S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 05-067

Banning Lobbyists and Their Employers from Boards and Commissions

QUESTIONS

1. May legislation constitutionally ban any person required to register as a lobbyist under Tenn. Code Ann. §§ 3-6-101, *et seq.*, from serving as an appointed member of any state or local board, commission, committee, or other entity having authority to formulate, implement, or recommend public policy?

2. May legislation constitutionally ban each officer and each employee of any organization or entity employing any person who is required to register as a lobbyist from serving as an appointed member of any state or local board, commission, committee, or other entity having authority to formulate, implement, enforce, or recommend public policy?

OPINIONS

1. This provision unconstitutionally burdens the right to engage in lobbying.

2. This provision unconstitutionally burdens the right to engage in lobbying through a paid lobbyist.

ANALYSIS

1. Banning Registered Lobbyists from Appointive Office

This opinion concerns the constitutionality of provisions that would ban registered lobbyists and employers of lobbyists from holding appointive office on boards or commissions. These provisions appear in proposed amendments to House Bill 2121. The request includes two different amendments. The first is numbered 00586149, and the second is numbered 00673249. The first, 00586149, would add a new section 3-6-115 to the Tennessee Code. This section would provide:

> Notwithstanding any provision of law to the contrary, every person who is required to submit, update or maintain registration as a lobbyist, pursuant to the provisions of this part, shall be disqualified from service as an appointed member of any state or local board, commission, committee, or other entity having authority to formulate,

> implement or recommend public policy. Such disqualification shall continue throughout the period of registration required by this part.

The second, 00673249, would add a new section 3-6-115, with the following subsection (a):

> (a) Notwithstanding any provision of law to the contrary, each person who is required to submit, update or maintain registration as a lobbyist, under the provisions of this part, shall be disqualified from service as an appointed member of any state or local board, commission, committee, or other entity having authority to formulate, implement, enforce or recommend public policy; and such disqualification shall continue throughout the period of registration required by this part. The provisions of this subsection apply only to appointments and reappointments occurring on or after the effective date of this act.

Each of the proposed amendments would disqualify any individual required to register as a lobbyist under state law from serving as an appointed member of "any state or local board, commission, committee, or other entity having authority to formulate, implement, or recommend public policy." This is a very broad ban.

Under state law, every person qualifying as a lobbyist must register within five days, pay a filing fee, and file a disclosure statement with the Registry of Election Finance. Tenn. Code Ann. § 3-6-104. The registration year runs from January 1 through December 31. Tenn. Code Ann. § 3-6-104(c). Registration is required if a person engages in lobbying that would directly or specifically benefit the economic, business, or professional interest of such person or the person's employer. Tenn. Code Ann. § 3-6-104(e). A public official performing the duties of the office, an attorney acting on behalf of a client, and a journalist are all excepted from these requirements. Tenn. Code Ann. § 3-6-104(d). A lobbyist means any person who engages in lobbying. Tenn. Code Ann. § 3-6-102(14). The term "lobby" means to communicate, directly or indirectly, with any official in the legislative branch or executive branch, for pay or for any consideration, for the purpose of influencing any legislative action or administrative action. Tenn. Code Ann. § 3-6-102(13).

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 analyzes, but not including the furnishing of information, statistics, studies, or analysis 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.

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). "Official in the executive branch" means:

> the governor, any member of the governor's staff, any member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee regulatory authority, or any member or employee of any executive department or agency, or other state body in the executive branch.

Tenn. Code Ann. § 3-6-102(16). Thus, under state law, an individual who receives pay or any consideration to influence state legislative or administrative action must register and file a disclosure statement. An individual who engages in lobbying and receives only reimbursement for actual-out-of-pocket personal expenses is exempt from paying the privilege tax on lobbyists, but must still register as a lobbyist. Tenn. Code Ann. § 3-6-104(d)(1).

Both proposed amendments would disqualify any individual required to register as a lobbyist from serving as an appointed member of any state or local board, commission, committee, or other entity having authority to formulate, implement, or recommend public policy. The disqualification would continue throughout the period of registration. Since the registration period runs for a calendar year, it appears that the ban would apply for any complete calendar year during which an individual was required to register as a lobbyist.

This Office recently noted that the right to engage in lobbying — including paid lobbying — is guaranteed by the First Amendment. Op. Tenn. Att'y Gen. 05-054 (April 20, 2005). Courts have upheld laws regulating and monitoring the activities of lobbyists. The United States Supreme Court has recognized that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma,*

413 U.S. 601, 611-612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (citations omitted); *see also, Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987), *appeal dismissed*, 485 U.S. 930, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988), *rehearing denied*, 485 U.S. 1029, 108 S.Ct. 1587, 99 L.Ed. 2d 902 (1988).

The proposed ban cannot meet this standard. It would prevent any individual required to register as a lobbyist from serving in appointed office to *any* state or local board, commission, committee, or other entity having authority to formulate, implement, or recommend public policy. Under state law, only individuals who lobby to influence state legislative and administrative action for pay or consideration must register. The law includes individuals who receive only out-of-pocket expenses, as well as individuals who engage in lobbying that would directly or specifically benefit the economic, business, or professional interest of such person or the person's employer. Presumably, the purpose of the ban is to ensure that appointed officials can exercise their authority without even the appearance of a conflict of interest. The interest in preventing corruption or the appearance of corruption has been found sufficiently compelling to justify a ban on some political activities by lobbyists. *Maryland Right to Life State Political Action Committee v. Weathersbee*, 975 F.Supp. 791 (Md. 1997). In that case, the United States District Court for the District of Maryland upheld a state law banning regulated lobbyists from serving as an officer or treasurer of a political committee that contributes to candidates for the General Assembly. The Court found that the ban was narrowly tailored to prevent political corruption and the appearance of corruption. The Court cited the defendants' articulation of this interest as follows:

> A lobbyist who also holds the purse strings of a political committee which donates money to a legislative candidate has the potential to exert tremendous influence over that legislator. Permitting a person to wear the hats of both lobbyist and political committee officer or treasurer increases markedly the likelihood that money will be traded for political favors.

975 F.Supp 791 at 797 (quoting defendants' brief). The Court also noted that the law was passed in response to an actual influence peddling scandal involving a lobbyist and donations from several political committees the lobbyist controlled.

But even if the interest of preventing corruption or the appearance of corruption represents a compelling state interest, the ban proposed by these two amendments is not sufficiently narrowly tailored to promote it. The ban applies regardless of the issues or agencies on which the lobbyist's activities are focused. Depending on the facts and circumstances, a member of a board or commission may well have no authority to influence a decision regarding which he or she is lobbying state government. Further, the bill does not attempt to delineate those situations where a real conflict of interest exists. A lobbyist who lobbies on behalf of the health industry, for example, would have no obvious broad conflict of interest in serving on a local parks and recreation commission that would justify banning him or her from the office completely. Similarly, an individual who lobbies on behalf of a public interest firm and is reimbursed for parking and meal

expenses has no obvious broad conflict of interest in serving on a wide range of boards or commissions.

Analyzing the ban as a limit on the right to hold public office yields the same result. The United States Supreme Court has recognized that there is no fundamental right to run for or hold public office. *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). Similarly, governments may limit the political activities of government employees to ensure impartial execution of the laws and maintain public confidence in governmental fairness. *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). But, in determining the validity of a restraint on job-related speech of public employees, a court must arrive at a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), *citing Pickering v. Board of Education of Township High School District 205, Will County*, 391 US. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In *National Treasury Employees Union*, the United States Supreme Court invalidated a law prohibiting federal employees from accepting compensation for making speeches or writing articles, regardless of whether the subject of the speech, or the person or group paying for it, had any connection with the employee's official duties. The Court found that the ban imposed a heavy burden on the rights of ordinary employees to engage in speech protected by the First Amendment. The Court acknowledged that the government's interest in attempting to avoid the misuse or appearance of misuse of power "is undeniably powerful." 115 S.Ct. at 1016. But the Court found the government had no evidence of impropriety by lower-level employees. The Court found, further, that the government's interest in avoiding administrative costs of detecting violations did not justify imposing a blanket ban, rather than one limited to speech relating to the employee's job. *Id.* at 1016-1017. The Court ruled on the law only as it applied to the lower-level employees who had brought the lawsuit and expressly refused to rule on the ban as applied to senior employees in the executive branch.

The proposed legislation applies to appointed members of boards and commissions, rather than lower-level public employees. In *National Treasury Employees*, the United States Supreme Court indicated that analyzing a ban on honoraria, as applied to senior executives, might involve weighing different governmental interests. Nevertheless, we think a court would conclude that a governmental interest in avoiding a hypothetical appearance of corruption does not justify banning any appointed member of a board or commission from engaging in paid lobbying on the state level. Since the ban extends to any individual required to register as a lobbyist, it also would ban a board member from being reimbursed for expenses, or even lobbying on behalf of one's employer or profession on the state level. The hypothetical interest does not outweigh the very real and broad burden on the exercise of First Amendment rights.

2. Ban on Employer of a Lobbyist from Appointive Office

The second amendment, 00673249, would add a new section 3-6-115, with the following subsection (b):

> (b) Notwithstanding any provision of law to the contrary, each officer and each employee of any organization or entity employing any person who is required to submit, update or maintain registration as a lobbyist, under the provisions of this part, shall likewise be disqualified from service as an appointed member of any state or local board, commission, committee, or other entity having authority to formulate, implement, enforce or recommend public policy, and such disqualification shall continue throughout the lobbyist's required period of registration under this part. The provisions of this subsection apply only to appointments and reappointments occurring on or after the effective date of this act. The provisions of this subsection do not prohibit appointment or reappointment of a person who is merely a member of a professional or trade association or organization for individuals or entities licensed or otherwise regulated by state or local government, provided that the member is not an officer or employee of such association or organization and the member does not engage in activities requiring registration under this part.

This provision bans any officer or employee of a business that hires a lobbyist from serving as an appointed member of any state or local board, commission, committee, or other entity having authority to formulate, implement, enforce, or recommend public policy. The right to petition the government under the First Amendment includes the right to employ a lobbyist to petition on one's behalf. Thus, for example, the United States Supreme Court has found that the antitrust laws do extend to businesses' attempts to influence the passage or enforcement of laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Michigan Paytel Joint Venture v. City of Detroit,* 287 F.3d 527, 538 n. 7 (6th Cir 2002) (the *Noer-Pennington* doctrine shields lobbyists and others whose legitimate attempts to influence governmental action are protected by the First Amendment as political activity from the Sherman Act); *see also, Moffett v. Killian,* 360 F.Supp. 228 (Conn. 1973); *Citizens Energy Coalition of Indiana v. Sendak,* 459 F.Supp. 248 (S.D. Ind. 1978), *aff'd,* 595 F.2d 1158 (7th Cir. 1979), *cert. denied,* 444 U.S. 842, 1003 S.Ct. 83, 62 L.Ed.2d 54 (1979) (a policy of refusing grants to consumer groups who employed lobbyists unconstitutionally infringed on the First Amendment rights of consumer groups).

Thus, this ban may only be upheld if it is narrowly tailored to further a compelling state interest. It is hard to discern the compelling state interest this ban is intended to further. Petitioning the government, either directly or indirectly through a paid lobbyist, is an activity protected by the First Amendment. It is not clear why merely hiring a lobbyist to represent one's interests should

result in a ban from service on all state and local appointive commissions. The reason for extending this ban to all officers and employees of an employer of a lobbyist is even less clear. The ban includes individuals who may have no link to paid lobbying activity beyond employment by a company that hires a lobbyist. The ban, therefore, unconstitutionally infringes on the First Amendment rights of companies who employ lobbyists, and their officers and employees. Similarly, analyzed as a restriction on the right to hold office, any hypothetical interest that the ban promotes is far outweighed by the burden it places on the individuals to whom it applies.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Beth Harwell
State Representative
107 War Memorial Building
Nashville, TN 37243