

STATE OF TENNESSEE

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Opinion No. 02-114

Use of Legislative Office and Staff

QUESTIONS

1. Is it a violation of any law for a state legislator to use his or her office:
 - a. for fundraising phone calls for a not-for profit 501(c)(4) entity formed to promote the lottery referendum on the November 2002 ballot; or
 - b. to disseminate information regarding the state lottery referendum for that entity?

2. Is it a violation of any law for any legislator's staff to respond on behalf of the legislator to requests for information regarding the referendum and/or to assist the legislator in carrying out his or her duties informing the public about the referendum election?

OPINIONS

1.
 - a. It is not a violation of any law for a state legislator to use his or her office for fundraising calls for a not-for-profit entity formed to promote the lottery referendum on the November 2002 ballot.
 - b. It is not a violation of any law for a state legislator to use his or her office to disseminate information regarding the state lottery referendum for a not-for-profit entity formed to promote the lottery referendum on the November 2002 ballot.

2. A legislative staff member does not violate any law responding on behalf of the legislator to requests for information regarding the referendum or assisting the legislator in carrying out his or her duties informing the public about the referendum election, so long as the response or information does not directly advocate voting in favor of the referendum issue.

ANALYSIS

1. State Legislator’s Use of Office Facilities

a. Fundraising

The first question is whether it would violate any law for a state legislator to use his or her office for fundraising phone calls for a not-for profit 501(c)(4) entity formed to promote the lottery referendum on the November 2002 ballot.

Rules promulgated by the Department of General Services prohibit solicitation of gifts in state facilities. Tenn. Admin. Comp. Ch. 0690-4-1-.01, *et seq.* But those regulations only apply to “[a]ny building, or part thereof, which is . . . under the control of the *executive branch* of state government.” Ch. 0690-4-1.02(2). The rules therefore do not apply to legislative offices.

Subsection (b) of Tenn. Code Ann. § 2-19-206 provides:

(b) It is unlawful to use public buildings or facilities *for meetings or preparation of campaign activity* in support of any particular candidate, party or *measure* unless reasonably equal opportunity is provided for presentation of all sides or views, or reasonably equal access to the buildings or facilities is provided all sides.

(Emphasis added). A violation of this statute is a Class C misdemeanor. Tenn. Code Ann. § 2-19-208. Davidson County Chancery Court has held that this provision does not apply to popularly elected officials. *Hooker v. Sundquist*, Davidson County Chancery Court, 98-2748-I, Memorandum Opinion (October 14, 1998.) The Court based its conclusion on Tenn. Code Ann. § 2-19-201, which provides in relevant part:

As used in this part, unless the context otherwise requires:

* * * *

(3) “Public officers and employees” means all employees of the executive branch of the state government, or any department, division, or agency thereof, and all appointed officers and employees of any educational institution, establishment, corporation or agency supported principally by state funds. *Popularly elected officials, officials elected by the general assembly, qualified candidates for public office, teachers, as defined by § 49-1501 [repealed], members of the governor’s cabinet, and members of the governor’s staff are expressly excluded from the provisions of this part, except for the provisions of § 2-19-202.*

Emphasis added. This ruling was not appealed. Under this case, which is of limited precedential value, a state senator would not violate Tenn. Code Ann. § 2-19-206(b) by fundraising from his legislative office for a not-for-profit entity formed to promote the lottery referendum on the November 2002 ballot.

Federal law places some restrictions on the political activities of state personnel employed in connection with a federally funded activity. 5 U.S.C. §§ 1501, *et seq.* But these statutes do not apply to the legislative branch of state government. 5 U.S.C. § 1501(2).

b. State Legislator using State Office Facilities to Disseminate Information about the Lottery Referendum

The next question is whether it would violate any state law for a state legislator to use his or her office to disseminate information regarding the state lottery referendum for a not-for-profit entity formed to promote the lottery referendum on the 2002 ballot. As cited above, subsection (b) of Tenn. Code Ann. § 2-19-206 provides:

(b) It is unlawful to use public buildings or facilities *for meetings or preparation of campaign activity* in support of any particular candidate, party or *measure* unless reasonably equal opportunity is provided for presentation of all sides or views, or reasonably equal access to the buildings or facilities is provided all sides.

As discussed above, under *Hooker v. Sundquist*, Davidson County Chancery Court, 98-2748-I, Memorandum Opinion (October 14, 1998), this statute does not apply to elected officials, including state legislators. In any case, the statute, by its terms, prohibits the use of facilities for meetings or preparation of campaign activity in support of a candidate, party, or measure; it does not prohibit use of these facilities to disseminate information on matters of public interest.

2. Legislator's Staff

The next question is whether it is a violation of any law for a member of a state legislator's staff to respond on behalf of the legislator to requests for information regarding the lottery referendum and/or to assist the legislator in carrying out his or her duties informing the public about the referendum election. This activity implicates Tenn. Code Ann. § 2-19-206(b) discussed above. Of course, unlike legislators, staff members are not expressly exempted from this statute. But the statute prohibits the use of public buildings for "meetings or preparation of campaign activity in support of any particular candidate, party or measure" unless equal access is provided for all sides of the issue. We think the term "preparation of campaign activity" used in this statute would include the use of state facilities to prepare and distribute information that directly urges constituents to vote for a particular candidate or for an issue in a referendum election. But this statute does not prohibit the use of state facilities for the distribution of any information concerning an issue of public concern; in fact, one of the duties of a legislator is to keep in touch with his or her constituents

concerning legislative matters. Obviously, the lottery referendum is an important matter of public concern; moreover, the General Assembly was directly involved in placing the issue on the ballot and will be required to implement a lottery if the lottery proposal receives a favorable vote. We do not think the statute, therefore, prohibits legislators or their staff members from using state facilities to disseminate information on the issue.

Of course, it may be difficult in some cases to distinguish between material that is merely informative and campaign material. In light of the fact that Tenn. Code Ann. § 2-19-206 is a criminal statute, and in view of the important role legislators can play in discussing matters of public interest, we think the statute prohibits the use of state facilities to prepare and distribute only material that directly advocates voting for a particular candidate, party, or referendum issue. For this reason, a legislative staff member does not violate Tenn. Code Ann. § 2-19-206(b) by responding on behalf of the legislator to requests for information regarding the referendum or assisting the legislator in carrying out his or her duties informing the public about the referendum election, so long as this response or information does not directly advocate voting in favor of the referendum issue.

This question also implicates Tenn. Code Ann. § 2-19-207. That statute provides:

(a) It is unlawful for *any person employed by the state* to engage actively in a political campaign on behalf of any party, committee, organization, agency or political candidate, or to attend political meetings or rallies or to otherwise use such person's official position or employment to interfere with or affect the result of any regular or special primary election conducted within the state, *or to perform political duties or functions of any kind not directly a part of such person's employment, during those hours of the day when such person is required by law or administrative regulation to be conducting the business of the state.*

(b) (1) Nothing in this section shall be construed to deprive any official or employee of the state from voting for the party or candidate of such person's choice or to deprive such person of the right to express such person's personal opinion concerning any political subject, party or candidate.

(2) *Elected officials, state employees on leave or during those hours not required by law or administrative regulation to be conducting the business of the state,* persons duly qualified as candidates for public office and teachers, as defined in § 49-1501 [repealed], are expressly excluded from the provisions of this section.

Tenn. Code Ann. § 2-19-207(a), (b)(1) & (b)(2) (emphasis added). Again, state employees, unlike state legislators, are not expressly excluded from this statute. By its terms, this statute prohibits any

person employed by the State from engaging actively in a political campaign or from performing political duties or functions of any kind *not directly a part of such person's employment*, during regular business hours. Responding to requests for information and assisting a legislator in disseminating information about a matter of public concern like the lottery referendum, logically, are a part of the employment of any legislative staff member. For this reason, a legislative staff member does not violate Tenn. Code Ann. § 2-19-207 by responding to requests for information and assisting a legislator in disseminating information about the lottery referendum, so long as the response or information does not directly advocate voting in favor of the referendum issue.

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