

Conflicts of Interest In Tennessee

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Conflicts of interests in Tennessee are governed principally by two statutes, and a common law doctrine:

1. Tennessee's Conflicts of Interest Law, codified at Tennessee Code Annotated, § 12-4-101 et seq.
2. Tennessee also appears to recognize common law conflicts of interest.
3. Tennessee's new Ethics Law codified at Tennessee Code Annotated, § 8-17-101 et seq.

For the purposes of simplicity, I will try to address each of those separately.

Tennessee's Conflict of Interest Law

The Tennessee Conflicts of Interest Law is found in Tennessee Code Annotated, section 12-4-101. It covers many public officials and employees, including municipal officials and employees. Always confusing, the answer to the question of whether a conflict of interest exists in a particular case is highly fact dependent. Contracts, including employment contracts, in which family members of municipal officials are financial beneficiaries, are particularly troublesome. In addition, the Conflicts of Interest Law does not do a good job of addressing the problem of public officials and employees who have oversight and supervisory responsibilities over municipal contracts, but have no duty to vote on them.

KEY TO CONFLICTS OF INTEREST LAW

The key to the Tennessee Conflicts of Interest Law is personal financial interest. If the municipal official in question has no personal financial interest in the municipal contract or work that raised the question of a conflict of interest, there is no violation of the Conflicts of Interest Law.

WHO AND WHAT INTERESTS DOES IT COVER?

Who Does It Cover?

Officers, committeemen, directors, or other persons who have certain duties with respect to municipal contracts and work in which a covered official or person has either a direct or an indirect interest. Those duties include any one or more of the following duties:

- vote for,
- let out,
- overlook, or
- in any manner to superintend any such contract or work.

Alders and many mayors have a duty to vote for, let out, overlook, and in most cases, superintend, a wide variety of municipal contracts and work. A recorder might have the general duty to overlook and superintend a broad range of municipal contracts and work. A street superintendent might have a specific duty to overlook and superintend municipal street work. Lower ranking city employees might not have any of those duties.

What Does It Cover?

1. Direct Interests.

A direct interest is a contract between the city official himself, or a business of which the official is the sole proprietor or has controlling interest. Controlling interest means ownership of the largest number of outstanding shares owned by **any** single individual or corporation.

2. Indirect Interests.

There are two important kinds of indirect interests:

- A contract in which the municipal official is interested, but not directly so.
- A contract in which the municipal official is directly interested, but where he or she is the sole supplier of the goods or services in question in the municipality.

HANDLING DIRECT AND INDIRECT INTERESTS

Direct Interests Are Generally Prohibited.

Generally, municipal officials covered by the Conflicts of Interest Law cannot have a direct interest; that is, they cannot provide goods and services to the municipality. That is true even if they provide the goods and services at considerably less cost than the municipality could have gotten them elsewhere.

Exception: Where the municipal official is the sole supplier of the goods and services in question in the municipality. In that case the direct interest is converted to an indirect interest. Another exception for certain municipal employees who are municipal officials is covered below.

Indirect Interests Are Allowed If They Are Acknowledged.

Generally, municipal officers covered by the Conflicts of Interest Law can be indirectly interested in a municipal contract if they publicly acknowledge their interest. How the public interest is acknowledged is not prescribed in the Conflicts of Interest Law. Presumably, an elected official would acknowledge an indirect interest at a public meeting of the municipal body of which he is a member at the time or times the contract in which he has an indirect interest is an issue. The requirement that indirect interests be acknowledged apparently includes cases in which the public official in question is the sole supplier of goods and services in the municipality.

SPECIAL PROVISIONS OF CONFLICTS OF INTEREST LAW

Rule For Certain Officials Not Members of Governing Bodies.

A provision of the Conflicts of Interest Law appears to permit a municipal official except a member of a municipal governing body to vote on whole budgets, appropriation and tax rate resolutions, or their amendments, where the official has a direct interest in a part of the budget, appropriation or tax rate resolution. However, the official cannot vote specifically on a specific amendment to the budget or a specific appropriation or resolution in which he or she is directly interested.

Rule For Municipal Employees Serving On Municipal Governing Bodies.

- **When the employee was hired before his or her initial election or appointment to the governing body:** The employee/member of the governing body may vote on matters in which he or she has both a direct and an indirect interest, by uttering certain magic words contained in the Conflicts of Interest Law:

Because I am an employee of (name of governmental unit), I have a conflict of interest in the proposal about to be voted. However, I declare that my argument and my vote answer only to my conscience and to my obligation to my

constituents and the citizens this body represents.

If the employee/member of the governing body fails to utter the magic words, his or her vote must be challenged at the same meeting and before any other business is transacted.

- **When the employee was hired after his or her initial election or appointment to the municipal governing body:** The employee/member of the governing body may not vote on matters in which he or she has either a direct or an indirect interest.

ABSTINENCE FROM VOTING

A member of a municipal governing body may abstain from voting on any matter in which he has either a direct or an indirect conflict of interest. If he does so, he is not counted for purposes of determining a majority vote..

Common Law Conflicts of Interest

Common law conflicts of interest generally arise in two contexts: public officials and employees holding *incompatible offices*, and public officials having a *financial conflict of interest*. This paper will deal only with common law conflicts of interest in the context of public officials having a financial conflict of interest.

As far as I can determine, there is only one Tennessee case that involves the application of the common law conflicts of interest doctrine where the financial interest of a public official or employee is involved. . In Ramsey v. Gibson County, 7 Tenn.Civ. App. (7 Higgins) 53 (1916), a cook in a county workhouse supplied food for the workhouse from a store he owned. The Court denied him payment for the food, declaring:

That it is not material to determine whether Ramsey [the cook] was such an official as cannot deal with the county under Shannon's Code, Section 1133 [what is now Tennessee Code Annotated, § 12-4-101.] We think that under no circumstances can the Courts recognize the right of a man occupying the position of Ramsey to recover upon his contracts. Sound public policy forbids this...The rule forbids the giving of any validity to such contracts because of the vast opportunities open for fraud and because such contracts are in flat contradiction of the soundest ethical and judicial principles. See Madison County v. Alexander, 116 Tenn., 689, and cases there cited....The law forbids the assumption by anyone of a position where his interest and his duty will conflict. [At 54-55]

At that time, Shannon's Code, § 1133, much the same as it does now, provided that: "It shall not be lawful for any officer, committeeman, director, or other person whose duty it is to vote for, let out, overlook, or in any manner superintend, any work or any contract in which any

public municipal corporation...shall or may be interested, to be directly or indirectly interested in such contract.” Note that at that time, the statute entirely prohibited both direct and indirect interests.”

The Ramsey Court sounded unsure that Shannon’s Code, § 1133, covered the workhouse cook. He certainly had no duty to vote for the contract, and arguably as a cook he had no duty to overlook or to in any manner superintend the contract. He was on the bottom of the employment totem pole, so to speak. But even if that was true, the contract was a violation of public policy. That case appears to indicate that the common law conflict of interest is alive in Tennessee.

But at the time of Ramsey, Tennessee’s Conflicts of Interest Law entirely prohibited both direct and indirect conflicts of interest—very strict law. Indeed, it was so strict, the law was subsequently changed to allow indirect conflicts of interest as long as they were disclosed. The purpose for changing the law was to allow directors and employees of banks and other private entities to serve as public officials and employees. In such cases the business itself may have a financial relationship with the government, but the directors or employees of the business may have only an indirect interest in that relationship. But it still appears that under Ramsey, even such a person could have common law conflict of interest in a matter in which he had the ability to influence the outcome to his financial advantage, especially if he were a public officer who had a right to vote on such matters. .

A number of Tennessee Attorney General’s Opinions also opine that the common law conflict of interest applies in Tennessee, even as to financial conflicts of interest on the part of public officials, even though those opinions point to no Tennessee cases for support. It is said in TAG 94-073 that:

There exists a strong public policy which opposed an official placing himself in a position in which personal interest 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. Tenn. Att. Gen. 83-278 (August 15, 1983). See also Op. Tenn. Att. Gen. 90-73 (July 27, 1990); Op. Tenn. Atty. Gen.85-036 (February 14, 1985). Thus, if gifts received by a county official put him or her in a position in which personal interest may conflict with public duty there would be common law conflict of interest. If the gift is so trivial that it would not have the potential for affecting the official’s impartiality in fulfilling his or her duties, there may be no conflict of interest.

It is also said in TAG U93-48, that

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. Op. Tenn. Atty. Gen. 85-036 (February 14, 1985), quoting 1958 Minnesota Governor's Committee on Ethics and Government Report 17, quoted in Note: Conflict of Interest: State Government Employees, 47 Va. L. Rev. 1034 (1961) (footnote 1).

But it is difficult to determine what kind of financial conflict of interest it would take in Tennessee to trigger the common law conflict of interest doctrine. As the TAG opinions above indicate, that doctrine might be triggered even when the public official or employee acted in good faith on a matter in which he had a financial interest; some common law conflict cases from other jurisdictions declare that it is the *appearance* of absence of impartiality that triggers the doctrine. As indicated above, Ramsey involved a low-ranking employee; it does not tell us how the common law conflict of interest doctrine applies to, say, members of a planning commissions or members of other public bodies who have a financial interest in the matters in which they have a voice and a vote.

However, such issues have arisen in other states, although most of them involve public officers who have the right to vote on issues and contracts; few of them involve public employees. . An Illinois Court in Midwest Television, Inc. v. Champaign-Urbana Communications, Inc., 347 N.E.2d 34 Ill. App. (1976) observed that the statutory conflicts of interest law applied to public officers, and refused to find that the common law conflict of interest doctrine applied to public employees, reasoning that:

If potential conflicts of interest are interpreted broadly [sic.] and such prohibitions reach both officers and employee, these restrictions can work a severe hardship, especially at the municipal level. Many persons might be discouraged from working at that level since it would require divestment of substantial business interests so that the government may make an intermittent or even uncompensated use of their service. 'Conflicts of Interests; State Government Employees,' 47 Va. L. Rev. 1034, at 1051.] [At 38]

The question of whether the city manager could fire a city police officer where the officer established his wife in a non-emergency ambulance transfer service and gave the city notice he planned to work during his off-duty hours in that service, arose in Marsh v. Town of Hanover, 313 A.2d 411 (N.H. 1973). The state's statutory conflicts of interest law did not prohibit the police officer's employment in that capacity. However, the Court observed that, "The common law of New Hampshire identifies a conflict of interest where a potential exists for a public officer to influence the outcome of a matter in which he has a *direct personal and pecuniary interest*." [Citations omitted by me.] Such conflict normally arises in context where an official is acting in a judicial or legislative capacity. [citations omitted by me.] However, the general principle underlying this law applies to all public servants. [Citations omitted by me.] [At 414]

The court went on to declare that the city provided both emergency and non-emergency ambulance service, and that if the city got out of the non-emergency ambulance service the officer would not receive a pecuniary benefit from his dual position, but that if the city stayed in the non-emergency ambulance service, the officer's promotion of his wife's interest in the ambulance service would reflect a clear conflict of interest with the city's interest.

But there are a significant number of common law conflict of interest cases where it is alleged that the public official in question voted or otherwise took some other action, on a matter in which he had a financial interest, but where that interest did not involve a municipal contract. A number of such cases involve votes on zoning issues. [See Griswold v. City of Homer, 925 P.2d 1015 (Alaska 1996) (zoning); Raynes v. City of Leavenworth, 821 P.2d 1024 (Wash. 1992) (zoning); Helmke v. Board of Adjustment, City of Ruthven, 418 N.W.2d 346 (Iowa 1988) (zoning); Care of Tenafly, Inc. v. Tenafly Zoning Board of Appeal, 704 A.2d 1032 (N.J. 1998) (zoning); Hanig v. City of Winner, 692 N.W.2d (S.D. 2005); Friends Retirement Concepts v. Board of Education of the Borough of Somerville, 811 A.2d 962 (N.J. 2002).]

Those cases give guidance on what financial interests trigger the common law conflict of interest doctrine. The answer is: It depends upon the circumstances. Indeed, the cases are not even in agreement on what happens when a person who has such an interest votes.

Tennessee's Ethics Law

Tennessee's new ethics law governing local governments is a product of Public Acts 2006 (Extraordinary Session), Chapter 1. That law is codified at Tennessee Code Annotated, § 8-17-101, and covers both municipal officers and employees. That law requires municipalities to adopt ethical standards by July 1, 2007, which, at a minimum, must include two things:

1. Rules setting limits on and/or providing for reasonable and systematic disclosure of gifts or other things of value received by officials or employees that appear to affect their discretion.
2. Rules requiring reasonable and systematic disclosure by officials and employees of personal interest that affect or appear to affect their discretion.

The Ethics Law does not define what is a “personal interest.” The MTAS Model Ethics Policy is broader than is Tennessee’s Conflicts of Interest Law, requiring the disclosure by officials entitled to vote on any personal interest that might affect their discretion, and public officials who have discretion in matters that do not require a vote to disclose their personal interests.