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 definition of
“employer of lobbyist” as it relates to
membership organizations.

INTRODUCTION

The following Advisory Opinion is written as a result of an inquiry made by Mr. Bryan K. McCarty, on behalf of the Tennessee Education Association (“TEA”), an employer of lobbyists, as to whether the local affiliates of the TEA can, during the legislative session, serve refreshments at meetings to which State Senators and Members of the House are invited to discuss challenges 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 that term is defined by the Governmental Ethics Reform Act of 2006 (“Act’). The Act specifically excludes members of associations. Moreover, 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. Notwithstanding the fact that 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. Thus, they are neither subject to the gift giving restrictions in the Act nor are they required to register as employers of lobbyists.

BACKGROUND

Mr. McCarty asks that the Commission provide the TEA with clarification of the ethics rules, their application and the reporting requirements concerning local TEA affiliates and whether they can provide refreshments to legislators. The TEA is the employer of eight (8) lobbyists and requests that their local affiliates meet with legislators. These meeting are organized by the TEA through their field staff or “UniServ Coordinators”, who are paid employees of 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 be contacting them to schedule meetings with legislators. 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 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 which the affiliates are to report the results of their meetings. Legislators and members of the affiliates attend these meetings; however, TEA staff and its Government
Relations staff (two of which are TEA’s registered lobbyists) may attend but do not take an active role. Meals are rarely involved but refreshments are provided and are paid for by the local affiliates.

DISCUSSION

The Act brought about many changes to the lobbying practices of both employers of lobbyists and lobbyists in Tennessee. The law imposes reporting and registration requirements as well as new restrictions on the receipt and furnishing 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). The Act defines, in T.C.A. § 3-6-301(8), “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.” This language suggests that 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. Simple participation in an organization that may employ the services of a lobbyist does not catapult that member to “employer of lobbyist” status.

This result is further supported by the specific exclusion from the definition of “employer of lobbyist” in the Act of “individual employees, officers, directors, or members of a corporation, labor organization, association, or membership organizations.” T.C.A. § 3-6-301(8). Mere membership in organizations or associations that happen to employ lobbyists does not confer employer status on those members. Notwithstanding that there may be an agency relationship between the affiliates and the TEA, because the statute exempts “individual employees, officers, directors, or members of a corporation, labor organization, association, or membership organizations,” the Commission lacks the authority to grant employer of lobbyist status to members, even when the totality of those members’ actions are taken at the request and with the direction of the membership organization.

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 (West 2006); See Hussmann Refrigeration, Inc. v. South Pittsburg Associates, 697 S.W.2d 388, 392 (Tenn. Ct. 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); also Sodexo Mgmt. v. Johnson, 174 S.W.3d 174, 178 (Tenn. Ct. App. 2004). The primary purpose of the relationship is to benefit the principal and to further his or her 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. Sup. Ct. 2005) (“The existence of an agency relationship is not dependent upon a contract, an explicit agreement, or an understanding between the parties.”); See also Johnson v. LeBonheur Children’s Med. Ctr., 74 S.W.3d 338, 343 (Tenn. Sup. Ct. 2002). Notwithstanding the lack of observance 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. Sup. Ct. 2000).
Nevertheless, the activities engaged in by the affiliates are not completely exempt under the Act. 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 in any other regard than being reimbursed for his or her out-of-pocket expenses and this reimbursement is received for ten (10) days or fewer per calendar year. If the TEA affiliates’ activities were limited to meeting with their local legislators once per calendar year to influence legislation and they receive no compensation or reimbursement for this service, their activities would fall within the exception contained in T.C.A. § 3-6-307(a).

CONCLUSION

The existence 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.” 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 Commission lacks the authority to deem the affiliates “employers of lobbyists” under the Act.

Therefore, the affiliates of TEA are not employers of lobbyists or lobbyists under the law and the affiliates may provide refreshments to legislators.

Thomas J. Garland,
Chair
R. Larry Brown
Donald J. Hall
Linda Whittley Knight, Esq.
Dianne Ferrell Neal
Benjamin S. Purser, Jr.,
Members

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