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November 12, 2013

Opinion No. 13-89

County Commissioner Voting on County School System Budget

QUESTIONS

1. May a county commissioner who is also an employee of the county school system vote on the school system's budget?
2. May a county commissioner vote on the county school system's budget if a company owned by the commissioner has a contract to render services to the school system for compensation as authorized by the school system budget?
3. May a county commissioner vote on the county school system's budget if the commissioner has an application for a charter school pending with the county school system?

OPINIONS

1. Pursuant to Tenn. Code Ann. § 12-4-101(c), a county commissioner whose county school system employment predates the commissioner's election to the commission may vote on the school system budget after informing the governing body of the interest immediately prior to the vote. If the county school system employment postdates the commissioner's election to the commission, the commissioner would be prohibited from voting on the county budget.
2. If a contract exists between the county commissioner's company and the county school system, a direct and prohibited conflict of interest exists under Tenn. Code Ann. § 12-4-101(a)(1). Accordingly, the county commissioner would be prohibited from voting on the county budget.
3. Assuming the lack of a consummated charter agreement between the commissioner and the county school system and the lack of a county school system budget with funds dedicated to students associated with the commissioner's charter school, Tenn. Code Ann. § 12-4-101 would not prohibit the commissioner from voting on the county budget.

ANALYSIS

1. This opinion concerns Tennessee conflict of interest statutes governing county commissioners when they vote on the county school system's budget.¹ Tennessee's general conflict of interest statute is set forth at Tenn. Code Ann. § 12-4-101. With respect to direct and prohibited conflicts of interest, subsection (a)(1) of this statute provides in pertinent 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. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.

Tenn. Code Ann. § 12-4-101(a)(1). Under this provision, a prohibited conflict of interest exists when a county commissioner or a county commissioner's business is a party to a public contract that he or she has a duty to vote for, let out, overlook, or superintend.

Subsection (b) of Tenn. Code Ann. § 12-4-101 addresses indirect conflicts of interest:

(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(b).

In the 1980s, this Office opined on several occasions that persons who vote on budgets and appropriations superintend the contracts paid for by those budgets and appropriations. *See, e.g.,* Tenn. Att'y Gen. Op. 88-37 (Feb. 23, 1988); Tenn. Att'y Gen. Op. 85-36 (Feb. 14, 1985); Tenn. Att'y Gen. Op. 84-177 (May 25, 1984). Based on this analysis, this Office reasoned that a municipal alderman who is also a municipal employee was prohibited from voting on the budget of the municipal department for which he worked. Tenn. Att'y Gen. Op. 87-66 (April 13, 1987). Similarly, this Office concluded that a county commissioner who is also a county employee

¹ This opinion does not address any local law regarding conflicts of interest that may also apply since local laws may vary from jurisdiction to jurisdiction. Questions regarding the applicability of local laws are best addressed to the counsel representing the impacted local entity.

could not vote on a budget that contains his salary. Tenn. Att’y Gen. Op. 88-37 (Feb. 23, 1988); Tenn. Att’y Gen. Op. 85-289 (Dec. 5, 1985). Under these circumstances, such a person would have a direct conflict of interest under Tenn. Code Ann. § 12-4-101(a) because the person superintended a contract with himself. *See* Tenn. Att’y Gen. Op. 88-37 (Feb. 23, 1988); Tenn. Att’y Gen. Op. 87-66 (April 13, 1987); Tenn. Att’y Gen. Op. 85-289 (Dec. 5, 1985).

After these opinions were issued, the General Assembly amended Tenn. Code Ann. § 12-4-101(a)(1) in 1989 by adding the following language:

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.

1989 Tenn. Pub. Acts, ch. 366, § 2.

This provision, codified as part of Tenn. Code Ann. § 12-4-101(a)(1), recognizes that a person who votes on budgets and appropriations superintends the contracts paid for by those budgets and appropriations but declares that Tenn. Code Ann § 12-4-101(a)(1) is not to 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 budgets and appropriations except in particular circumstances. While members of local governing bodies of counties and municipalities voting on budgets and appropriations were specifically not excepted from the prohibitions contained in Tenn. Code Ann. § 12-4-101(a)(1), the 1989 amendment also revised subsection (c) of Tenn. Code Ann. § 12-4-101, which specifically addresses the authority of a member of a local governing body of a county or municipality who is also an employee of such county or municipality to vote on matters in which the member has a conflict of interest. The 1989 amendment included the provisions currently codified at subsections (c)(1) and (2) of Tenn. Code Ann. § 12-4-101. *See* 1989 Tenn. Pub. Acts, ch. 366, § 3. These subsections 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.

(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. § 12-4-101(c)(1) and (2).

The 1989 amendment also deleted the provision in subsection (c) that had stated:

Nothing in subsection shall be construed as altering, amending, or otherwise affecting the provisions of subsection (a) of this section. In the event of any conflict between this subsection and subsection (a) of this section, the provisions of subsection (a) shall prevail.

Tenn. Code Ann. § 12-4-101(c)(4) (1987) *repealed by* 1989 Tenn. Pub. Acts ch. 366, § 3.

The deletion of this provision, along with the legislative history of the 1989 amendment, led this Office to conclude that subsection (c) of Tenn. Code Ann. § 12-4-101 applies to direct and indirect conflicts. Tenn. Att’y Gen. Op. 91-31 (Apr. 9, 1991). Opinion 91-31 states:

Under [Tenn. Code Ann. § 12-4-101(c)], a member of a local governing body employed by the county or municipality may vote on matters in which a conflict of interest, direct or indirect, exists, but only if employment predates initial election or appointment to the local governing body. The legislation requires the member to announce that he or she has a conflict of interest in this situation as one of the prerequisites to being allowed to vote in spite of the conflict. A member whose employment occurs on or after the date of initial election or appointment is precluded from voting because of the conflict of interest under any circumstances.

Id. at 3. Thus, Tenn. Code Ann. § 12-4-101(c)(1) permits a county employee subsequently elected to the county commission to vote on matters in which the commissioner has a conflict of interest, direct or indirect, after disclosure, while Tenn. Code Ann. § 12-4-101(c)(2) prohibits a county commissioner employed by the county after his or her initial election to the commission from voting on matters in which the commissioner has either a direct or indirect conflict of interest.²

A county commissioner clearly has a direct interest in an employment contract with the county school system. While the management and control of the schools of the county is vested in the county board of education, the county government controls funding. *See* Tenn. Code Ann.

² In past opinions, this Office has observed that Tenn. Code Ann. § 5-5-102(c)(3) also restrains a county commissioner from voting on particular matters when the county commissioner is also a county employee, but for the reasons discussed in Tenn. Att’y Gen. Op. 09-175 (Nov. 6, 2009), this Office has concluded that Tenn. Code Ann. § 12-4-101(c) controls over the provisions of Tenn. Code Ann. § 5-5-102(c)(3) to the extent the statutes conflict.

§ 49-2-203(a)(2); Tenn. Code Ann. § 49-2-301(b)(1)(W). *See also State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 225 (Tenn. 1988); *Benson v. Hardin County*, 173 Tenn. 246, 116 S.W.2d 1025, 1026 (1938). After a county school board approves the school system budget, it is then presented to the county commission for inclusion in the county budget. *See* Tenn. Code Ann. § 49-2-301(b)(1)(W). The county commission has the power to adopt or reject the proposed school budget. *Morgan County Bd. of Comm'rs v. Morgan County Bd. of Educ.*, No. 03A01-9308-CV-00290, 1994 WL 111457, at *3 (Tenn. Ct. App. Apr. 6, 1994). In short, the General Assembly “has manifestly vested the authority to appropriate funds for county purposes (including education) in [the county commission] alone.” *Ayers*, 756 S.W.2d at 225. Consequently, a county commissioner who is also an employee of the county school system is subject to the constraints of Tenn. Code Ann. § 12-4-101(c) when voting on the school system budget that contains the individual’s salary as a school system employee.

Thus, a county commissioner whose county school system employment predates the commissioner’s election to the commission may vote on the school system budget after informing the governing body of the interest immediately prior to the vote. *See* Tenn. Code Ann. § 12-4-101(c)(1). If the county school system employment postdates the commissioner’s election to the commission, the commissioner would be prohibited from voting on the county budget. *See* Tenn. Code Ann. § 12-4-101(c)(2); Tenn. Att’y Gen. Op. 09-175 (Nov. 6, 2009) (stating that Tenn. Code Ann. § 12-4-101(c)(2) would prohibit a county commissioner who was later employed as a school psychologist for the county school system from voting on the county budget if the budget contained the individual’s salary as a school psychologist).

2. The provisions of Tenn. Code Ann. § 12-4-101 require a contract interest to exist in order for a conflict of interest to arise. *Englewood Citizens for Alternate B v. Town of Englewood*, No. 03A01-9803-CH-00098, 1999 WL 419710, *5 (Tenn. Ct. App. June 24, 1999). In *Englewood*, county commissioners received an indirect benefit from a construction project upon which they voted, but the court dismissed the conflict of interest claim brought against them under Tenn. Code Ann. § 12-4-101 due to the lack of a contract interest on the part of the commissioners. *Id.*

Accordingly, if a contract exists between the county commissioner’s company and the county school system, a direct and prohibited conflict of interest will exist under Tenn. Code Ann. § 12-4-101(a)(1) because the county commission is responsible for approving the budget of the county school system and appropriating the funds necessary to meet that budget. As explained above, Tenn. Code Ann. § 12-4-101(a)(1) forbids a county commissioner or a county commissioner’s business from being a party to a public contract that he or she has a duty to vote for, let out, overlook, or superintend.

If a contract does not exist between the county commissioner’s company and the county school system, Tenn. Code Ann. § 12-4-101 may well not be implicated; however, the common-law of Tennessee cautions that a public officer should not place himself in a position in which personal interests may conflict with public duty. *See* Tenn. Att’y Gen. 12-09 (Jan. 20, 2012); Tenn. Att’y Gen. Op. 93-73 (Dec. 28, 1993); Tenn. Att’y Gen. Op. 85-122 (April 16, 1985). As this Office has recognized:

At common law, “the essence of the offense [of having a conflict of interest] was acting or appearing to act inconsistently with the best interest of the public” Note: *Conflicts of Interests: State Government Employees*, 47 Va. L.R. at 1048. In *Anderson v City of Parsons*, 209 Kan. 337, 496 P.2d 1333 (1972), the common law principle was described as not permitting the public officer “to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public.” *Id.* at 1337. This policy is not limited to a single category of officers, but applies to all public officials. *Low v. Madison*, 135 Conn. 1, 60 A.2d 774 (1948); *Housing Authority of the City of New Haven v. Dorsey*, 164 Conn. 247, 320 A.2d 820 (1973), *cert. denied* 414 U.S. 1043.

Tenn. Att’y Gen. Op. 12-09, at 3 (Jan. 20, 2012) (quoting Tenn. Att’y Gen. Op. 85-36, at 2 (Feb. 14, 1985)).

In applying this common law principle, this Office has opined that officials should abstain from voting or participating in official acts or proceedings that directly affect contracts with a relative. Tenn. Att’y Gen. Op. 93-73 (Dec. 28, 1993). Similarly, this Office has stated that a county commissioner should abstain from voting on an appropriation of county funds to a nonprofit corporation for which he serves as a director. Tenn. Att’y Gen. Op. 88-122 (July 13, 1988). A common-law conflict of interest was also determined to exist when a local school superintendent required students in vocational classes to perform repair work on his personal residence during school hours. Tenn. Att’y Gen. Op. U93-48 (April 6, 1993). Thus, any review of a potential conflict of interest of the county commissioner must be conducted in recognition of Tennessee’s strong public policy against public officials placing themselves in a position where their personal interests may conflict with their public responsibilities.

3. While a contract, specifically a charter agreement, would be entered with the county board of education if the Commissioner’s application for a charter school were accepted, *see* Tenn. Code Ann. § 49-13-110, there is no indication in the question posed by this opinion request that such an agreement exists or is immediately forthcoming. Thus, the county school system budget upon which the county commissioner is prepared to vote will not contain funds dedicated to students associated with the commissioner’s charter school. Without such, the county commissioner does not violate Tenn. Code Ann. § 12-4-101 by voting on the school system budget. As explained above, a contract interest must exist before Tenn. Code Ann. § 12-4-101 is implicated. The common law conflict of interest principle, though, would still apply.

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