STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

June 8, 2016

Opinion No. 16-22

Tennessee Professional Educators Collaborative Conferencing Act of 2011

Question 1

Does the Tennessee Professional Educators Collaborative Conferencing Act of 2011 ("PECCA") prohibit a public professional employees' organization from using member dues collected through payroll deductions to engage in political communications (e.g., communications that identify a specific candidate for state office and encourage the recipient to vote for or against a candidate)?

Opinion 1

Yes, if the dues deduction was obtained through collaborative conferencing. If the payroll deduction was made pursuant to a memorandum of understanding reached between professional employees and the relevant board of education, the funds may not be used for political communications.

Question 2

Does PECCA prohibit a public professional employees' organization from allocating or transferring member dues collected through payroll deductions to organizations, such as parent or affiliate associations, that engage in political communications?

Opinion 2

Yes, if the deduction was obtained through collaborative conferencing, and with some exceptions. If the payroll deduction was made pursuant to a memorandum of understanding reached between professional employees and the relevant board of education and if the allocation or transfer is a "contribution" under PECCA, the transfer or allocation is an impermissible use of funds.

Question 3

Does PECCA prohibit a public professional employees' organization from directing member dues collected through payroll deductions to a third party that directly or indirectly financially supports political communications?

Opinion 3

There is no categorical bar on directing dues obtained through PECCA payroll deductions to third parties that merely support, but do not engage in, political communications. Many specific situations that fall within this description may nevertheless be prohibited by the general ban on use of PECCA payroll deductions in political activity, depending on the details of the individual case.

Question 4

Does PECCA prohibit a public professional employees' organization from commingling member dues collected through payroll deductions with other funds that are used directly or indirectly to support political activities?

Opinion 4

Although PECCA does not prescribe any particular requirements for separating funds obtained via payroll deductions from other funds, individual employees' organizations must select appropriate mechanisms for maintaining funds to ensure compliance with PECCA's ban on use of payroll deductions for political activities.

ANALYSIS

1. The Professional Educators Collaborative Conferencing Act of 2011 ("PECCA"), Tenn. Code Ann. §§ 49-5-601 to -609, provides that professional employees of local boards of education may, voluntarily and with the support of a threshold percentage of their peers, initiate "collaborative conferencing" with representatives of that board. *Id.* § 49-5-605(b)(1). A professional employees' organization is "any organization with membership open to professional employees . . . in which the professional employees participate and that exists for the purpose of promoting the professional status and growth of educators and the welfare of students." *Id.* § 49-5-602(9). PECCA envisions that professional employees' organizations that are supported by a sufficient threshold of professional employees will participate in the collaborative conferencing process. *Id.* § 49-5-605(b)(4).

Collaborative conferencing is a formal process by which representatives of the board and representatives of the professional employees may "confer, consult and discuss and . . . exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving." *Id.* § 49-5-602(2). If representatives of the professional employees and representatives of the board are able to reach an agreement on terms through collaborative conferencing, those terms are then memorialized in a memorandum of understanding that, upon approval by the board of education, is binding upon the parties. *Id.* §§ 49-5-602(5), -609(c).[1]

[1] This Opinion deals only with payroll deductions voluntarily agreed on in the course of collaborative conferencing and included in a memorandum of understanding. PECCA does not modify or repeal the general powers possessed by boards of education outside the collaborative conferencing process. Tenn. Code Ann. § 49-5-604(a).

PECCA limits the scope of collaborative conferencing to certain specified employment-related topics, including "[p]ayroll deductions," and expressly provides that collaborative conferencing shall not include any provisions permitting "[p]ayroll deductions for political activities." *Id.* § 49-5-608(a)(7), (b)(6). The threshold question is whether "payroll deductions" includes a voluntary deduction of dues for membership in a professional employees' organization. "Payroll deduction" is not defined or limited in the statute, and the term is broad enough to encompass deductions for membership dues. Moreover, and the legislative history supports the conclusion that the term "payroll deduction" was intended to include voluntary deduction of dues for membership in employees' professional organizations. When enacting PECCA, the legislature openly considered the issue of voluntary deduction of such membership dues, and the discussion shows that PECCA was intended to allow for payroll deductions of membership dues but to prevent payroll deductions that go to politically related activities.[2]

Accordingly, PECCA likely permits the voluntary deduction of dues for membership in professional employees' organization. But those deductions are not without restrictions. PECCA forbids a local board of education and its professional employees from agreeing, through collaborative conferencing, to a system of payroll deductions for the purpose of "[e]ngaging in or paying for any form of political communication, including communications which mention the name of a political candidate." Tenn. Code Ann. §§ 49-5-608(a)(7) & (b)(6), -602(7)(D).

Thus, a professional organization receiving funds pursuant to payroll deductions secured through collaborative conferencing cannot use those funds to engage in political communications.

2. A PECCA memorandum of understanding may not provide for payroll deductions for the purpose of "[m]aking contributions to any entity which engages in any form of political communication, including communications which mention the name of a political candidate." *Id.* § 49-5-608(a)(7) & (b)(6), -602(7)(B). Accordingly, an allocation or transfer of member dues to an entity engaged in political communication is impermissible under a PECCA memorandum of understanding if that allocation or transfer is a "contribution."

PECCA does not define "contribution." When a statute does not define a term, courts may look to the term's ordinary dictionary definition to assist in construing the statute. *See In re Estate of Tanner*, 295 S.W.3d 610, 626 (Tenn. 2009). The ordinary dictionary definition of "contribution" is "a gift or payment to a common fund or collection." *New Oxford American*

[2] For example, when the Senate considered the version of PECCA returned from the conference committee, Senator Jim Kyle and PECCA sponsor Senator Jack Johnson engaged in a lengthy discussion of the payroll deduction provision, including the following:

> KYLE: Is it fair to say that this conference report would not allow any association of any group of teachers to petition to have payroll deduction for political activities?
>
> JOHNSON: That is correct, Mr. Speaker. The bill as presented before you in the conference report would allow for payroll deductions of union dues, just as many of us have professional dues deducted from our payroll, but payroll deductions that go to politically related activities would not be allowed.

Sen. Reg. Calendar, Discussion of Conf. Comm. R. on S.B. 113, Sen. Session of May 20, 2011, 107th Gen. Assembly (statement of Sen. Kyle) at http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0113&GA=107.

Dictionary 378 (3rd ed. 2010). Thus, a transfer or allocation of the dues is impermissible if it meets this definition and the recipient is an entity engaged in political communication.

3. As explained in response to Questions 1 and 2, member dues, if deducted under a PECCA memorandum of understanding, may not be used to engage in or pay for political activity, including political communications, nor may they be used as contributions to an entity that engages in political activity. Tenn. Code Ann. § 49-5-608(a)(7) & (b)(6). "Political activity" under PECCA includes, *but is not limited to*:

> (A) Lobbying as defined in [Tenn. Code Ann.] § 3-6-301;
>
> (B) Making contributions to any entity which engages in any form of political communication, including communications which mention the name of a political candidate;
>
> (C) Engaging in or paying for public opinion polling;
>
> (D) Engaging in or paying for any form of political communication, including communications which mention the name of a political candidate;
>
> (E) Engaging in or paying for any type of political advertising in any medium;
>
> (F) Telephone communication for any political purpose;
>
> (G) Distributing political literature of any type; or
>
> (H) Providing any type of in-kind help or support to or for a political candidate[.]

Tenn. Code Ann. § 49-5-602(7).

Because PECCA's list of political activities is expressly nonexclusive, the statute's silence on an activity does not necessarily mean that the activity is a permissible use of deducted member dues. When a statute provides a nonexclusive list of items it encompasses, courts will look to the policy of the statute as a whole as well as the "characteristics consistent with the legislature's listed examples" to determine whether an unenumerated item falls within the statute's scope. *Bean v. McWherter*, 953 S.W.2d 197, 200 (1997).

It is beyond the scope of this Opinion to predict how courts will apply PECCA to every activity that could be described as providing direct or indirect support to political communication. But, generally speaking, if an activity falls within the express prohibitions of PECCA, it is barred. If an activity is not on the list of expressly proscribed "political activity," it will likely nevertheless be barred if the activity shares characteristics with the expressly barred activities or if barring the activity would be consistent with and in furtherance of PECCA's purposes. *See* Tenn. Code Ann. § 49-5-601(b) (setting forth purposes of PECCA).

4. The fourth question is, generally, whether a professional employees' organization that receives dues through a payroll deduction secured via collaborative conference may commingle those dues with funds, obtained through some other means and used for purposes that would be an impermissible use of the dues under PECCA. PECCA makes no mention of "commingling," nor does it posit any particular accounting or asset management requirements for professional employees' organizations. Nevertheless, in order to comply with PECCA, an organization receiving payroll deductions under a memorandum of understanding must, by implication, either engage only in activities for which use of the dues would be permissible or take some other steps to ensure that dues are not spent improperly. Use of separate accounts, i.e., avoidance of "commingling," would be one way to achieve that objective. Nothing in the text of PECCA, however, appears to preclude other appropriate mechanisms for maintaining separation of and accounting for funds, such as through ordinary itemized accounting.

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