



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 508

January 31, 2013

Whether a legislator may receive compensation as the executive director of a non-profit organization and whether he may solicit contributions to that organization if the contributions may be used to compensate him. (AOR-573)

A legislator has asked the Texas Ethics Commission (“commission”) whether he may serve and receive compensation as the executive director of a non-profit organization and whether he may solicit contributions to that organization if the contributions may be used to compensate him. The legislator states that the organization is exempt from taxation under section 501(c)(3) of the Internal Revenue Code and that the organization’s goal is educational. The organization holds an annual training event in the Texas State Capitol, during which students receive education in public policy, legislative procedures, leadership, and government. The legislator states that the organization “does absolutely zero lobbying” and has no interest in influencing legislation. As executive director, the legislator’s job duties would include raising funds from individual and corporate donors, writing grants, communicating with alumni and donors, and representing the organization at various conferences for the purpose of promotion and recruiting students. The legislator would receive compensation from the organization for his services.

The legislator states that he and the organization wish to “operate beyond reproach and not even have the possibility of even the appearance of impropriety,” and he wishes to “confirm whether or not there would be any issues with” his responsibilities as executive director. Furthermore, the legislator specifically asks whether he may, as the organization’s executive director, raise funds for the organization.

The first issue is the permissibility of the legislator receiving compensation from the organization. The second issue is the permissibility of the legislator soliciting contributions to the organization if the contributions may be used by the organization to compensate the legislator. The lobby law, the campaign finance law, and the Penal Code contain restrictions that are relevant to these issues. It is important to review the relevant restrictions in these laws because what is permissible under one area of law may not be permissible under another.

Compensation Received from Organization

In many advisory opinions, we have addressed the issue of outside employment by legislators and other public servants¹ and officeholders. *See, e.g.*, Ethics Advisory Opinion Nos. 408 (1998), 226 (1994), 205 (1994), 148 (1993), 117 (1993). The laws within the commission’s jurisdiction do not specifically prohibit a legislator from receiving compensation for private employment. *See* Ethics Advisory Opinion No. 371 (1997) (stating that, as a general rule, a legislator may accept a fee for work performed in a capacity other than as a legislator). However, a legislator is generally prohibited from soliciting, accepting, or agreeing to accept a benefit from any person unless a specific exception under section 36.10 of the Penal Code applies. Penal Code § 36.08(f).² A “benefit” is “anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest.” *Id.* § 36.01(3).

Section 36.08 of the Penal Code does not prohibit a fee for which a public servant gives legitimate consideration in a capacity other than as a public servant. *Id.* § 36.10(a)(1). In other words, section 36.08 of the Penal Code

does not prohibit a legislator from accepting compensation that is commensurate with the actual value of the services provided by the public servant if the services rendered, and not the status of the public servant rendering the services, are of value to the person paying for the services. Ethics Advisory Opinion Nos. 358 (1997), 41 (1992). Thus, if the legislator is employed and compensated by the organization in an amount that reflects the actual value of his services, and not because of his status as a legislator, then the prohibitions under section 36.08 of the Penal Code would not prohibit the compensation.

Section 36.07 of the Penal Code prohibits a legislator from accepting an honorarium for services that he would not have been asked to provide but for his official position. Penal Code § 36.07(a). For a legislator to accept compensation from the organization, the services must be provided in a capacity other than as a legislator and as long as his official position is not a reason for his employment. *See, e.g.*, Ethics Advisory Opinion No. 148 (1993).

Section 36.02 of the Penal Code prohibits a legislator from accepting, soliciting, or agreeing to accept “any benefit as consideration for the legislator’s decision, opinion, recommendation, vote, or other exercise of discretion as a public servant.” Penal Code § 36.02. Thus, a legislator may not accept compensation in exchange for an official act as a legislator.³

Whether the Penal Code prohibitions apply in any particular situation depends upon the specific facts. *See* Ethics Advisory Opinion Nos. 441, at n.3 (2001) (stating that permissibility of a benefit under chapter 36 of the Penal Code would require a consideration of all relevant circumstances); 192 (1994) (stating that whether a violation of the honorarium prohibition has occurred in a particular instance is generally a question of fact).

Chapter 305 of the Government Code, the lobby law, also restricts a legislator from accepting certain benefits, including cash, from a registered lobbyist. Gov’t Code § 305.024. The legislator states that the organization does not intend to influence legislation. If the organization is not registered under the lobby law and does not intend to influence legislation or administrative action, then the lobby law restrictions do not apply.

Title 15 of the Election Code also prohibits a candidate or officeholder (including a legislator) from accepting a political contribution from a corporation. Elec. Code §§ 253.003(b), 253.094. A political contribution is a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement to make such a transfer that is offered or given with the intent that it be used in connection with a campaign or to defray officeholder expenses that are not reimbursable with public money. *Id.* § 251.001(2), (3), (5). Any time a legislator receives something of value from a corporation, a fact question arises as to whether the corporation has made a political contribution to the legislator. If nothing is given to the legislator with the intent that it be used in connection with a campaign or to defray officeholder expenses that are not reimbursable with public money, then no prohibited political contribution has been made.

In summary, the aforementioned prohibitions would not prohibit the legislator from receiving compensation from the organization, provided that the compensation reflects the actual value of his services and not because of his status as a public servant; the services are provided in a capacity other than as a public servant and as long as the legislator’s official position is not a reason for his employment by the organization; the compensation is not received in exchange for an official act as a public servant; and the compensation is neither a prohibited political contribution nor a gift, loan, or other prohibited lobby expenditure made by a registered lobbyist.

Solicitation of Contributions to Organization

The second issue is whether the legislator may solicit contributions to the organization. There is a legitimate question whether the legislator, as executive director of the organization, would receive a benefit by virtue of soliciting contributions to the organization, exercising control over the same funds after they are contributed, and ultimately receiving the proceeds of the contributions as compensation for fundraising and other services.

In previous advisory opinions, we held that if a legislator exercised control over a person’s decision to make a contribution to a charity or to select a particular charity that would receive a contribution, the legislator would receive a prohibited benefit or honorarium (if in consideration for services). Ethics Advisory Opinion Nos. 427

(2000) (EAO-427)⁴, 150 (1993) (EAO-150)⁵, 97 (1992) (EAO-97)⁶. Subsequently, in 2005, the legislature passed House Bill 762 (H.B. 762), which added section 572.060 to the Government Code.⁷ It states as follows:

(a) Unless otherwise prohibited by the Code of Judicial Conduct, a state officer or state employee may:

(1) solicit from any person a contribution to:

(A) an organization that:

(i) is exempt from income taxation under Section 501(a), Internal Revenue Code of 1986, by being listed under Section 501(c)(3) of that code;

(ii) does not attempt to influence legislation as a substantial part of the organization's activities; and

(iii) has not elected under Section 501(h), Internal Revenue Code of 1986, to have that subsection apply to the organization; or

(B) a governmental entity; or

(2) recommend to any person that the person make a contribution to an organization or entity described by Subdivision (1).

(b) A monetary contribution solicited or recommended as provided by Subsection (a) must:

(1) be paid or made directly to the charitable organization or governmental entity by the person making the contribution;

(2) be in the form of a check, money order, or similar instrument payable to the charitable organization or governmental entity; or

(3) be in the form of a deduction from a state employee's salary or wage payment under the state employee charitable campaign under Subchapter I, Chapter 659.

(c) A contribution solicited or recommended as provided by Subsection (a) that is not a monetary contribution must be delivered directly to the charitable organization or governmental entity by the person making the contribution.

(d) A contribution paid as provided by Subsection (b) or delivered as provided by Subsection (c) is not:

(1) a political contribution to, or political expenditure on behalf of, the state officer or state employee for purposes of Title 15, Election Code;

(2) an expenditure for purposes of Chapter 305; or

(3) a benefit to the state officer or state employee for purposes of Sections 36.08 and 36.09, Penal Code.

Gov't Code § 572.060.

H.B. 762 and its legislative history only addressed suggestions, solicitations, or recommendations by state officers and state employees to donate to a non-profit organization or governmental entity.⁸ Nevertheless, legislative intent is primarily discerned from the plain meaning of the words in a statute.⁹ Whether or not the legislature intended to create a means whereby a legislator may engage in the conduct described in the opinion, the plain language of section 572.060 of the Government Code states that a contribution solicited by a legislator (or other state officer) and donated to a non-profit organization in certain circumstances is not a political contribution to the legislator, a political expenditure on behalf of the legislator, a lobby expenditure, or a benefit to the legislator for purposes of sections 36.08 and 36.09 of the Penal Code. Thus, if a legislator solicits a contribution to the organization for which the legislator serves as executive director, and if the solicitation and contribution are made in accordance with section 572.060 of the Government Code, then the contribution is not a political contribution to the legislator, a political expenditure on behalf of the legislator, a lobby expenditure, or a benefit to the legislator for purposes of sections 36.08 and 36.09 of the Penal Code.¹⁰

We caution, however, that section 572.060 of the Government Code does not exempt a contribution from the honorarium prohibition in section 36.07 of the Penal Code. Thus, as we stated in prior advisory opinions, a legislator may not request that a payment be made to a third party in consideration for services provided as a legislator. Ethics Advisory Opinion Nos. 150 (1993), 97 (1992), 19 (1992). Furthermore, section 572.060 of the Government Code does not exempt a contribution from the definition of “benefit” for purposes of the bribery prohibition or other relevant provisions in chapters 36 and 39 of the Penal Code.¹¹ Whether the honorarium or bribery provisions apply to a solicited contribution depends upon the specific facts.

Standards of Conduct

The legislator also asks whether there are any additional “issues” or any appearance of impropriety regarding his position as executive director under the facts stated in the request. Notwithstanding section 572.060 of the Government Code, a situation in which a legislator solicits undisclosed contributions from lobbyists, other legislators, or members of the public that may have an interest in state or local legislative matters to a charity that the legislator oversees and that pays the legislator’s salary could raise appearance issues. Chapter 572 of the Government Code sets out standards of conduct applicable to all state officers, including legislators. Gov’t Code § 572.051. One standard is that a state officer should not accept or solicit any gift, favor, or service that might reasonably tend to influence the officer in the discharge of official duties or that the officer knows or should know is being offered with the intent to influence the officer’s official conduct. *Id.* § 572.051(a)(1). Another standard is that a state officer should not accept other employment or compensation that could reasonably be expected to impair the officer’s independence of judgment in the performance of the officer’s official duties. *Id.* § 572.051(a)(3). The legislature has also stated that the policy underlying Chapter 572 of the Government Code is that a state officer may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer’s duties in the public interest. *Id.* § 572.001(a). Whether a state officer’s particular activity is appropriate under these standards depends upon the officer’s circumstances. *See* Ethics Advisory Opinion No. 358 (1997).

SUMMARY

The laws under the Ethics Commission’s jurisdiction would not prohibit a legislator from solely receiving compensation from the organization under the stated facts, provided that the compensation reflects the actual value of the legislator’s services and not because of his status as a public servant; the services are provided in a capacity other than as a public servant and as long as the legislator’s official position is not a reason for his employment by the organization; the compensation is not received in exchange for an official act as a public servant; and the compensation is neither a prohibited political contribution nor a gift, loan, or other prohibited expenditure by a registered lobbyist.

A legislator should understand that the solicitation of contributions to an organization for which the legislator serves as executive director and from which the legislator receives compensation for services could be viewed as improper under certain circumstances. Accordingly, a legislator should use extreme caution when soliciting such contributions.

¹“Public servant” also includes a person elected, selected, or otherwise designated as an officer, employee, or agent of government; and a candidate for nomination or election to public office. Penal Code § 1.07(a)(41).

² Section 36.09 of the Penal Code also prohibits a person from offering, conferring, or agreeing to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting. Penal Code § 36.09(a).

³ In previous advisory opinions, we have stated that it is impossible for a legislator to act in a capacity other than as a legislator in attempting to influence legislation. Ethics Advisory Opinion Nos. 178 (1993), 123 (1993).

⁴ We stated that if a public servant names or approves the recipient of a charitable contribution, the public servant has received the equivalent of a gift certificate, something the public servant can dispense according to his or her own interests. Therefore, a public servant would be receiving a “benefit” if the public servant accepted a grant of the right to determine the beneficiary of a charitable contribution. However, we noted that a public servant is free to encourage or solicit others to make contributions directly to a charitable organization, but could not solicit the right to exercise control over the ultimate recipient of someone else’s money. Ethics Advisory Opinion No. 427 (2000). We also held that if a registered lobbyist provides a state officer or employee with the opportunity to exercise discretion in regard to the decision to make a contribution to a particular organization, the registrant would be “conferring an expenditure” by making a gift to the state officer or employee, which would be subject to lobby law gift restrictions. *Id.*

⁵ In the opinion, we stated that a legislator could not request that a payment be made, or agree that a payment will be made, to a third party in consideration for a speech by the legislator because the payment would constitute a prohibited honorarium. Ethics Advisory Opinion No. 150 (1993). See also Ethics Advisory Opinion No. 19 (1992) (EAO 19) (stating that the honorarium provision prohibits a public servant from accepting or soliciting a fee for speaking if the public servant would not have been requested to speak but for his official position or duties, or from requesting or accepting a payment made to a third party in exchange for speaking).

⁶ We stated that for purposes of section 36.07, “in consideration for” includes more than just contractual consideration. Ethics Advisory Opinion No. 97 (1992).

⁷ Acts 2005, 79th Leg., ch. 53, § 1, eff. Sept. 1, 2005.

⁸ House Comm. on Elections, Bill Analysis, Tex. C.S.H.B. 762, 79th Leg., R.S. (2005). See also, House Research Organization, Bill Analysis, March 29, 2005, Tex. C.S.H.N. 762, 79th Leg., R.S. (2005). Senate Research Center, Bill Analysis, April 15, 2005, Tex. H.B. 762, 79th Leg., R.S. (2005)..

⁹ State v. Shumake, et al, 199 S.W.3d 279, 284 (Tex. 2006).

¹⁰ If a legislator solicits a contribution to an organization solely for the purpose of using the organization as a conduit to receive contributions for the legislator’s own use, then such a donation would not be made in accordance with section 572.060 of the Government Code. See Gov’t Code §§ 572.060(b), (c). Also, we caution that if the legislator has a private interest in any measure or bill requiring a vote of the legislator, he must disclose that fact and may not vote on the matter. Tex. Const. art. III, § 22; Gov’t Code § 572.053. Additionally, a legislator may not, with the intent to obtain a benefit or to harm or defraud another, intentionally or knowingly violate a law relating to the public servant’s office or employment, or misuse government property, services, personnel, or any other thing of value belonging to the government that has come into his custody or possession by virtue of his office or employment. *Id.* § 39.02(a). Other restrictions outside the jurisdiction of the Ethics Commission also apply to a legislator’s outside employment. See, e.g., Tex. Att’y Gen. Op. Nos. GA-0567 (2007), GA-0087 (2003). We cannot address those restrictions.

¹¹ Thus, a legislator may not, as consideration for an official act as a legislator, solicit a benefit to any other person in whose welfare the legislator has a direct and substantial interest. Penal Code § 36.02.