

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

January 19, 2023

Opinion No. 23-001

**Elected School Board Member Serving as Board Member and/or Executive Director of
Affiliate Professional Employees' Organization**

Question

May an elected board member of a county school system, or local education agency (LEA), simultaneously serve as a board member and/or executive director of an affiliate professional employees' organization as defined in the Professional Educators Collaborative Conferencing Act, Tenn. Code Ann. § 49-5-602(9), and adhere to school board member expectations and fulfill obligations set forth in Tenn. Code Ann. § 49-2-202 and Tenn. Code Ann. § 49-2-203?

Opinion

Because the Professional Educators Collaborative Conferencing Act (PECCA) provides a process for a local board of education and professional employees to enter a binding memorandum of understanding (MOU) regarding terms and conditions of professional employee service and envisions that professional employees' organizations will participate in this process, it is foreseeable—and indeed likely—that an elected school board member who also serves as a board member or as the executive director of an affiliate professional employees' organization will have conflicting interests and conflicting fiduciary duties to the parties on both sides of the collaborative conferencing process. A board member of a county school system is, by virtue of that position, a public officeholder. Under common law principles, when a public officeholder has such a conflict of interests, recusal of the officeholder from participation in the matter in which the conflict arises is appropriate. If the officeholder has a conflict of interests but nevertheless participates in the matter, the action taken by that public officeholder is considered tainted and must be invalidated.

Furthermore, Tenn. Code Ann. § 12-4-101 makes it unlawful for a public official to be directly or indirectly financially interested in a contract that the official has a duty “to vote for, let out, overlook, or in any manner to superintend.” Whether an official has an impermissible pecuniary interest will depend on the particular facts and circumstances of any given case, but if the official is “directly or unlawfully indirectly interested” in a contract, that official would be subject to a financial penalty and “shall be dismissed from such office the officer then occupies, and be ineligible for the same or a similar position for ten (10) years.” Tenn. Code Ann. § 12-4-102.

Finally, Tenn. Code Ann. § 2-10-124(a) makes it an offense for elected county officials to receive a fee, commission, or any other compensation for “consulting services” from any entity other than the State, a county, or a municipality. It appears that an elected county school board

member who receives any compensation from an affiliate professional employees' organization for "consulting services" would be in violation of this statute.

ANALYSIS

1. *Doctrine of "Incompatibility of Offices" Does Not Apply*

The question posed raises conflict-of-interest concerns. But because the question involves an individual who holds only *one* public office, it does not implicate the doctrine of "incompatibility of offices," which applies only when *two* public offices are involved.¹ 63C Am.Jur.2d *Public Officers and Employees* §§ 60, 62 (2022). A person who serves on a county school board holds a public office,² but a person who serves on the board of an affiliate professional employees' organization or as executive director of such an organization does not necessarily hold a public office at all because a "professional employees' organization" is simply "*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." Tenn. Code Ann. § 49-5-602(9) (emphasis added). For example, a professional association of public-school educators, such as the Metropolitan Nashville Education Association or the Memphis-Shelby County Education Association, fits this definition. Both these associations are non-profit corporations—i.e., not governmental entities; thus, one does not become a public officeholder by serving on the board or as executive director of either of these organizations. *See Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (public officeholder exercises functions concerning the public assigned to him by law); 63C Am.Jur.2d *Public Officers and Employees* § 9 (2002) (a public officer exercises some portion of governmental sovereign power).

Even though the doctrine of incompatibility of offices does not apply, common-law principles prohibiting public officers from acting when they have a conflict of interest do apply because a conflict of interest can exist even if only one governmental office is involved. *Id.* at § 60. For example, the officeholder's own personal interests or fiduciary duties owed to another nongovernmental entity may conflict with the fiduciary duties the office-holder owes to the public as a governmental office-holder. *Id.*; 67 C.J.S. *Officers* § 347 (2022).

Additionally, a school board member who is also the executive director of an affiliate professional employees' organization could be in violation of Tenn. Code Ann. § 2-10-124(a), the Tennessee law that makes it an offense for elected officials to receive any form of compensation for "consulting services" from any entity other than the State, a county, or a municipality.

¹ When it does apply, the common-law doctrine of incompatibility of offices precludes a public officer from occupying two inherently inconsistent public offices. 63C Am.Jur.2d *Public Officers and Employees* § 62. When a person accepts a public office that is incompatible with another public office already held by that person, the public office first held is ipso facto terminated without judicial proceedings. *State v. Thompson*, 193 Tenn. 395, 399, 246 S.W.2d 59, 61 (1952). The doctrine developed to prevent one person from holding two public offices, the duties of which could give rise to possible conflicts of governmental, as distinguished from personal or private, interests. 63C Am.Jur.2d *Public Officers and Employees* § 62 (2022).

² *See* Tenn. Code Ann. § 49-2-201; *Southern v. Beeler*, 183 Tenn. 272, 289, 195 S.W.2d 857, 864 (1946).

2. *Conflict of Interest*³

Under well-established Tennessee law, public officials may not place themselves in a position in which personal interest conflicts with public duty. This policy is reflected in various statutory provisions, as well as common-law doctrine that prohibits a public official from “plac[ing] 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.” Tenn. Att’y Gen. Op. 14-23 (Feb. 26, 2014) (citation omitted); Tenn. Att’y Gen. Op. 13-89 (Nov. 12, 2013) (citation omitted). This policy is not limited to a single category of officials but applies to all officials. *Id.*

An examination of the respective duties of county school boards and professional employees’ organizations under PECCA reveals that a conflict of interest is likely to arise when a person simultaneously serves as a school board member and as a board member or executive director of a professional employees’ organization.

a. County School Boards

A board member of a county school system is a public official who performs wide-ranging duties on behalf of the school system that elects him. *See* Tenn. Code Ann. §§ 49-2-201 to -214. Pertinent here, members of school boards are required to perform various duties that affect school personnel and their working conditions: They elect teachers who have attained or are eligible for tenure and fix the salaries of and make written contracts with them, *id.* § 49-2-203(a)(1); manage and control all public schools established or that may be established under the board’s jurisdiction, *id.* § 49-2-203(a)(2); purchase all supplies, furniture, fixtures, and material of every kind, *id.* § 49-2-203(a)(3)(A); dismiss teachers, principals, supervisors, and other employees upon sufficient proof of improper conduct, inefficient service, or neglect of duty, *id.* § 49-2-203(a)(6); suspend, dismiss, or alternatively place pupils, when the progress, safety, or efficiency of the school makes it necessary or when disruptive, threatening, or violent students endanger the safety of other students or school system employees, *id.* § 49-2-203(a)(7); approve a budget, *id.* § 49-2-203(a)(9)(A); develop and implement an evaluation plan for all certificated employees, *id.* § 49-2-203(a)(12); employ a director of schools, *id.* § 49-2-203(a)(13)(A); and adopt policies on the employment of substitute teachers, *id.* § 49-2-203(a)(14).

b. Professional Employees’ Organizations Under PECCA

PECCA, Tenn. Code Ann. §§ 49-5-601 to -609, provides that “professional employees”⁴ of local boards of education may, voluntarily and with the support of a threshold percentage of

³ Discussion of applicable conflict-of-interest provisions is limited to state law. Local law may furnish additional conflict-of-interest provisions.

⁴ A “professional employee” under PECCA is “any person employed by any local board of education in a position that requires a license issued by the department of education for service in public elementary and secondary schools of this state, supported, in whole or in part, by local, state or federal funds, but shall not include any member of the management team as defined in this part, or a retired teacher who is employed as a teacher in accordance with title 8, chapter 36, part 8.” Tenn. Code Ann. § 49-5-602(8).

their peers, initiate “collaborative conferencing” with representatives of that board. *Id.* § 49-5-605(b)(1). PECCA envisions that “professional employees’ organizations” that are supported by a sufficient threshold of professional employees will participate in the collaborative conferencing process. *Id.* §§ 49-5-603, -605.

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.” *Id.* § 49-5-602(2). The terms and conditions subject to collaborative conferencing under PECCA comprise: (1) salaries or wages; (2) grievance procedures; (3) insurance; (4) fringe benefits, but not to include pensions or retirement programs of the Tennessee consolidated retirement system or locally authorized early retirement incentives; (5) working conditions; except those working conditions which are prescribed by federal law, state law, private act, municipal charter, or rules and regulations of the state board of education, the department of education or any other department or agency of state or local government; (6) leave; and (7) payroll deductions with certain exceptions. *Id.* § 49-5-608(a).

If representatives of the professional employees and representatives of the school board can reach an agreement on terms through collaborative conferencing, those terms are then memorialized in an MOU that, upon approval of the board of education, is binding on the parties. *Id.* §§ 49-5-602(5); -609(c).

c. Common-law Conflict of Interest

Because PECCA provides a process for a local board of education and professional employees to enter a binding MOU regarding terms and conditions of professional employee service and envisions that professional employees’ organizations will participate in this process, it is foreseeable—and indeed likely—that an elected school board member who also serves as a board member or as the executive director of a professional employees’ organization will have conflicting interests and conflicting fiduciary duties to the parties on both sides of the collaborative conferencing process, as explained below.

As a school board member, the individual must act primarily for the benefit of the public. 63C Am.Jur.2d *Public Officers and Employees* § 237 (2022). A school board member is required to discharge all duties of the office with undivided loyalty and perform those duties faithfully. *Id.*; see Tenn. Code Ann. § 49-2-202(b) (member of local board of education “shall take oath to discharge faithfully the duties of the office”). This same individual, though, as board member or executive director of the professional employees’ organization would also owe a duty of loyalty to the professional employees’ organization, the interests of which may be in conflict with the interests of the public. See *Summers v. Cherokee Children & Family Servs., Inc.*, 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002) (duty of loyalty requires director or officer of nonprofit corporation to faithfully pursue the interest of the organization). And, if the same individual stands to benefit personally from the MOU, that individual also has a conflict based on a personal interest. See 67 C.J.S. *Officers* § 347 (2022).

Thus, the individual’s duty as a board member or director of the professional employees’ organization to act in the interest of the organization and its members could conflict with his or her duty to act in the public interest when negotiating or approving an MOU as a member of the school board. Such a conflict of interests would prevent the individual from exercising his or her respective duties in a completely objective manner.

And the conflict of interest does not necessarily end once an MOU goes into effect. If difficulties arise in the performance of the contract, as they often do,⁵ the individual would have to decide whether to negotiate against or sue an entity on whose board he sits. And substantial conflicts could arise during the litigation process when the individual is faced with making decisions about the litigation.

Accordingly, the potential for a significant clash of duties and loyalties—i.e., a significant conflict of interests—arises when a school board member also serves as a board member or executive director of a professional employees’ organization. Under common law principles, when conflicts of interest arise between an officeholder’s private interests and public duties, it is proper that the office-holder recuse himself from the matter in which the conflict arises. *Id.*; 63C Am.Jur.2d *Public Officers and Employees* § 242 (2022). Common-law policy dictates that an official not place himself in a position in which personal interest may conflict with public duty. *Id.* “The good faith of the officer is not a consideration because the policy exists to prevent an officer from being influenced by anything other than the public good.” Tenn. Att’y Gen. Op. 12-09 (Jan. 20, 2012); *see* 63C Am.Jur.2d *Public Officers and Employees* § 242 (2022).

Of course, whether a public official has a conflict of interest in any given situation would depend on all facts and circumstances; but once a conflict of interest is established, any action taken by that official is considered tainted and must be invalidated. 67 C.J.S. *Officers* § 347 (2022).

d. Prohibited Interest in Public Contract

Furthermore, if the school board member has a direct or indirect *pecuniary* interest in an MOU, statutory conflict-of-interest provisions would apply. *See* Tenn. Att’y Gen. Op. 09-175 (Nov. 6, 2009) (citation omitted); Tenn. Att’y Gen. Op. 79-42 (Feb. 1, 1979) (citations omitted); *see, e.g., State ex rel. Abernathy v. Anthony*, 206 Tenn. 597, 599-600, 335 S.W.2d 832, 833 (1960) (unlawful for member of county school board to receive compensation as agent for insurance policies on schools).

State law makes it unlawful for a public official to be financially interested in “any contract” that the public official has to vote for or supervise. *See id.*; Tenn. Code Ann. § 12-4-

⁵ *See, e.g., Lawrence Cnty. Educ. Ass’n v. Lawrence Cnty. Bd. of Educ.*, 244 S.W.3d 302 (Tenn. 2007); *Polk Cnty. Bd. of Educ. v. Polk Cnty. Educ. Ass’n*, 139 S.W.3d 304 (Tenn. Ct. App. 2004); *Blount Cnty. Educ. Ass’n v. Blount Cnty. Bd. of Educ.*, 78 S.W.3d 307 (Tenn. Ct. App. 2002); *Carter Cnty. Bd. of Educ. v. Carter Cnty. Educ. Ass’n*, 56 S.W.3d 1 (Tenn. Ct. App. 1996); *Hamblen Cnty. Educ. Ass’n v. Hamblen Cnty. Bd. of Educ.*, 892 S.W.2d 428 (Tenn. Ct. App. 1994); *Memphis Educ. Ass’n v. Board of Educ. of Memphis City Sch. Sys.*, 706 S.W.2d 88 (Tenn. Ct. App. 1985).

101.⁶ The law prohibits a public official from being “directly interested” in a contract that the official has a duty “to vote for, let out, overlook, or in any manner to superintend.” Tenn. Code Ann. § 12-4-101(a)(1). “Directly interested” is defined as “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.” *Id.* And the law prohibits a public official from being “indirectly interested” in a contract that the official has a duty “to vote for, let out, overlook, or in any manner to superintend” unless the official publicly acknowledges the interest. *Id.* § 12-4-101(b). “Indirectly interested” is defined as “any contract in which the officer is interested but not directly so” *Id.*

In short, both direct and indirect pecuniary interests as defined, respectively, by statute are prohibited by law, but there is an exception for indirect interests that the individual publicly discloses. *See id.* § 12-4-101(a) and (b). Whether a prohibited pecuniary interest—direct or indirect—exists in any given situation will depend on the particular facts and circumstances. And if the official has a prohibited direct interest or indirect interest that is not publicly acknowledged, he or she would be subject to a financial penalty and “shall be dismissed from such office the officer then occupies, and be ineligible for the same or a similar position for ten (10) years.” *Id.* § 12-4-102.

3. ***Prohibited “Consulting Services”***

Tennessee law further provides that “[i]t is an offense for any member of a municipal or county legislative body, member-elect of a municipal or county legislative body, *or other elected county or municipal official* to knowingly receive a fee, commission or any other form of compensation for *consulting services*” from any entity other than the State, a county, or a municipality. *Id.* § 2-10-124(a) (emphasis added).

“Consulting services” with respect to an elected municipal or county official . . . means services to advise or assist a person or entity in influencing legislative or administrative action, as that term is defined in § 3-6-301, relative to the municipality or county represented by that official. “Consulting services” with respect to an elected municipal or county official . . . also means services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the municipality or county represented by that official. . . .

Id. § 2-10-122(2).

⁶ While an MOU is generally not an enforceable contract, courts will enforce one as a binding contract if there is clear evidence that the parties intended to be bound by it. Tenn. Att’y Gen. Op. 17-42 (Sept. 21, 2017) (citing *APCO Amusement Co. v. Wilkins Family Restaurants, Inc.*, 673 S.W.2d 523 (Tenn. Ct. App. 1984)). In this instance, PECCA itself makes clear that an MOU is “binding” upon approval of the board of education. Tenn. Code Ann. § 49-5-609(c). Thus, Tenn. Code Ann. § 12-4-101 appears to apply.

Because county school board members are elected, *id.* § 49-2-201, and deemed “county officers,” *Southern*, 183 Tenn. at 289, 195 S.W.2d at 864, they appear to be subject to Tenn. Code Ann. § 2-10-124(a). *See* Tenn. Att’y Gen. Op. 10-46 (Apr. 12, 2010) (suggesting same). Consequently, a county school board member who receives a fee, commission, or any other form of compensation from an affiliate professional employees’ organization would seemingly violate the statute if the school board member performs “consulting services” for the professional employees’ organization.⁷

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⁷ To the extent there is any ambiguity about the meaning of Tenn. Code Ann. § 2-10-124(a) and/or Tenn. Code Ann. § 2-10-122(2), or any dispute as to their application to a county school board member, we observe that the Tennessee Ethics Commission is the agency charged with the implementation and enforcement of these provisions. *See* Tenn. Code Ann. § 3-6-105(a). The Commission is authorized to issue formal advisory opinions “that deal with any statutory provision or provisions that are in any way subject to interpretation, unclear or uncertain, or subject to dispute as to their meaning or application.” *Id.* § 3-6-117(a).