

TENNESSEE ETHICS COMMISSION
ADVISORY OPINION NO. 07-01
February 15, 2007
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Interpretation of T.C.A. § 3-6-301 *et seq.*
with respect to the provision of refreshments
by local affiliates of membership organizations
which employ lobbyists

INTRODUCTION

The following Advisory Opinion is written in response to an inquiry made by Mr. Bryan K. McCarty, on behalf of the Tennessee Education Association (“TEA”), an employer of lobbyists. The TEA asks whether the local affiliates of the TEA may, during the legislative session, serve refreshments at meetings to which State Senators and Representatives are invited to discuss matters related to public education. These meetings are planned and the agendas supplied by the TEA.

For the reasons discussed below, the Tennessee Ethics Commission (“Commission”) concludes that local affiliates of the TEA are not, under these facts, “employers of lobbyists” or “lobbyists,” as those terms are defined by the Governmental Ethics Reform Act of 2006 (“Act”).

First, the Act envisions some volitional and direct act to create the employment relationship or some agreement to lobby for compensation. Those factors are not present in this case. Although the local affiliates of the TEA are acting at the direction of the TEA, they can neither be considered employers of lobbyists nor lobbyists under the Act.

Second, the Act specifically excludes members of associations.

Third, if members of the local affiliates engage in lobbying activities, for which they are not reimbursed, or are reimbursed only for their expenses, for fewer than ten days per year, they and their employers are exempt from registration requirements.

Thus, they are not subject to the gift giving restrictions in the Act.

BACKGROUND

The TEA employs eight (8) lobbyists. The TEA is registered as an employer for those lobbyists, and the lobbyists are registered.

The TEA requests that its local affiliates meet with legislators. The TEA organizes these meetings through its field staff, or “UniServ Coordinators,” who are paid employees of the TEA and who are responsible for the logistics of planning these meetings.

When the Tennessee General Assembly convenes each year, the President of the TEA and its government relations manager contact the Presidents of the local affiliates to give them notice that their UniServ Coordinator will contact them to schedule meetings with legislators.

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The TEA encourages the affiliates to work closely with the UniServ Coordinators to schedule these meetings. The TEA provides a deadline by which these meetings should occur. The UniServ Coordinators contact the Presidents of the local affiliates, set the meeting dates, and select the meeting sites.

The TEA provides the local Presidents a list of issues from its legislative program, which includes talking points, statements of position, and questions relating to the legislator's willingness to support the concepts and positions taken in the TEA's proposed legislation. The TEA provides a form on which the affiliates are to report the results of their meetings. Legislators and members of the affiliates attend these meetings. Additionally, TEA staff and its Government Relations staff (two of whom are among TEA's registered lobbyists) sometimes attend, but do not take an active role. The local affiliates provide and pay for refreshments and – on rare occasions – for meals.

The Presidents and members of the local affiliates are not compensated for their services.

DISCUSSION

1. Employer of Lobbyists.

The Act brought about many changes to the lobbying practices of both employers of lobbyists and lobbyists in Tennessee. It requires reporting and registration, and imposes restrictions on the giving and receiving of gifts. The Act specifically prohibits a lobbyist or an employer of a lobbyist from providing “a gift, directly or indirectly, to a candidate for public office, official in the legislative branch, official in the executive branch, or immediate family of such candidate or official.” T.C.A. § 3-6-305(a).

T.C.A. § 3-6-301(8) defines “employer of a lobbyist” as “any person or entity that *employs, retains, or otherwise arranges for a lobbyist* to engage in lobbying on behalf of the person or entity for compensation.” [Emphasis added.] Thus, the employment relationship is commenced by some willful act; one cannot be an employer of a lobbyist if one does not take any affirmative steps toward creating the employment relationship.

Even if it could be argued that the TEA or the local affiliate is an “employer of a lobbyist” because it “arranges for” the local Presidents to meet with legislators under the language of T.C.A. § 3-6-301(8), the statute requires that the local Presidents would have to be acting “for compensation.” Under the facts given to us, the TEA does not compensate either the local affiliates or the local Presidents for their services or reimbursement of their expenses. The cost of the refreshments is borne by the local affiliates. Thus, the local Presidents are not acting “for compensation.”

This result is further supported by the specific exclusion of “individual employees, officers, directors, or members of a corporation, labor organization, association, or membership organizations” from the definition of “employer of lobbyist.” T.C.A. § 3-6-301(8). Mere

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membership in organizations or associations that happen to employ lobbyists does not confer employer status on those members. Even though there may be an agency relationship between the affiliates and the TEA¹, because of the exemption in § 3-6-301(18), the local affiliates of the TEA are not employers of lobbyists even when those members' actions are taken at the request and with the direction of the parent organization.

2. Volunteer Lobbyists.

The statute contains a separate exception that applies to this situation. T.C.A. § 3-6-307(a) addresses situations in which a person is engaged in lobbying on behalf of an entity, but is not compensated other than being reimbursed for his or her out-of-pocket expenses for ten (10) or fewer days of services per calendar year. If the TEA affiliates' activities are limited to meeting with their local legislators once per calendar year to influence legislation, and they receive no compensation or reimbursement, either for this service or for reimbursement of expenses, their activities will fall within the exception contained in T.C.A. § 3-6-307(a).²

CONCLUSION

First, the possibility of an agency relationship between an organization that employs lobbyists and its members does not confer "employer of lobbyist" status on those members, even where the members are acting at the request and the direction of the employer of lobbyists. T.C.A. § 3-6-301(8) defines "employer of a lobbyist" as "any person or entity that *employs, retains, or otherwise arranges for a lobbyist* to engage in lobbying on behalf of the person or entity for compensation." [Emphasis added.] The Act exempts "individual employees, officers, directors, or members of a corporation, labor organization, association, or membership organizations." Thus, even if an agency relationship exists between the TEA and its local affiliates, the TEA does not become an employer of a lobbyist as to the affiliates and the affiliates are not "employers of lobbyists" under the Act.

¹ An agency relationship exists when one person (the "principal") "manifests assent to another person (the 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to so act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). See *Hussmann Refrigeration, Inc. v. South Pittsburg Associates*, 697 S.W.2d 588, 592 (Tenn. App. 1985) (suggesting that in the broadest sense, an agency relationship is one in which the principal authorizes the agent to act for the principal's benefit but retains the right to control the agent's conduct). See also *Sodexo Mgmt. v. Johnson*, 174 S.W.3d 174, 178 (Tenn. App. 2004). The primary purpose of the relationship is to benefit the principal and to further the principal's interest. Formal expression of consent on the part of the agent is not necessary for an agency relationship to exist; consent can be inferred from action. *Bostic v. Dalton*, 158 S.W.3d 347, 351 (Tenn. 2005); see also *Johnson v. LeBonheur Children's Med. Ctr.*, 74 S.W.3d 338, 343 (Tenn. 2002). Notwithstanding a lack of formalities, an agency relationship will be found if the facts establish the existence of such a relationship, whether or not the parties intended to create one. *White v. Revco Disc. Drug Ctr.*, 33 S.W. 3d 713, 723 (Tenn. 2000).

² Under the statute, if they were reimbursed for out-of-pocket expenses, they would still be exempt from registration if they performed lobbying services for ten or fewer days per year.

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Second, if the Presidents of the local affiliates meet with legislators on ten (10) or fewer days per year, and do not receive any compensation at all (either for services or reimbursement of expenses), they are within the statutory exemption for volunteer lobbyists under T.C.A. § 3-6-307(a).

Therefore, the affiliates of the TEA may provide refreshments to legislators.

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