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Opinion No. 05-126

Legislator as President of the Tennessee Professional Fire Fighters Association

**QUESTIONS**

Based on the facts further discussed below, does a member of the General Assembly, by serving as president of the Tennessee Professional Fire Fighters Association, violate any conflict of interest laws?

1. Does the fact that the president draws a salary create a conflict?
2. If the answer to Question 1 is yes, does a certain dollar amount trigger the conflict?
3. Does the fact that the association has a lobbyist that answers to the president create a conflict?
4. If the answer to Question 3 is yes, would the answer be different if the lobbyist answered to another designated officer?
5. Are there any possibilities that the representative would be in conflict of any ethics law by serving as president of the Tennessee Professional Fire Fighters Association?

**OPINIONS**

1. Since the facts presented do not involve a contract that the legislator has a duty to vote for, let out, overlook, or superintend, the arrangement does not violate Tenn. Code Ann. § 12-4-101, the general conflict of interest law. Under the Ethics Act, it is an offense for a member of the General Assembly to receive compensation from any entity other than the State, a county, or a municipality in return for consulting services. Receiving the salary violates the Ethics Act if it is paid for consulting services. Whether it is paid for consulting services depends on all the facts and circumstances, including the purpose of the organization and the member's duties as president. No one fact is necessarily dispositive. In this case, however, the most salient fact is that the primary function of the Association is to "promote legislation at the state level that will benefit its members." We think a court is likely to conclude that being president of such an organization necessarily involves assisting the Association in influencing legislative action. For this reason, we think a court is likely to conclude that, under this arrangement, the legislator is violating the Ethics Act because he is receiving compensation for consulting services as the act defines them.

2. No.

3. We think a court is likely to conclude that, where the president directly supervises a lobbyist paid to promote legislation in the Tennessee General Assembly, he or she is being paid to advise or assist the lobbyist, and the Association, to influence legislative action.

4. If the Association's lobbyist reported to an officer other than the president, it would be easier to argue that the president is not being paid to advise or assist the lobbyist or the Association in influencing legislative action. But we cannot conclude that this change by itself would prevent the president from violating the prohibition. The legislator would still be the chief executive officer of an association the primary purpose of which is to influence legislative action in Tennessee. It can be argued that, simply by supervising all the day-to-day operations of the Association, the legislator is advising or assisting the Association to influence legislative action.

5. As discussed above, we think that this arrangement would probably be held to violate the prohibition in Tenn. Code Ann. § 2-10-123(a).

### ANALYSIS

1. Receiving a Salary as President of the Tennessee Professional Fire Fighters Association

This opinion is based on the following facts presented in the opinion request. The requesting representative currently serves as president of the Tennessee Professional Fire Fighters Association (the "Association"). The primary function of the Association is to promote legislation at the state level that will benefit its members. The organization is made up of thirty-three city and county fire department associations consisting of over five thousand members. The executive board is represented by the president of each local affiliate. All action of the Association is made by the board between conventions and the delegates at the biannual convention. The president does not vote on the board. But it is the president's duty to carry out the mandate of the board and the convention delegates. The president draws a salary of seven hundred dollars a month. Although not part of the president's official duties, the requesting representative lobbied without compensation for the Association before he was elected to membership in the General Assembly. The Association has a hired lobbyist that answers and reports directly to the president.

This opinion will not address whether this activity violates any ethics rules of the Tennessee House of Representatives. Interpretation of those rules is within the authority of that House. *See* Tenn. Const. Art. II, § 12. The general conflict of interest statute is Tenn. Code Ann. § 12-4-101. Section (a) of that statute prohibits a public official from being directly interested in a contract that he or she has a duty to vote for, let out, or supervise. No such contract exists in this case. Under Tenn. Code Ann. § 12-4-101(b), a legislator must disclose his or her interest in any contract in which he or she has an indirect interest and that he or she has a duty to vote for, let out, overlook, or superintend. Again, the facts presented do not involve a contract that the legislator has a duty to

vote for, let out, overlook, or superintend. The arrangement, therefore, does not violate Tenn. Code Ann. § 12-4-101.

The only law this arrangement might violate is Chapter 102 of the Public Acts of 2005 (the “Ethics Act”). The key question is whether the representative is receiving compensation for consulting services from a private entity. The definition of the term “consulting services” as used in the Ethics Act is very broad, and includes services to advise or assist a person or entity in influencing state legislative action. Thus, if the duties of the president of the Association include advising or assisting the Association to influence state legislative action, then that individual is providing consulting services within the meaning of the Ethics Act. As discussed below, since the major purpose of the Association is to “promote legislation at the state level that will benefit its members,” we think a court is likely to conclude that the president’s duties necessarily assist the Association in influencing legislative action.

Under the Ethics Act, it is an offense for any member of the General Assembly, member-elect of the General Assembly, Governor, member of the Governor’s staff, Secretary of State, Treasurer, or Comptroller of the Treasury to knowingly receive a fee, commission, or any other form of compensation<sup>1</sup> for consulting services from any person or entity, other than compensation paid by the State, a county, or a municipality. The statute defines “consulting services” as follows:

The term “consulting services” with respect to an official in the legislative branch or an official in the executive branch means services to advise or assist a person or entity in influencing state legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state. The term “consulting services” does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure.

New Tenn. Code Ann. § 2-10-122(1). Whether any particular activity falls within this definition will depend on specific facts and circumstances. Tenn. Code Ann. § 3-6-102(11) provides:

“Influencing legislative or administrative action” means promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including, but not limited to, the provision or use of information, statistics, studies, or analyses, but not including the furnishing of information, statistics,

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<sup>1</sup> The terms “fee, commission, or any other form of compensation” do not include anything of value which may be accepted under Tenn. Code Ann. § 2-10-116 or which is identified in § 3-6-114(b) or (c). New Tenn. Code Ann. § 2-10-122(5).

studies, or analyses requested by an official of the legislative or executive branch to such official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch.

We assume that Chapter 102, by incorporating this definition, also incorporates the definition of the other terms within this provision that appear in Tenn. Code Ann. § 3-6-102. The term “legislative action:”

means introduction, sponsorship, debate, voting or any other nonministerial official action or nonaction on any bill, resolution, amendment, nomination, appointment, report or any other matter pending or proposed in a legislative committee or in either house of the general assembly.

Tenn. Code Ann. § 3-6-102(12). The term “administrative action:”

means the taking of any recommendation, report or nonministerial action, the making of any decision or taking any action to postpone any action or decision, action of the governor in approving or vetoing any bill or resolution, the promulgation of a rule and regulation, or any action of a quasi-legislative nature, by an official in the executive branch.

Tenn. Code Ann. § 3-6-102(1).

Sponsors of the Act in the Senate and the House addressed how the prohibition on receiving compensation for consulting services would apply to a legislator acting as the head of an organization. In each case, the sponsor emphasized that the prohibition applied where the legislator was directly involved in providing the consulting services. In the Senate State and Local Committee, April 12, 2005, Senators Herron, Burchett, and Cohen, the committee chair, had the following exchange:

Sen. Burchett: I have a question. It deals with, what if you're a, say a statewide director of a statewide organization, would this keep you from doing that. I know we've dealt with that in the past legislatures. I guess I should ask the sponsor that question.

Sen. Cohen: That's his question for the sponsor. Does any of this address that subject where somebody who might be the director of an org[anization] let's assume, Mr. Hensley, for instance, was a legislator, would he be able to continue to be the director of the Tennessee Wholesale Beverages, or would he have to give that up, or

would that just be, you know, the benefit of the legislator having to bypass Mr. Hensley and cut out the middleman?

Sen. Herron: *If Mr. Hensley were attempting to influence legislation or help people procure contracts, he would be in violation.*

Senate State and Local Committee, April 12, 2005 (remarks of Senators Burchett, Cohen, and Herron) (emphasis added).

When the House of Representatives adopted the Report of the Joint Conference Committee that became the final bill, Representatives McMillan and Kernell had the following exchange:

Rep. Kernell: Okay. Secondly, secondarily, if someone is a director of a health advocacy group. Let's say they're the director of the heart association or the lung association, and let's say that their association wants to effect change in TennCare or maybe eliminate smoking in Tennessee among children or maybe tax cigarettes, or maybe they're the head of any other association, the head of a union or a business association, and that association has a policy to change the law. Can they be in charge of that association as executive director, as one of the legislators said, and still serve under this act?

McMillan: Yes. This particular statute as I said before does not prohibit titles. Does not prohibit positions. It prohibits receiving compensation for prohibited conduct. *As long as you are not acting or promoting the prohibited conduct, the position that you hold, the compensation that you receive for that position, does not affect your ability to serve in this General Assembly if it is not for the prohibited purposes. So, if you're not lobbying for that particular effect on legislative or administrative action, then you are not prohibited from holding that other position.*

Rep. Kernell: I'm wondering if the head of a health association, like heart, lung, MS, or anything. If they want to have an effect on the State, not contracts, just state law, at what point will they have to divide themselves off from their job here versus there to avoid this being in conflict?

Rep. McMillan: You know you are posing specific examples that I think you would have to examine under the factual scenario. Just in general, *I think if someone is being compensated for a position that does not involve conduct that directly seeks to influence administrative or legislative action on their part, then I think that, that's okay under this act. I think if they are taking direct action and*

*receiving compensation for that action . . . now remember, this particular statute does not prohibit the conduct, it prohibits receiving compensation directly for prohibited conduct.*

Rep. Kernell: Okay. So in other words, the compensation that has to be . . . whatever the compensation includes those parameters have to directly match the parameters of the conduct.

Rep. McMillan: That is correct. I think if you look in the very first section. Section 2-10-122, section 1, where it defines the prohibited conduct, which is consulting services, with respect to an official in the legislative branch, which would be a legislator, it means attempting to advise or assist a person or entity in influencing state legislative or administrative action. *You as the legislator have to be directly involved in that conduct and be compensated for that conduct in order to come within the scope of this act.*

Rep. Kernell: So this would not prohibit someone, a legislator, who is representing for an association, or a public official at the state and local level from testifying in front of a committee?

Rep. McMillan: Not if you're not receiving any direct compensation for it.

House Session, April 21, 2005 (remarks of Representatives McMillan and Kernell) (emphasis added).

The first question is whether the fact that, as president, the requesting official receives a salary creates a conflict. As cited above, under the Ethics Act, it is an offense for a member of the General Assembly to receive compensation from any entity other than the State, a county, or municipality for consulting services. Based on the facts presented, the Association is not the State, a county, or municipality. Under the Ethics Act, therefore, a legislator may not receive compensation from the Association for "consulting services." The key question, therefore, is whether the legislator, as president of the Association, is receiving compensation for consulting services — that is, services to advise or assist a person or entity in influencing state legislative or administrative action. Sponsors of the bill emphasized that a legislator must be "directly involved" in prohibited conduct and be compensated for that conduct. But the prohibited services include advising or assisting a person or entity to influence state legislative or administrative action. These services do not just include directly and personally lobbying the General Assembly, but also include advising or assisting others to do so. In this case, the legislator serves as the president of an association, the primary purpose of which is to influence legislative action in Tennessee. We assume that, as president, the legislator supervises and helps to facilitate all the Association's activities. Of course, only a court could make a definitive ruling on this issue after considering all relevant facts and circumstances. But since the Association's activities are largely confined to

promoting legislation, we think a court is likely to find that a legislator, by acting as the Association's president, is being paid to advise or assist the Association in influencing state legislative action.

2. Dollar Amount to Trigger the Conflict

The second question is whether a legislator must receive more than a certain amount of compensation for consulting services before he or she violates the prohibition. The Act prohibits a member of the General Assembly from receiving any amount of compensation — as that term is defined — for consulting services. The Act contains no threshold amount of compensation required to trigger this prohibition. The Act does in effect exempt most members of executive boards or commissions who receive only expenses or a nominal per diem of no more than six hundred dollars a month from certain disclosure requirements. Tenn. Code Ann. § 2-10-122(3). But the Act contains no such exemption for officials in the legislative branch.

3. Hiring a Lobbyist

The next question is whether the fact that the Association has a lobbyist that answers to the president creates a conflict. Again, the issue is whether a legislator is receiving compensation for consulting services. We think a court is likely to conclude that, where the president directly supervises a lobbyist paid to promote legislation in the Tennessee General Assembly, he or she is being paid to advise or assist the lobbyist, and the Association, to influence legislative action.

4. Lobbyist Answering to Officer Other than the President

The next question is whether the answer to Question 3 would be different if the lobbyist were to answer to an officer other than the president. In that case, it would be easier to argue that the president is not being paid to advise or assist the lobbyist or the Association in influencing legislative action. But we cannot conclude that this change by itself would prevent the legislator from violating the prohibition. The legislator would still be the chief executive officer of an association, the primary purpose of which is to influence legislative action in Tennessee. It can be argued that, simply by supervising all the day-to-day operations of the Association, the legislator is advising or assisting the Association to influence legislative action.

5. Legislator Serving as President of the Tennessee Professional Fire Fighters Association

The last question is whether there are any possibilities that a legislator would be in conflict of any ethics law by serving as president of the Tennessee Professional Fire Fighters Association. As discussed above, we think that this arrangement would probably be held to violate the prohibition in Tenn. Code Ann. § 2-10-123(a), as long as the legislator receives compensation for his services as president of the Association.

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