nondelegable statutory responsibilities is to serve on the board.

ANALYSIS

This opinion concerns a member of the board of a human resource agency operating under Tenn. Code Ann. §§ 13-26-101 to -111. A human resource agency is created by the chief elected public officials of the counties and cities of an economic development district established under Tenn. Code Ann. §§ 13-14-101 to -114. The agency is governed by a board including the county mayor of each county within the district, the mayor of each municipality within the district, the chief executive officer of any metropolitan government within the district, one representative from a local agency in each county appointed by the county mayor or chair, and one state senator and one state representative whose districts lie within the development district.

Tenn. Code Ann. § 13-26-103(a). No votes may be cast by proxy. Tenn. Code Ann. § 13-26-103(b). The board may appoint an executive committee to act for it and determine the authority of such committee. Tenn. Code Ann. § 13-26-103(a).

The board also is required to appoint a policy council. Tenn. Code Ann. § 13-26-103(d). Membership of the council “shall be broadly based and equitably distributed between providers and consumers of human resource services and/or established by public law.” *Id.* Thus, the policy council may or may not include members of the agency’s board. The powers of the council include

the power to adopt bylaws, *to appoint persons to senior staff positions*, to determine major personnel, fiscal, and program policies, to approve overall program plans and priorities, and to assure compliance with conditions of and approve proposals for financial assistance under this chapter, *subject to ratification by the governing board.*

Tenn. Code Ann. § 13-26-104. (emphasis added).

The question posed is whether a board member who sits on the board by virtue of his or her elected office must resign from the board, which can only be accomplished by resigning his or her elected office, before the policy council, the board’s executive committee, or the board votes on whether to employ that member as the executive director.

Statutes governing human resource agencies contain no specific conflict of interest provisions. Thus, Tenn. Code Ann. § 12-4-101, the general conflict of interest statute, governs this issue. Subsection (a) addresses prohibited conflicts of interest as follows:

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 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. This subdivision (a)(1) shall not be construed to prohibit any officer, committee person, 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). Under this provision, a board member may not be a direct party to a contract that he or she has a duty as a board member to vote for, let out, overlook, or in any manner superintend.

Any person who violates the provisions of Tenn. Code Ann. § 12-4-101(a)(1) must forfeit all pay or compensation associated with the contract at issue, and shall be dismissed from the membership on the Board and is ineligible to serve in the same or a similar position for ten years. Tenn. Code Ann. § 12-4-102. *See also* Tenn. Att’y Gen. Op. 04-016 (Feb. 5, 2004). The Tennessee Supreme Court has observed that the severity of these penalties evidence an “intent of the lawmakers to meet a serious menace to public funds by drastic and far-reaching provisions.” *Savage v. Mynatt*, 156 Tenn. 119, 123, 299 S.W. 1043, 1044 (1927).

There can be no question that Tenn. Code Ann. § 12-4-101(a)(1) prohibits a board member of a human resource agency to “vote for, let out, overlook, or in any manner to superintend” a contract whereby the board member would become the executive director of the agency. *See* Tenn. Att’y Gen. Op. 10-55 (April 23, 2010). (§ 12-4-101(a)(1) prohibits a board member of an industrial development authority from serving as employee of authority). This statutory language is extremely broad, and is to be liberally construed. *See State ex rel. Abernathy v. Robertson*, 5 Tenn. Civ. App. 438, 454-55 (1914) (finding this statute was enacted “to protect the public from official corruption and oppression; and, though it is drastic in some of its provisions, it should be liberally construed so as to effectuate the objects sought”). *See also Madison County v. Alexander*, 116 Tenn. 685, 686-89 (1906); *Hope v. Hamilton County*, 101 Tenn. 325, 327-33 (1898).

Accordingly, given the broad language as well as the severe sanctions imposed for a violation of this statute, once a board member decides to pursue the executive director position then the member must immediately resign from the board, given at that point the member has a direct interest in a contract of employment that the member has a duty to “overlook” and “in any manner to superintend.” The member then is placed in the position forbidden by the statute, required to oversee and appoint the executive director position yet now personally interested in obtaining the position. Admittedly, a board member’s application to be hired as executive director might not come before the full board if the policy council, which has the power to appoint persons to senior staff positions subject to ratification by the full board, does not recommend that the board member be hired. In that situation, if the board member is not also a member of the policy council (or if the board member resigns from the policy council), then the board member would never “vote for” his or her own employment contract. But the language of § 12-4-101 covers much broader territory than voting, and in keeping with the courts’ construction to interpret the statutes’ prohibitions broadly, the board member could be found to be illegally “overlooking” or “superintending” such a contract even if he or she is never called upon to vote on it. A similar analysis would apply if, in addition to policy council approval, the contract required executive committee approval. In both cases the Board member could conceivably influence the selection process, even though not directly voting on the contract itself, and such possible influence is what the prohibition against “overlooking” or “superintending” a contract is intended to avoid.

Furthermore, given in this case the member holds his or her position on the board *solely* by virtue of an elected office *and* it is one of the statutory duties of the office that cannot be delegated, then by necessity the board member would have to resign the elected office to allow his or her successor to assume the board position that the member must vacate. Again, this conclusion is in conformity with the statute's longstanding overarching purpose to avoid conflicts between public officials and their private interests.

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