

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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February 3, 2005

Opinion No. 05-017

County Financial Management Committee Member Whose Spouse Is County Employee

QUESTIONS

1. Assume a member of a county financial management committee appointed under Tenn. Code Ann. § 5-21-104 is married to an employee of the county finance department. Does Tenn. Code Ann. § 12-4-101 require that member to be disqualified from voting on all matters before the committee?

2. Does Tenn. Code Ann. § 5-21-121, or any other provision of law, require that member to be disqualified from voting on all matters before the committee?

OPINIONS

1. Under Tenn. Code Ann. § 12-4-101(b), a member of the county financial management committee must disclose any indirect pecuniary interest in a contract with the county if he or she has the duty to vote for, let out, or superintend that contract. This Office has concluded that an official is indirectly interested in a contract between a governmental agency and his or her spouse if the two commingle assets. Under Tenn. Code Ann. § 12-4-101(b), therefore, the committee member must disclose his or her indirect interest when voting on contracts that affect the spouse's employment contract with the county, especially such matters as the spouse's compensation. In the past, this Office has suggested that an official "should abstain from voting or any way participating in official acts or proceedings which directly affect" contracts with a relative. But the statute does not require abstention.

2. Under Tenn. Code Ann. § 5-21-121, a member of the county financial management committee may not be "financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of any supplies, materials or equipment for the county." Since the statute explicitly prohibits an interest in the purchase of any supplies, materials, or equipment for the county, it would not prohibit a member from having an indirect interest in his or her spouse's employment contract with the county. But the statute does not define the term, "personal beneficial interest." The Court of Criminal Appeals has found that a similar statute prohibited a county official "from having any personally favorable interest in a county contract, regardless of whether that interest is direct or circuitous." Depending on the facts and circumstances, a member of the committee could have a prohibited conflict of interest in a purchase of supplies, materials, or equipment for the finance department where his or her spouse is employed. Abstention from voting

on these matters would not cure this conflict.

ANALYSIS

1. Disqualification under Tenn. Code Ann. § 12-4-101

This opinion concerns conflict of interest rules governing a member of a county financial management committee appointed under Tenn. Code Ann. § 5-21-104. This provision is part of the County Financial Management System of 1981, Tenn. Code Ann. §§ 5-21-101, *et seq.* This statutory scheme applies in counties that have adopted it as provided in Tenn. Code Ann. § 5-21-126. Tenn. Code Ann. § 5-21-103 creates a finance department to administer county funds of departments, agencies, and boards that are handled by the county trustee. Tenn. Code Ann. § 5-21-103(a)(1). The statutory scheme also creates a county financial management committee. Tenn. Code Ann. § 5-21-104. The committee is to establish and approve policies, procedures, and regulations for implementing a sound and efficient financial system for administering the funds of the county. Tenn. Code Ann. § 5-21-104(e)(1). The county commission may authorize this committee to assume the functions of a budget, investment, and/or purchasing committee. Tenn. Code Ann. § 5-21-104(a). The committee includes the county mayor, supervisor of highways, superintendent of education, and four members elected by the county legislative body. Tenn. Code Ann. § 5-21-104(b). The four members elected by the county commission need not be county commissioners. The financial management committee appoints a director to oversee the financial department and implementation of committee policies. Tenn. Code Ann. § 5-21-107. The director also acts as the county purchasing agent. Tenn. Code Ann. § 5-21-118.

The request is whether a member of a county financial management committee appointed under Tenn. Code Ann. § 5-21-104 who is married to an employee of the county finance department is disqualified from voting on all matters before the committee. The request does not indicate that the committee member is also a county commissioner. This opinion will address only any conflict that might arise with regard to a committee member who is not also a county commissioner.

The general conflict of interest statute appears at Tenn. Code Ann. § 12-4-101. That statute prohibits any official from being directly interested in a contract that he or she has a duty to vote for, let out, overlook, or superintend. An official is directly interested in a contract if it is with the official personally or with a business in which he or she has a controlling interest. With regard to direct and prohibited conflicts of interest, subsection (a)(1) provides in relevant part:

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. The provisions of this subdivision shall not be construed to prohibit any officer, committee person, 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.

Tenn. Code Ann. § 12-4-101(a)(1). Based on the facts presented in the request, the committee member has no direct prohibited interest in a contract simply because his or her spouse is a member of the finance department.

Subsection (b) of the same statute addresses indirect conflicts of interest:

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) (emphasis added). Under this statute, an official has an indirect interest in a contract in which he or she is interested, but not directly so. This Office has indicated in the past that the interest referred to under the statute is a pecuniary interest. Op. Tenn. Att’y Gen. U96-043 (June 4, 1996). Under this statute, a member of the county financial management committee must disclose any indirect pecuniary interest in a contract with the county if he or she has the duty to vote for, let out, or superintend that contract. This Office has concluded that an official is indirectly interested in a contract between a governmental agency and his or her spouse if the two commingle assets. Op. Tenn. Att’y Gen. 00-181 (November 22, 2000). Under Tenn. Code Ann. § 12-4-101(b), therefore, the committee member must disclose his or her indirect interest when voting on contracts that affect the spouse’s employment contract with the county, especially such matters as the spouse’s compensation. In the past, this Office has suggested that an official “should abstain from voting or any way participating in official acts or proceedings which directly affect” contracts with a relative. Op. Tenn. Att’y Gen. 00-137 (August 24, 2000); Op. Tenn. Att’y Gen. 93-73 (December 28, 1993). But the statute does not require abstention.

2. County Financial Management Act of 1981

The County Financial Management Act of 1981 contains a separate, and more stringent, conflict of interest provision. Tenn. Code Ann. § 5-21-121 provides:

- (a) The director, purchasing agent, members of the committee, members of the county legislative body, or other officials, employees, or members of the board of education or highway commission shall not be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of any supplies, materials or equipment for the county.
- (b) No firm, corporation, partnership, association or individual furnishing any such supplies, materials or equipment, shall give or offer nor shall the director or purchasing agent or any assistant or employee accept or receive directly or indirectly from any person, firm, corporation, partnership or association to whom any contract may be awarded, by rebate, gift or otherwise, any money or other things of value whatsoever, or any promise, obligation or contract for future reward or compensation.

A violation of this provision is a misdemeanor and subjects a county official or employee to removal from office or position. Tenn. Code Ann. § 5-21-125. The Tennessee Court of Criminal Appeals recently concluded that a conflict of interest in a similar local option law is unconstitutional because it imposes criminal penalties for conflicts of interest only in the counties that adopt the law, and that this classification has no rational basis. *State v. Whitehead*, 43 S.W.3d 921 (Tenn. Crim. App. 2000), *p.t.a. not filed*. Based on this action, a court would probably reach the same conclusion with regard to criminal penalties for a violation of Tenn. Code Ann. § 5-21-125. But the Court did not address the constitutionality of the statute to the extent it imposes the penalty of removal from office or position. We think the statute is defensible in this respect. The statute addresses the qualification for office of local government officials. An official takes office subject to the conditions imposed by the terms and nature of the political system in which he operates. *Gordon v. Leatherman*, 450 F.2d 562, 565 (5th Cir. 1971). Further, the statute is part of a statutory scheme that can be adopted by any county. Such legislation does not suspend the general law within the meaning of Article XI, Section 8 of the Tennessee Constitution, the state equal protection provision, because it is in itself a general law in that such legislation is open to adoption by all the counties in the State. Op. Tenn. Att’y Gen. 81-197 (March 26, 1981).

Under Tenn. Code Ann. § 5-21-121, a member of the county financial management committee may not be “financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of any supplies, materials or equipment for the county.” This Office has concluded that the statute does not prohibit an interest in a contract for services. Op. Tenn. Att’y Gen. 02-128 (November 25, 2002). The statute, therefore, would not prohibit a member from being interested in the employment contract between his or her spouse and the county. But the statute does not define the term, “personal beneficial interest.” In *State v. Whitehead*, the Court of Criminal

Appeals found that a similar statute prohibited a county official “from having any *personally favorable interest* in a county contract, regardless of whether that interest is direct or circuitous.” 43 S.W.3d at 929 (emphasis added). Depending on the facts and circumstances, a member of the committee could have a prohibited conflict of interest in a purchase of supplies, materials, or equipment for the finance department where his or her spouse is employed.

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