S T A T E O F T E N N E S S E E
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Opinion No. 12-65

Conflicts of Interest under Tenn. Code Ann. § 5-14-114

QUESTIONS

1. Does the phrase "other officials of the county" in Tenn. Code Ann. § 5-14-114(a) include persons serving on non-statutory committees who are appointed by the county commission, or does this phrase only include persons appointed to statutory committees, commissions, or authorities in a manner prescribed by law?

2. Does a past or future history of a financial relationship with the county create a conflict of interest pursuant to Tenn. Code Ann. § 5-14-114, or does the statute only prohibit financial relationships that exist during the individual's tenure in office?

3. May an official recuse himself or herself from the decision-making process where a conflict of interest exists and thereby remain on a board of commissioners under Tenn. Code Ann. § 5-14-114.

OPINIONS

1. The phrase "other officials of the county" as used in Tenn. Code Ann. § 5-14-114(a) should generally include individuals whose positions are appointed by the official action of a legislative body, including the county commission, and who serve for a term of office, regardless whether the appointments are to committees or other authorities expressly created by law.

2. Tenn. Code Ann. § 5-14-114(a) prohibits county officials during their tenure of service from having 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." This statutory language unambiguously applies only during the time when an individual actually holds a designated county office.

3. No.

ANALYSIS

The questions posed concern the conflict of interest provisions for county officials codified at Tenn. Code Ann. § 5-14-114, which states as follows:

> (a) 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.
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> (b) Nor shall any such persons accept or receive, directly or indirectly, from any person, firm or corporation to which any contract or purchase order may be awarded, by rebate, gift or otherwise, any money or anything of value whatsoever, or any promise, obligation or contract for future reward or compensation.
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> (c) A violation of this section is a Class D felony.[1]

This statute applies in all counties that have adopted the County Purchasing Law of 1957, codified at Tenn. Code Ann. § 5-14-101 to - 116.

1. The initial question is whether the phrase "other officials of the county" used in Tenn. Code Ann. § 5-14-114(a) applies to persons appointed by the county commission to serve on non-statutory committees or is limited only to persons appointed in a manner prescribed by law to statutory committees, commissions, or authorities.

The statute explicitly includes within its coverage various county officials, including both the county purchasing agent and the purchasing commissioners. The county purchasing agent, appointed by the mayor, is a "county employee" and has no term of office. Tenn. Code Ann. § 5-14-103(a). Members of the county purchasing commission include the county mayor and four other members appointed by the county mayor with the approval of the county governing body. Tenn. Code Ann. § 5-14-106(a). The statute prescribes no compensation or term of office for members of the purchasing commission. *Id.* Subsection (a) of Tenn. Code Ann. § 5-14-114 next states it covers members of the county legislative body, and "other" officials of the county. County commissioners are elected to a term of office. Tenn. Code Ann. §5-5-102(e).[2]

While the term "county officials" as used in Tenn. Code Ann. § 5-14-114(a) is not specifically defined, Tennessee courts have recognized that a "public officer" such as a county official is broadly defined to include "an incumbent of a public office; an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given

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[1] The Tennessee Court of Criminal Appeals has concluded that subsection (c) of this statute is unconstitutional because it arbitrarily imposes criminal sanctions in the counties that have adopted the County Purchasing Law of 1957. *State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). But, for the reasons discussed in Op. Tenn. Att'y Gen. 08-15, at 4 (January 30, 2008) and Op. Tenn. Att'y Gen. 07-141, at 5-6 (October 10, 2007), this Office has opined the statute remains defensible to the extent it makes an official violating the statute subject to removal under an ouster action.

[2] The county legislative body is the basic legislative unit of a Tennessee county, unless the county prior to the enactment of Tenn. Code Ann. § 5-5-101 had adopted a metropolitan form of government. Tenn. Code Ann. § 5-5-101(a).

him by law, and who exercises the functions concerning the public assigned to him by law." *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1987) (quoting 67 C.J.S. *Officers* § 2). *See also Gambling v. Town of Bruceton*, 803 S.W.2d 690, 692-93 (Tenn. Ct. App. 1990). Tennessee courts have also observed that the term "public officer" generally requires a set salary for a defined term of office, definite emoluments and defined duties fixed by statute. *Wise v. City of Knoxville*, 194 Tenn. 90, 93-94, 250 S.W.2d 29, 31 (1952). An office thus "'embraces the ideas of tenure, duration, emolument, and duties.'" *State ex rel. Thompson v. Crump*, 134 Tenn. 121, 130-131, 183 S.W. 505, 507 (1916) (quoting *United States v. Hartwell*, 73 U.S. 385, 393 (1867)); *Sitton v. Fulton*, 566 S.W.2d at 889. To constitute a public office, the office must have some permanency and continuity and not be only temporary or occasional. *State ex rel. Lawson v. Farmer*, 189 Tenn. 276, 279, 225 S.W.2d 60, 61 (1949).

For these reasons, the phrase "other officials of the county" as used in Tenn. Code Ann. § 5-14-114(a) should generally include individuals whose positions are created by the official action of a legislative body and who serve a term of office, including positions on non-statutory committees appointed by the county commission, unless the appointed position lacks the defined criteria of a public office. *See, e.g.,* Op.Tenn. Att'y Gen. 11-77 (Nov. 14, 2011) (stating that members of a coordinating committee established under Tenn. Code Ann. § 6-58-104 to assist in developing a growth plan were not public officers since the members did not have definite terms, were uncompensated and were charged with a particular task rather than possessing broadly defined duties).

2. The next question posed is whether a past or future history of a financial relationship with the county creates a conflict of interest pursuant to Tenn. Code Ann. § 5-14-114, or whether the statute only prohibits financial relationships during the individual's tenure in office. By its terms, the statute prohibits individuals holding the identified county offices from having any financial or 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." This statutory language unambiguously applies only during the time when an individual actually holds a designated county office and prohibits such an official from having the financial or personal beneficial interests identified. *See State v. White*, 362 S.W.3d 559, 566 (Tenn. 2012) (stating the general rule of statutory construction that, where the statute's language is clear, the courts will apply the plain meaning of the language used and not force an interpretation that would inappropriately limit or expand the statute's application). *But see* Op. Tenn. Att'y Gen. U95-073 at 4-5 (Aug. 15, 1995) (copy attached) (this Office opining that a county commissioner could continue to receive any deferred compensation associated with health insurance enrollments of county employees he solicited prior to becoming a commissioner, given the payments related solely to a contract or contractual service that arose prior to his becoming a county commissioner).

3. Finally, an individual may not mitigate the conflicts identified in Tenn. Code Ann. § 5-14-114(a) by simply recusing himself or herself from voting or participating in decision making with regard to transactions in which he or she has an interest prohibited under Tenn. Code Ann. § 5-14-114. As this Office has previously observed, Tenn. Code Ann. § 5-14-114(a) by its terms is an absolute prohibition. Op. Tenn. Att'y Gen. U95-073, at 4. An individual subject to it, therefore, cannot cure a violation by recusal.

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