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February 14, 1985

85-036

Honorable John N. Ford
State Senator
Suite 7, Legislative Plaza
Nashville, Tennessee 37219

Dear Senator Ford:

You have requested an opinion of this office on the following question:

QUESTION

What constitutes a conflict of interest relative to a member of the General Assembly?

OPINION

A legislator would have a prohibited conflict of interest if: (1) he placed himself in a position in which personal interest may conflict with public duty, (2) he possesses a direct interest under T.C.A. § 12-4-101(a), (3) he possesses an indirect interest under T.C.A. § 12-4-101(b) and does not publicly acknowledge it, (4) he violates other statutes related to conflicting interests, such as T.C.A. § 39-5-102, (5) his actions fall within the prohibitions of the Senate's Ethics Resolution [assuming the legislator is a senator], or (6) he takes any action which the particular House of the General Assembly determines to be a conflict of interest.

ANALYSIS

Broadly speaking, a conflict of interest may be defined as the use of a public office to advance private

interests at the expense of the public interest. Cranston, Regulating Conflicts of Interest of Public Officials: A Comparative Analysis, 12 Vand. J. Trans. L. 215 (1975) [hereinafter cited as Cranston]. Mores specifically, a conflict of interest has been said to exist:

> whenever a legislator or other public official has placed himself in a position where, for some advantage gained or to be gained for himself, he finds it difficult if not impossible to devote himself with complete energy, loyalty and singleness of purpose to the general public interest. The advantage that he seeks is something over and above the salary, the experience, the chance to serve the people, and the public esteem that he gains from public office.

159 Minnesota Governor's Committee on Ethics in Government Report 17, quoted in Note; Conflict of Interests: State Government Employees, 47 Va. L. Rev. 1034 (1961)(footnote 1).

The idea behind the concern with conflicts of interests is that public servants occupy positions of trust and confidence. Thus, a public official may be said to owe the public the fiduciary duty of acting solely in the interest of the public. Note, Conflict of Interests: State Government Employees, 47 Va. L. Rev. at 1034. It has even been said that any act on the part of an official which creates an appearance of conflict undermines public confidence and is prohibited. Id; Cranston at 220; Stocker v. Waterburg, 154 Conn. 446, 226 A.2d 514 (1967).

State legislators occupy a particularly difficult position in determining what constitutes a conflict of interst. Since membership in the General Assembly is only a part-time job, most members need private income. Considering the wide range of matters with which each legislator must deal, it is almost inevitable that he or she will have some interest affected by a legislative proposal. Atherton v. City of Concord, 109 N.H. 164, 245 A.2d 387 (1968); Eisenberg, Conflicts of Interest Situations and Remedies, 13 Rutgers L. R. 666 (1959); Note, Conflicts of Interest of State Legislators, 76 Harv. L. R. 1029 (1963). If the conflict of interest standards are too strict, many

people well suited for public office because of their business or professional experience would be effectively prevented from serving. Atherton v. City of Concord, supra.

The Common Law

At common law, "the essence of the offense [of having a conflict of interest] was acting or appearing to act inconsistently with the best interests of the public . . . ." Note: Conflicts of Interests: State Government Employees, 47 Va. L. R. at 1048. In Anderson v. City of Parsons, 209 Kan. 337, 496 P.2d 1333 (1972), the common law principle was described as not permitting the public officer "to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public." Id. at 1337. This policy is not limited to a single category of officers, but applies to all public officials. Low v. Madison, 135 Conn. 1, 60 A.2d 774 (1948); Housing Authority of the City of New Haven v. Dorsey, 164 Conn. 247, 320 A.2d 820 (1973), cert. denied 414 U.S. 1043.

The common law principle has been followed in several opinions of this office. For example, this office has stated:

> [t]here exists a strong public policy which opposes an official placing himself in a position in which personal interst may conflict with public duty . . . A public office is a trust conferred by the public. The duties of that office must be exercised with fairness and impartiality. The good faith of the officer is not a consideration, for the policy exists to prevent an officer from being influenced by anything other than the public good.

Op. Att. Gen. 83-278 (August 15, 1983). See also, Op. Att. Gen. 78-088 (May 16, 1978).

Statutes

The Tennessee statute on conflicts of interest relating to contracts dates from 1870. See, Public Acts of 1869-70, Ch. 92, Section 1. It has been on the books con-

tinuously, in one form or another, for over one hundred ten years. It was said of the predecessor of the present T.C.A. § 12-4-101 that it prohibited "public officials from using their public functions and duties to subserve their private interests." Madison County v. Alexander, 116 Tenn. 685, 688, 94 S.W. 604 (1906). The good faith of the officer was not a defense. Id. The statute, enacted to protect the public, was to be "liberally construed so as to effectuate the objects sought." State ex rel. Abernathy v. Robertson, 5 Tenn. Civ. App. 438, 454 (1914). These general guidelines apply equally as well to the present version of the statute, T.C.A. § 12-4-101.

T.C.A. § 12-4-101(a) prohibits any officer, whose duty it is to vote for, let out, overlook or in any manner superintend a contract, from being directly interested in that contract. T.C.A. § 12-4-101(a) defines "directly interested" to mean:

> any contract with the official himself or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. 'Controlling interest' shall include the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.

T.C.A. § 12-4-101(b) prohibits any officer, whose duty it is to vote for, let out, overlook or in any manner superintend a contract, from being indirectly interested in that contract unless the officer publicly acknowledges his interest. T.C.A. § 12-4-101(b) defines "indirectly interested" to mean:

> 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.

This office has consistently opined that the making of a general appropriation out of which contractual funds are eventually expended makes the appropriating body a superintending agency. Ops. Att. Gen. 84-177 (May 25,

1984); 81-110 (March 23, 1981). A legislator may therefore be said to be superintending state contracts. Therefore, under T.C.A. § 12-4-101(a), a legislator may not be directly interested in any state contract. Under T.C.A. § 12-4-101(b), a legislator may possess an indirect interest in a state contract if he or she publicly acknowledges that interest.

T.C.A. §§ 8-58-501, et seq. also deal with conflicts of interest. T.C.A. § 8-50-501(a)(1) requires each member of the General Assembly to disclose interests that fall within the purview of T.C.A. § 8-50-502. These interests include general sources of income; certain investments in corporations; officers, directorships, and salaried employments of the person, spouse or minor children; entities to which professional services are rendered; and certain retainer fees. T.C.A. §§ 8-50-501, et seq. requires legislators to disclose areas of potential conflicts of interest so that the public they serve may be fully informed.

Other statutes may also be related to the topic of conflicts of interest, such as T.C.A. § 39-5-102 (accepting bribes), T.C.A. § 39-5-402 (neglecting duties) and T.C.A. § 39-5-434 (legislator willfully absenting himself from General Assembly to obstruct its business).

Internal Checks

The State Senate adopted Senate Resolution No. 10 in 1983, which established a Code of Ethics for members of the Senate. This resolution recognized the necessity of such a code "to eliminate conflicts of interest in public office . . . ." It further recognized that "if public confidence in government is to be maintained and enhanced, it is not enough that senators should avoid acts of misconduct but they must also scrupulously avoid acts which may create even an appearance of misconduct."[1]

Section 1 of Resolution No. 10 state:

> A senator has a personal interest which is in conflict with the proper discharge

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[1]Senate Resolution No. 2, which is now being considered, contains substantially the same provisions as Senate Resolution No. 10 of 1983.

> of his duties if he has reason to believe or expect that he will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity.

Section 2 indicates the types of conduct a senator should avoid. The resolution goes on to set up a mechanism to consider complaints against a senator. The Ethics Committee may recommend to the Senate appropriate disciplinary action and even turn its evidence over to the appropriate district attorney.

Article II, Section 12 of the Tennessee Constitution states:

> Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the Legislature of a free State.

Thus, after the members are seated, a House of the General Assembly may expel a member by a two-thirds vote.

Even absent this provision, the Houses of the General Assembly would still possess the authority to expel a member. Such authority is "inherent, incidental and necessary, and must exist in every aggregate and deliberative body . . . ." Hiss v. Bartlett, 69 Mass. 468, 475, 63 Am. Dec. 768 (1855). The authority to expel a member enables "the legislative body to protect itself against participation in its proceedings by persons whom it judges unworthy to be members thereof, and affects only the rights of such persons to continue acting as members . . . ." French v. Senate, 146 Cal. 604, 80 P. 1031, 1034 (1905).

> It is a power of protection. A member may be physically, mentally or morally, wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent and disorderly, or in the habit of using profane, obscene and abusive language.

Hiss v. Bartlett, supra at 473. Clearly, the authority to expel is quite broad. Each House is "the sole judge of the exigency which may justify and require its exercise." Id. at 473; French v. Senate, 80 P. at 1032. Thus, a House of the General Assembly may determine that a member's actions constitute a conflict of interest and that such actions justify expulsion.

In summation, a legislator would have a prohibited conflict of interest if: (1) he placed himself in a position in which personal interest may conflict with public duty, (2) he possesses a direct interest under T.C.A. § 12-4-101(a), (3) he possesses an indirect interest under T.C.A. § 12-4-101(b) and does not publicly acknowledge it, (4) he violates other statutes related to conflicting interests, such as T.C.A. § 39-5-102, (5) his actions fall within the prohibitions of the Senate's Ethics Resolution [assuming the legislator is a senator], or (6) he takes any action which the particular House of the General Assembly determines to be a conflict of interest.

If you have any questions concerning this matter, please feel free to contact this office.

Sincerely,

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