

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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March 1, 2007

Opinion No. 07-23

Constitutionality of restriction on political activity of election commissioners

QUESTION

Whether proposed legislation that would limit the political activity of county and state election commissioners is constitutional?

OPINION

Yes.

ANALYSIS

You have asked whether the following proposed legislation is constitutional:

SECTION 1. Tennessee Code Annotate, Section 2-1-112(a), is amended by designating the existing language as subdivision (1) and adding the following language as subdivision (2):

(2) No member of a county election commission shall participate in the political management or leadership of a local, state or federal political party organization or in the management or leadership of a political candidate's campaign during the member's term of office. No member shall make a public endorsement of or permit the member's name to be used to endorse a particular candidate for political office during the member's term of office. Violation of this subsection (a) subjects the member to immediate removal from office by majority vote of the state election commission.

SECTION 2. Tennessee Code Annotates, Title 2, Chapter 11, Part 1, is amended by adding the following as a new section thereto:

2-11-111

No member of the state election commission shall participate in political management or leadership of a local, state or federal political party organization or in the management or leadership of a political candidate's campaign during the member's term of office. No member shall make a public endorsement of or permit the member's name to be used to endorse a particular candidate for political office during the member's term of office. Violation of this section subjects the member to removal by majority vote of the other members of the state election commission.

Analysis of this proposed legislation begins with Art. I, § 19 of the Tennessee Constitution and the Free Speech Clause of the First Amendment of the United States Constitution. The Tennessee Supreme Court has held that Art. I, § 19 of the Tennessee Constitution must be construed to have a scope as least as broad as that afforded the freedoms of speech and press under the First Amendment. With respect to the Free Speech Clause of the First Amendment, the United States Supreme Court has recognized that Congress and the states may place even-handed restrictions on the partisan political conduct of public officers and employees. In *United States Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed.2d (1947), the Court held that "Congress may regulate the political conduct of Government employees 'within reasonable limits', even though the regulation trenches to some extent upon unfettered political action." *Id.*, 330 U.S. at 102, 67 S.Ct. at 571. It then upheld the constitutionality of the Federal Hatch Act, finding that it was narrowly tailored:

It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the act.

Id., 330 U.S. at 99, 67 S.Ct. at 569.

Subsequently, in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), the Court was faced with a constitutional challenge to the Hatch Act's prohibition against federal employees actively participating in political management or political campaigns. The Court reaffirmed its holding in *Mitchell*, stating, "We agree with the basic holding in *Mitchell* that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." *Id.*, 413 U.S. at 567, 93 S.Ct. at 2891.

Finally, in *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the Court upheld the constitutionality of an Oklahoma statute that prohibited employees in the classified service from engaging in a range of political activities relying upon its holdings in *Mitchell* and *Letter Carriers*, *supra*. These United States Supreme Court cases demonstrate that governments may impose significant restrictions upon the political activities of their officers and employees that could not be placed upon the citizenry at large, provided that such restrictions are, of course, tailored to the compelling interest of the government.

Based upon these authorities, this Office has previously opined that various city charter provisions restricting the partisan political activities of city employees were constitutional. *See* Op. Tenn. Atty. Gen. 93-22 (March 17, 1993) (Oak Ridge City Charter); Op. Tenn. Atty. Gen. U86-106 (July 15, 1983) (Clarksville city ordinance); Op. Tenn. Atty. Gen. (March 1, 1983) (Bristol City Charter). This Office has also opined that proposed legislation prohibiting the Secretary of State, the Comptroller and the State Treasurer from serving as an officer of a committee which must file a report under the Campaign Financial Disclosure Act and from soliciting funds on behalf of any member of the General Assembly would be constitutional. *See* Tenn. Atty. Gen. Op. 90-41 (March 27, 1990).

Here, the proposed legislation would only limit members of the state and county election commissions from participating in the management or leadership of a local, state or federal political party organization or in a political candidate's campaign. It would further prohibit such members from making a public endorsement or allowing their name to be used to endorse a particular candidate for political office. The proposed legislation does not, however, prohibit election commission members from being a member of a political party, making a political contribution to a political party or a political candidate's campaign, or from "full participation by [the members] in political decisions at the ballot box." *Mitchell*, 330 U.S. at 99, 67 S.Ct. at 569. The state and county election commissions play a significant role in the conduct of local, state and federal elections in this state. *See, e.g.*, Tenn. Code Ann. § 2-12-116 (duties of county election commission, including duty to certify results of each election in regard to official tabulations). The involvement of a state or county election commission member in the management or leadership of a political party or political candidate's campaign could certainly give rise to a public perception of impropriety. Thus, it is our opinion that the need to avoid such public perception would constitute a sufficiently compelling interest to support the narrow limitations on the political activities of state and county election commission members contained in the proposed legislation. Accordingly, it is our opinion that the proposed legislation does not violate either Art. I, § 19 of the Tennessee Constitution or the Free Speech Clause of the First Amendment of the United States Constitution.

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