

STATE OF TENNESSEE

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January 6, 2004

Opinion No. 04-002

Conflict of Interest: Lottery Advertising

QUESTION

May a state legislator co-own radio stations that contract with vendors to advertise for the Tennessee Education Lottery?

OPINION

The answer to this question depends on the particular arrangement. Under Tenn. Code Ann. § 4-51-130, a legislator may not receive compensation or any benefit for advertising services rendered by a radio station that he or she owns to an on-line or instant ticket lottery vendor. The ban applies to benefits from an on-line or instant ticket lottery vendor that has contracted with the Tennessee Education Lottery Corporation (“TEL”), or to such a vendor seeking to contract with TEL. The ban extends to a legislator’s spouse and children living in the legislator’s house. It should also be noted that a legislator may not receive a gift from a lobbyist or any person who employs a lobbyist. Payments made in good faith for advertising services, however, would not ordinarily be a prohibited “gift” subject to the ban.

Under Tenn. Code Ann. § 12-4-101(a)(1), contracts between TEL and a business in which the legislator owns a controlling interest would not generally be prohibited because the General Assembly does not vote for, let out, overlook, or superintend TEL contracts. But the legislator should not serve on the Select Committee on the Tennessee Education Lottery Corporation. The prohibition would not apply if the company is the sole supplier of goods or services in a city or county. In that case, the legislator would be required to disclose his or her interest in the contract under Tenn. Code Ann. § 12-4-101(b).

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. Since the General Assembly ordinarily does not have a duty to vote for, let out, overlook, or superintend TEL contracts, this provision would not apply unless the member is on the Select Committee on the Tennessee Education Lottery Corporation. In any case, the legislator could be required to disclose the contract to the Registry of Election Finance if it falls within any of the categories in Tenn. Code Ann. § 8-50-502.

Under House Resolution 13, it appears that a member of the House would not be prohibited from voting on or influencing legislation in which the member has a personal interest in conflict with the member's duties so long as he or she discloses the information to the Registry of Election Finance as required under Tenn. Code Ann. §§ 8-50-501, *et seq.* Only the House Ethics Committee, however, can provide a definitive interpretation of this provision.

Depending on the facts and circumstances, a legislator could be subject to other codes of conduct. The member should consult the board or authority charged with administering those codes to determine his or her duties.

ANALYSIS

This request concerns conflict of interest laws as they apply to advertising for the Tennessee Education Lottery. The request indicates that a legislator co-owns a broadcasting company in Tennessee. It is anticipated that radio stations of this company may contract with lottery vendors or with the Tennessee Education Lottery Corporation ("TEL") to advertise for the Tennessee Education Lottery. As discussed below, a definitive answer to this question depends on the particular arrangement.

A. The Lottery Law

The TEL was established to operate a lottery under Tenn. Code Ann. §§ 4-51-101, *et seq.* Tenn. Code Ann. § 4-51-130 places various restrictions on the right of officials to work for or contract with TEL or lottery businesses. Subsection (b) states:

No member of the general assembly, the governor, a member of the governor's cabinet or a cabinet-level member of the governor's staff shall serve as an employee, *or otherwise receive compensation or other benefit for consultation or services rendered directly or indirectly through a partnership, corporation or other business entity, from an on-line or instant ticket lottery vendor of the Tennessee Education Lottery Corporation or an on-line or instant ticket lottery vendor seeking to become a vendor of the Tennessee Education Lottery Corporation*, while holding such position in state government. Nothing in this subsection (b) shall be construed as prohibiting *continued employment* of such official by a partnership, corporation, or other business entity receiving compensation from an on-line or instant ticket lottery vendor if:

(1) Such official has no direct or indirect contact with an on-line or instant ticket lottery vendor; and

(2) Such official does not share in any compensation or any benefit received from an on-line or instant ticket lottery vendor.

(Emphasis added). The provisions of the statute also apply to any children residing in the primary residence and the spouse of any member of the General Assembly, the Governor, a member of the Governor's cabinet or a cabinet-level member of the Governor's staff. Tenn. Code Ann. § 4-51-130(d). A violation of the statute is a class C misdemeanor punishable by a fine of one thousand dollars (\$1,000).

Under this section, a legislator is prohibited from receiving compensation for services from an on-line or instant ticket lottery vendor of the Tennessee Education Lottery Corporation or an on-line or instant ticket lottery vendor seeking to become such a vendor. This provision, therefore, would prevent a company owned by a legislator from contracting with an on-line or instant ticket lottery vendor to provide advertising services for that vendor. The ban also applies to compensation or other benefits for consultation or services rendered directly by the legislator personally to the on-line or instant ticket lottery vendor or indirectly through a partnership, corporation or other business entity. Under Tenn. Code Ann. § 4-51-130, therefore, a legislator may not receive compensation or any benefit for advertising services rendered by a radio station that he owns to an on-line or instant ticket lottery vendor. The ban applies to benefits from an on-line or instant ticket lottery vendor that has contracted with TEL, or to such a vendor seeking to contract with TEL.

The question then becomes whether, instead of contracting with a ticket vendor, a company owned by a legislator may provide advertising services to TEL, either directly as a contractor or indirectly as a subcontractor of another advertising company. In that case, compensation would not come from an on-line or instant ticket lottery vendor and the arrangement would not be prohibited by Tenn. Code Ann. § 4-51-130(b). Subsection (a) of Tenn. Code Ann. § 4-51-130 states:

No member of the general assembly, the governor, a member of the governor's cabinet or a cabinet-level member of the governor's staff shall serve as a *director or employee* of the corporation while holding such position in state government.

(Emphasis added). This provision would not prohibit a company owned by a legislator from contracting with TEL as an independent contractor.

In this connection, it should also be noted that a legislator may not receive a gift from a lobbyist or any person who employs a lobbyist. Tenn. Code Ann. § 3-6-114. Under the statute, the term "gift" means a payment, honorarium, subscription, loan, advance, forbearance, rendering or deposit of money or services, *unless consideration of equal or greater value is received*. Tenn. Code Ann. § 3-6-102(9). Payments made in good faith for advertising services, therefore, would not ordinarily be a prohibited "gift."

B. General Conflict of Interest Statute: Tenn. Code Ann. § 12-4-101

1. Direct Interest

Tenn. Code Ann. § 4-51-132 provides that the statute and accompanying amendments to the criminal law preempt “any other regulation of the area covered by this chapter and title 39, chapter 17, part 6.” We think the statute, however, refers to provisions regulating a state lottery, not to conflict of interest laws governing members of the General Assembly. The general conflict of interest statute appears at Tenn. Code Ann. § 12-4-101. Subdivision (a)(1) prohibits an official whose duty it is to vote for, let out, or supervise a contract from being directly interested in the contract. The statute provides:

(a) (1) 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.*

(Emphasis added). Under this statute, a legislator 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,*” may not be directly interested in the contract. The statute creating TEL describes it as follows:

The corporation shall be a body, politic and corporate, and a quasi-public instrumentality, and not a state agency or department, which shall be deemed to be acting in all respects for the benefit of the

people of the state through the operation of a state lottery and in the performance of other essential public functions entrusted to it.

Tenn. Code Ann. § 4-51-101(c). Under this definition, TEL is probably a “political subdivision created by statute” within the meaning of Tenn. Code Ann. § 12-4-101(a)(1). A legislator would be directly interested in a contract between TEL and a business in which the legislator owns a controlling interest. Under the statute, “controlling interest” includes, but is not limited to, the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation. With one exception in Tenn. Code Ann. § 12-4-101(b) discussed below, a contract between TEL and a company in which a legislator owns the controlling interest would be prohibited if the legislator has a duty to vote for, let out, overlook, or in any manner to superintend the contract. But, under the last sentence of Tenn. Code Ann. § 12-4-101(a)(1), the contract would not be prohibited if the legislator merely votes on an appropriations act that funds the contract.

The state legislature does not directly vote on TEL’s annual budget. Tenn. Code Ann. § 4-51-129 (5) & (6). Nor would most legislators ordinarily have a duty to vote for, let out, overlook, or in any manner superintend contracts with TEL. But the statute creates a legislative committee known as the Select Committee on the Tennessee Education Lottery Corporation. Tenn. Code Ann. § 4-51-133. This committee is responsible for inquiring into and reviewing the operations of TEL. A court could conclude that a legislator who serves on the committee has the duty to “superintend” contracts of TEL. For this reason, a legislator with a controlling interest in a company that contracts with TEL should not serve on the Select Committee on the Tennessee Education Lottery Corporation. As discussed below, these restrictions would not apply to a contract in which the legislator is directly interested, but is the sole supplier of goods or services in a municipality or county. In that case, restrictions governing indirect conflicts of interest would apply.

2. Indirect Interest

Under Tenn. Code Ann. § 12-4-101(b), a legislator must publicly acknowledge his or her interest in a contract in which he or she is indirectly interested. The statute provides:

(b) 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.

(Emphasis added). Under this statute, 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. Since the General Assembly ordinarily does not have a duty to vote for, let out, overlook, or superintend TEL contracts, this provision would not apply unless the legislator is on the Select Committee on the Tennessee Education Lottery Corporation. In any case, the legislator could be required to disclose the contract to the Registry of Election Finance if it falls within any of the categories in Tenn. Code Ann. § 8-50-502. Under that statute, legislators and other state officials must disclose various types of financial interests.

C. House Ethics Resolution

House Resolution 13 contains ethics provisions governing the current House session. These provisions are administered by the House Ethics Committee. *See* Tenn. Const. Art. II, § 12. Only that committee, therefore, can provide a definitive interpretation of the resolution. Article II of House Resolution 13 adopted by the current House of Representatives provides in relevant part:

SECTION 1. Unless a member fails to comply with Section 3 of this Article, a member has a personal interest which is in conflict with the proper discharge of the member's duties if the member has reason to believe or expect that the member will derive a *direct monetary gain or any other advantage* or suffer a *direct monetary loss* by reason of the member's official activity.

SECTION 2. The integrity and reputation of the House will be maintained and enhanced and the public interest protected if members *avoid* the following types of conduct:

- (a) Actions which destroy a member's independence of judgment as a legislator;
- (b) Actions which involve undue influence upon any state department, agency, court, or governmental subdivision; and
- (c) Actions which constitute an abuse of the member's official position or a violation of the member's trust;

SECTION 3. While recognizing that members of the House serve as members of a citizen legislature which reflects a variety of

professions and occupations and while also recognizing that some degree of personal interest in certain legislation is inevitable, *a member shall not vote on or influence legislation if the member has a personal interest which is in conflict with the proper discharge of the member's duties, unless the member discloses such information* with the registry of election finance in accordance with the requirements of Tennessee Code Annotated, Title 8, Chapter 50, Part 5.

(Emphasis added). Article I of this resolution authorizes the House Ethics Committee to consider alleged violations of the code and to render advisory opinions to the members. As noted above, Title 8, Chapter 50, Part 5 contains general disclosure requirements that members of the General Assembly, among other officers, must file with the Registry of Election Finance. Under the provision, it appears that a member of the House would not be prohibited from voting on or influencing legislation in which the member has a personal interest in conflict with the member's duties so long as he or she discloses the information to the Registry of Election Finance as required under Tenn. Code Ann. §§ 8-50-501, *et seq.*

Depending on the facts and circumstances, a legislator could be subject to other codes of conduct. The member should consult the board or authority charged with administering those codes to determine his or her duties.

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