



Random Audit of Lobbyist Michael Butler

November 10, 2008

Introduction

Registered lobbyist Michael Butler was randomly selected for audit on June 24, 2008. He was notified of his selection by letter of that same date. By letter of July 11, 2008, Tennessee Ethics Commission ("Commission") staff requested that Mr. Butler provide certain audit-related information in advance of scheduling an audit interview. Mr. Butler provided most of the requested information and participated in an audit interview that was held by mutual agreement on September 4, 2008. The interview took place at the offices of the Commission.

Audit authority and Scope

Under the Ethics Reform Act of 2006 ("Act"), the Commission has a duty to audit each year "the registration statements, amendments to registration statements and reports of no more than four percent (4%) of all lobbyists" to determine compliance with the Act. The lobbyists are selected randomly. Tenn. Code Ann. § 3-6-308(a)(7). The documents subject to audit are those which have been on file with the Commission less than two (2) years as of the time of the audit. Tenn. Code Ann. § 3-6-301(4)(A).

Audit objectives

The overall objective of the audit was to determine whether the statements, amendments, and reports filed concerning the lobbyist in 2007 and 2008 were timely, accurate, complete, and otherwise in compliance with the Act. In order to achieve this objective, the following specific objectives were identified:

1. to determine whether the lobbyist and his or her employer(s) registered timely in 2007 and 2008;
2. to determine whether the lobbyist had entered into any prohibited contingency fee agreement(s);
3. to determine whether the compensation reported by the employer(s) for the period from October 1, 2007 through March 31 2008 correlated with the compensation received by the lobbyist;
4. to determine whether the lobbyist attended and paid for the required annual training in 2007 and 2008;
5. to determine whether in-state events given by the lobbyist or the lobbyist's employer were in compliance with the requirements of the Act;

Summary of Audit Conclusions

1. Neither Mr. Butler nor his employer registered within seven (7) days of entering into an agreement that Mr. Butler would engage in lobbying for compensation in 2008.
2. The audit revealed no evidence that Mr. Butler had entered into any prohibited contingency fee agreement with his employer.
3. The compensation reported by the employer was less than the portion of Mr. Butler's salary which is attributable to his lobbying duties.
4. As of the date of the interview, Mr. Butler had not yet completed the required training for 2008 or made arrangements to complete it before year end.
5. The employer held an in-state event on March 19, 2008 but did not provide a copy of the invitation to the Commission seven (7) days in advance. Further, the expense report for the in-state should be amended to reflect a slightly lower total expenditure.

Details regarding these conclusions, including responses from Mr. Butler, follow.

AUDIT CONCLUSIONS

1. Neither Mr. Butler nor his employer registered timely.

Mr. Butler is employed as an in-house lobbyist for the Tennessee Wildlife Federation, and has been so employed since before the commencement of the 2007 and 2008 registration years. A lobbyist is required to register within seven (7) days of entering into such an agreement, regardless of when the lobbyist actually engages in lobbying.¹ Lobbying is a continuing part of his job, and therefore Mr. Butler is legally considered to have entered into an agreement to lobby as of the first day of the 2008 registration period, January 1, 2008. Mr. Butler and his employer should have registered by January 8, 2008.

Mr. Butler registered on February 12, 2008, and the Tennessee Wildlife Federation ("Federation") registered on February 14, 2008.² Mr. Butler reported there was a problem with the Commission's website. According to the administrative assistant with whom Mr. Butler spoke, the problem was that Mr. Butler needed to obtain a separate "e-gov." account for himself and for his employer. The system will not allow both an employer and a lobbyist to use the same account or password. Mr. Butler suggested that the system should be modified to allow in-house lobbyists and their employers to register in combination rather than separately.

Mr. Butler also reported that it was not clear when the seven (7) days commenced to run in the in-house lobbyist context. The Commission's formal interpretation was explained, and Mr. Butler anticipates filing timely for 2009.

¹ Tenn. Code Ann. § 3-6-302(a)(2). See Op. Tenn. Ethics Comm'n, No. 06-01 (Dec. 12, 2006).

2. The audit revealed no evidence that Mr. Butler had entered into a contingent fee lobbying agreement with his employer.

Mr. Butler has no written contract. His performance is evaluated by his employer, and presumably the evaluation affects the amount of Mr. Butler's compensation. However, the audit revealed no evidence that "the amount of the . . . compensation . . . is contingent upon achievement of an outcome deemed to be successful for the employer."³

3. The lobbying compensation reported by Mr. Butler's employer was less than the portion of Mr. Butler's salary attributable to his lobbying duties.

According to the Federation's website, Mr. Butler works with elected officials, state and federal agencies, and civil leaders to implement sound natural resources policy and create solutions to natural resource user conflicts. At the interview, Mr. Butler indicated that he thought only communications with officials in the legislative branch could be considered lobbying, and that his lobbying activity was only incidental to his employment.

As to the first point, the Act's the definition of "lobby" explicitly includes lobbying of executive officials. "Lobby" means to "communicate, directly or indirectly, with any official in the legislative branch or executive branch for the purpose of influencing any legislative action or administrative action."⁴

As to the second point, the exception for persons whose lobbying duties are only incidental arises by virtue of the Act's definition of "compensation." The Act provides that "lobbyists" must register. The Act defines a "lobbyist," in turn, as one "who engages in lobbying for compensation."⁵ Finally, "compensation" is defined as "any salary, fee, payment, reimbursement or other valuable consideration, or any combination thereof, whether received or to be received; however, 'compensation' does not include the salary or reimbursement of an individual whose lobbying is incidental to that person's regular employment."⁶

The term "incidental" is not defined in the Act. However, the plain meaning of the word is "occurring or apt to occur as an unpredictable or minor concomitant," or "of a minor, casual, or subordinate nature."⁷ From the information stated on the website and at the interview, it is apparent that Mr. Butler's lobbying activities do not occur as an

³ Tenn. Code Ann. § 3-6-304(k).

⁴ Tenn. Code Ann. § 3-6-301(15)(A).

⁵ Tenn. Code Ann. § 3-6-301(17).

⁶ Tenn. Code Ann. § 3-6-301(7).

⁷ Webster's II New College Dictionary (3rd ed., 2005), at 75.

unpredictable or minor concomitant of his other duties. Nor are they of a minor, casual, or subordinate nature.

The Federation's semi-annual report of lobbying expenditures for the period from October 1, 2007 through March 31, 2008 showed Mr. Butler as the Federation's only lobbyist. The report also showed total aggregate lobbyist compensation as less than ten thousand dollars (\$10,000). Although Mr. Butler clearly has non-lobbying duties as well as lobbying duties, review of job and salary information provided by Mr. Butler in connection with the audit shows that the amount of compensation attributable to lobbying is under-reported.⁸ As set forth in the instructions for filing the lobbying expenditure report (SS-8011), "compensation paid to any lobbyist who performs duties for the employer in addition to lobbying and related activities shall be apportioned to reflect the lobbyist's time allocated for lobbying and related activities in this state." However, it is clear that the amount of compensation paid for Mr. Butler's lobbying work is greater than ten thousand dollars (\$10,000).

Mr. Butler stated his intent at the interview to have the employer amend the lobbying expenditure report filed on May 14, 2008. As of this writing, the report has not been amended.

4. Mr. Butler attended and paid for the 2007 training, but had not yet completed or made arrangements to complete the 2008 training.

At the interview, Mr. Butler said he planned to take the 2008 training program available on the web.

5. The invitation for the in-state event held on March 19, 2008, was not filed with the Commission seven days in advance, and the expense report for the event should be amended to show a slightly lower total expenditure.

Pursuant to Tenn. Code Ann. § 3-6-305(b)(8), "[e]ntertainment, food, refreshments, meals, beverages, or health screenings that are provided in connection with an in-state event to which invitations are extended to the entire membership of the general assembly" are not subject to the Act's general ban on gifts from lobbyists to state officials. The exemption from the ban only applies if certain additional conditions are met, including the requirement that "a copy of the invitation shall be delivered to the ethics commission and to each member of the general assembly at least seven (7) days in advance of the event by the employer or lobbyist paying for the event."

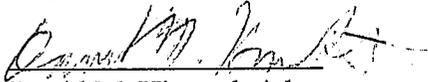
Mr. Butler's employer, the Tennessee Wildlife Foundation (is it the Foundation or the Federation??), extended an invitation to all members of the general assembly to attend a

⁸ The specific amount of Mr. Butler's salary is confidential random audit information and is therefore not included in this public report. Tenn. Code Ann. § 3-6-308(c). "Random audit information" is defined in Tenn. Code Ann. § 3-6-301(4)(A).

"Wildlife Heritage Day" at the War Memorial Auditorium on March 19, 2008. By letter received March 18, 2008, the Foundation (Federation?) filed a copy of the invitation with the Commission. Although the letter was dated March 12, 2008, this is not sufficient to comply with the Act's requirement that the invitation be "delivered" to the Commission "at least seven (7) days in advance of the event."

The Act also requires that "within thirty (30) days following the event, the employer or lobbyist shall electronically report to the commission the total aggregate cost paid for the event, as well as the per person contractual cost for the event or the per person cost for the event based on the number of persons invited, which shall not exceed fifty one dollars (\$51.00) per person per day, excluding sales tax and gratuity."⁹ On April 10, 2008, the Tennessee Wildlife Federation (Foundation?) filed a cost report which was signed by Mr. Butler. The report showed a total aggregate cost for the event of eight thousand, six hundred seventy-two dollars and twenty-seven cents (\$8,672.27). The per-person contractual cost based on the number of persons invited was seven dollars and thirty-six cents (\$7.36). A review of the cost documentation provided by Mr. Butler in advance of the interview showed that total cost was actually lower than reported, at eight thousand, six hundred forty-four dollars and thirty-four cents (\$8,644.34).

Report completed by:



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⁹ Tenn. Code Ann. § 3-6-305(b)(8).