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Misconduct Involving Public Officials and Employees

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Misconduct Involving Public Officials and Employees

Reference Number: CTAS-640

The criminal statutes relating to misconduct of public officials and employees are found in T.C.A. §§ 39-16-401 *et seq.* "Public servant" is broadly defined for these purposes as a person elected, selected, appointed, employed or otherwise designated as one of the following:

1. An officer, employee or agent of government;
2. A juror or grand juror;
3. An arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
4. An attorney at law or notary public when participating or performing a governmental function;
5. A candidate for nomination or election to public office; or
6. A person who is performing a governmental function under claim of right although not legally qualified to do so.

T.C.A. § 39-16-401.

Official Misconduct

Reference Number: CTAS-641

"Tennessee's official misconduct statute only applies to public officials who have an affirmative duty to act and refuse to do so or who misuse their official authority for private gain." Op. Tenn. Atty. Gen. 09-72 (May 6, 2009). Pursuant to T.C.A. § 39-16-402(a), a public servant commits an offense who, with intent to obtain a benefit, or to harm another, intentionally or knowingly:

1. Commits an act relating to the servant's office or employment that constitutes an unauthorized exercise of official power;
2. Commits an act under color of office or employment (acting or purporting to act in an official capacity or take advantage of such actual or purported capacity) that exceeds the servant's power;
3. Refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the office or employment;
4. Violates a law relating to the servant's office or employment, or
5. Receives any benefit not otherwise provided by law.

In 2012, the legislature amended this statute to make it an offense to purchase real property or otherwise obtain an option to purchase real property with intent to make a profit if the public servant knows that such real property may be purchased by a governmental entity and such information is not public knowledge. It is also an offense to acquire nonpublic information derived from such person's position as a public servant or gained from the performance of such person's official duties as a public servant and knowingly act on such nonpublic information to acquire, or obtain an option to acquire, or liquidate, tangible or intangible personal property with intent to make a profit. T.C.A. § 39-16-402(c).

It is a defense to prosecution for this offense that the benefit involved was a trivial benefit incidental to personal, professional or business contact, and involved no substantial risk of undermining official impartiality. T.C.A. § 39-16-402(d). The offense of official misconduct is a Class E felony. T.C.A. § 39-16-402(e). See *State v. Szczepanowski*, 2002 WL 1358681 (Tenn.Crim.App. 2002) (upholding the constitutionality of the statute); *State v. Chumbley*, 2007 WL 1774250 (Tenn.Crim.App. 2007) (jail administrator convicted of official misconduct and theft). See also Op. Tenn. Atty. Gen. 94-073 (June 16, 1994) (the acceptance of a gift by a county official or employee from a company that does business with the county may, depending upon the circumstances, constitute the criminal offense of official misconduct); Op. Tenn. Atty. Gen. U93-48 (April 6, 1993) (a school superintendent requiring vocational students to provide repair work to his personal residence may constitute official misconduct); Op. Tenn. Atty. Gen. 91-76 (August 20, 1991) (a deputy sheriff is not entitled to a reward given for a service performed within the duties of his office; the acceptance of such a reward might be considered official misconduct). Under T.C.A. § 8-47-103, county attorneys are directed to investigate any complaint alleging that a county officer within their jurisdiction is guilty of any of the acts constituting official misconduct as set forth in T.C.A. § 8-47-101, and upon determination of reasonable cause, to institute a proceeding in the appropriate court to oust such official. Op. Tenn. Atty. Gen. 07-169 (December 21, 2007); Op. Tenn.

Atty. Gen. 00-126 (August 7, 2000).

Official Oppression

Reference Number: CTAS-642

A public servant acting under color of office or employment (acting or purporting to act in an official capacity or taking advantage of actual or purported capacity) commits an offense who:

1. Intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt, search, seizure, dispossession, assessment or lien when the public servant knows the conduct is unlawful; or
2. Intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity, when the public servant knows the conduct is unlawful.

T.C.A. § 39-16-403(a).

An offense under this section is a Class E felony. T.C.A. § 39-16-403(c).

See *Coffey v. State*, 339 S.W.2d 1 (Tenn. 1960) (upholding constable's conviction for official oppression and removal from office).

Misuse of Official Information

Reference Number: CTAS-643

A public servant commits an offense who, by reason of information to which the public servant has access in the public servant's official capacity and that has not been made public, attains or aids another to attain a benefit. An offense under this section is a Class B misdemeanor. T.C.A. § 39-16-404.

Suspension, Removal and Discharge from Office

Reference Number: CTAS-644

A public servant convicted of official misconduct, official oppression or misuse of official information shall be removed from office or discharged from the position. A public servant elected or appointed for a specified term shall be suspended without pay immediately upon conviction in the trial court and continuing through the final disposition of the case, removed from office for the remainder of the term during which the conviction occurred if the conviction becomes final, and barred from holding any appointed or elected office for ten years from the date the conviction becomes final. A public servant who serves at will shall be discharged upon conviction in the trial court. Subsequent public service shall rest upon the hiring or appointing authority provided that such authority has been fully informed of the conviction. T.C.A. § 39-16-406. See *State v. Keck*, 1997 WL 254228 (Tenn.Crim.App. 1997).

Purchasing Property Sold Through Court or Sheriff's Sale

Reference Number: CTAS-645

A judge, sheriff, court clerk, court officer, or employee of any court commits an offense who bids on or purchases, directly or indirectly, for personal reasons or for any other person, any kind of property sold through the court for which the judge, sheriff, court clerk, court officer, or employee discharges official duties. A bid or purchase in violation of this provision is voidable at the option of the person aggrieved. This offense is a Class C misdemeanor, with no incarceration. T.C.A. § 39-16-405. See Op. Tenn. Atty. Gen. 99-105 (May 10, 1999) (purchase of confiscated items by law enforcement officers, city or county employees at public auction).

In addition, no sheriff, deputy sheriff, or constable may purchase, either directly or indirectly, any property sold through their own judicial sale no matter which court is involved. T.C.A. §§ 8-8-206 and 8-10-116. See *also* Op. Tenn. Atty. Gen. 99-105 (May 10, 1999) (purchase of confiscated items by law enforcement officers, city or county employees at public auction).

Purchasing Surplus County Property

Reference Number: CTAS-646

It is also unlawful for any county official or employee to purchase from the county any property declared to be surplus by the county except by bid at public auction or competitive sealed bid during the tenure of such person's office or employment, or for six months thereafter. T.C.A. § 5-1-125. A violation of this statute is a Class A misdemeanor. See Op. Tenn. Atty. Gen. 03-131 (October 3, 2003).

Misrepresentation of Information to Auditor

Reference Number: CTAS-647

A public servant commits an offense who, with intent to deceive, knowingly misrepresents material information related to an audit conducted by a state auditor in the department of audit. This offense is a Class C misdemeanor. T.C.A. § 39-16-407.

Sexual Contact with Inmates

Reference Number: CTAS-648

It is an offense for a law enforcement officer, correctional employee, vendor or volunteer to engage in sexual contact with a prisoner or inmate who is in custody at a penal institution whether the conduct occurs on or off the grounds of the institution. This offense is a Class E felony. T.C.A. § 39-16-408.

Destruction of and Tampering with Governmental Records

Reference Number: CTAS-649

Pursuant to T.C.A. § 39-16-504, it is unlawful for any person to:

1. Knowingly make a false entry in, or false alteration of, a governmental record;
2. Make, present, or use any record, document or thing with knowledge of its falsity and with intent that it will be taken as a genuine governmental record; or
3. Intentionally and unlawfully destroy, conceal, remove or otherwise impair the verity, legibility or availability of a governmental record.

A violation of this section is a Class E felony. T.C.A. § 39-16-504(b). See *State v. Chumbley*, 2007 WL 1774250 (Tenn.Crim.App. 2007) (jail administrator convicted of official misconduct and destruction of and tampering with governmental records). See also Op. Tenn. Atty. Gen. 03-057 (May 1, 2003) (if a register of deeds determines that a recorded deed was not entitled to registration, the register is not authorized to remove the recorded deed but may record an instrument stating that the deed in question was not entitled to registration).

Private Use of County Road Equipment and Materials Prohibited

Reference Number: CTAS-650

The chief administrative officer shall not authorize or knowingly permit the trucks or road equipment, the rock, crushed stone or any other road materials to be used for any private use or for the use of any individual for private purposes. Any employee of the county road department who uses any truck or any other road equipment or any rock, crushed stone or other road material for that employee's personal use, or sells or gives those things away, shall be immediately discharged. No truck or other road equipment or any rock, crushed stone or any road material shall be used to work private roads or for private purposes of owners of the roads. T.C.A. § 54-7-202(a) - (c). A violation of this statute is a Class C misdemeanor. Each separate use of the same for other than authorized purposes constitutes a separate offense and is subject to a separate punishment. T.C.A. § 54-7-202(e). See *State ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn. 1981) ("The statute prohibits private use unequivocally, without mention of compensation and it follows that such use violates the statute, with or without compensation."); *State v. Keck*, 1997 WL 254228, *21 (Tenn.Crim.App. 1997) ("We note that regardless of the Defendant's good intentions, the statute clearly states that county equipment and materials shall not be authorized for private use. Whether the Defendant received any personal compensation or benefit is irrelevant."). See also Op. Tenn. Atty. Gen. 03-088 (July 15, 2003) (under the County Uniform Highway Act, the chief administrative officer of the county is specifically prohibited from authorizing or knowingly permitting the use of trucks, road equipment, rock, crushed stone or any other road material for private uses).

Misuse of County Time and Property

Reference Number: CTAS-651

A county official has a duty not to neglect the duties of the office. *State ex rel. Thompson v. Reichman*, 188 S.W. 225 (Tenn. 1916) (sheriff removed from office for neglect of office). Therefore, while outside activities may be permissible, they can cause problems if taken to extremes. For example, a county official could sell computers during non-working hours, but if a contract called for the county official to personally train the purchaser's employees to use the new equipment during regular working hours over

the first month of operation, a serious question of neglect of duty could arise.

As the Attorney General has noted,

conflicts of interest exist 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 1959 Minnesota Governor's Committee on Ethics and Government Report 17, quoted in Note; Conflict of Interests: State Government Employees, 47 Va. L. Rev. 1034 (1961) (footnote 1).

The occasional use of the office telephone for personal business should not cause a problem. But if a county official was also, for example, a real estate broker, the official could not use their county office in a dual capacity, official and private, without violating various duties and violating the prohibition against the use of public property for private purposes, which would be a form of official misconduct. T.C.A. § 39-16-402. See Op. Tenn. Atty. Gen. 81-587 (November 3, 1981) (the offices in a county courthouse may be used only for a public purpose); Op. Tenn. Atty. Gen. 82-391 (a county official can not use county property to conduct an insurance business or any other business in his private capacity).

In *Azbill v. Lexington Mfg. Co.*, 188 Tenn. 477, 483, 221 S.W.2d 522 (1949), the Tennessee Supreme Court noted that public funds provided by taxation may be used only for public, not private, purposes. The Attorney General has opined that, consistent with the foregoing principle, public equipment and other property paid for, and public officers and employees compensated, by public funds appropriated for public purposes from revenues derived by counties from taxes authorized by law cannot properly be donated or applied by a county officer to a private use. Op. Tenn. Atty. Gen. 84-166 (May 17, 1984); Op. Tenn. Atty. Gen. 03-088 (July 15, 2003). See Op. Tenn. Atty. Gen. No. U93-48 (April 6, 1993) (it is improper for a county official to use publicly owned equipment for private gain); Op. Tenn. Atty. Gen. 97-043 (April 7, 1997) (a law enforcement officer should not perform services that are not part of his or her official responsibilities while wearing his/her uniform or driving a patrol car in a way that might convey that any services performed for a private individual are, in fact, being carried out as part of the officer's official duties). See also *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981) ("It is patently intolerable and clearly unlawful and an inexcusable dereliction of duty for a public official to allow public employees to work for private employers while being paid from the public treasury.").

Theft of Services

Reference Number: CTAS-652

Another offense closely related to the misuse of county time and property is "theft of services." In addition to other conduct, a person commits "theft of services" who:

Having control over the disposition of services to others, knowingly diverts those services to the person's own benefit or to the benefit of another not entitled thereto.

T.C.A. § 39-14-104(2).

As used in the statute, the term "services" is defined to include labor, skill, professional service, transportation, telephone, mail, gas, electricity, steam, water, cable television or other public services, accommodations in hotels, restaurants or elsewhere, admissions to exhibitions, use of vehicles or other movable property. T.C.A. § 39-11-106(a)(35). See *State v. Gardner*, 1990 WL 169233 (Tenn.Crim.App. 1990) (county sheriff who used deputy sheriffs to build his personal residence was convicted of misuse of public funds in violation of T.C.A. § 39-5-408, the statute replaced by T.C.A. § 39-14-104(2)).

Inmate Labor for Private Purposes Prohibited

Reference Number: CTAS-653

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may employ, require or otherwise use any such inmate housed therein to perform labor that will or may result directly or indirectly in such sheriff's, jailer's or other person's personal gain, profit or benefit or in gain, profit or benefit to a business partially or wholly owned by such sheriff, jailer or other person. This prohibition shall apply regardless of whether the inmate is or is not compensated for any such labor. T.C.A. § 41-2-148(a). See also Op. Tenn. Atty. Gen. 03-075 (June 18, 2003).

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail

may permit any such inmate housed therein to perform any labor for the gain, profit or benefit of a private citizen, or for-profit corporation, partnership or other business unless such labor is part of a court-approved work release program or unless the work release program operates under a commission established pursuant to T.C.A. § 41-2-134. T.C.A. § 41-2-148(b)(1). See *also* Op. Tenn. Atty. Gen. 03-125 (September 29, 2003).

Penalties

Reference Number: CTAS-654

Any sheriff, jailer or other person responsible for the custody of an inmate housed in a local facility who violates the provisions of T.C.A. § 41-2-148 regarding inmate labor for private purposes commits a misdemeanor and shall be punished upon a first conviction by a fine equal to the value of the services received from the inmate or inmates and imprisonment for not less than 30 days nor more than 11 months and 29 days. Upon a second or subsequent conviction for a violation of T.C.A. § 41-2-148, the sheriff, jailer or other person is guilty of a felony and is subject to a fine of not less than the value of the services received from the inmate or inmates nor more than \$5,000 and imprisonment for not less than one nor more than five years. If the person violating T.C.A. § 41-2-148 for the second or subsequent time is a public official, in addition to the punishment set out above such person shall immediately forfeit his office and shall be forever barred from holding public office in this state. T.C.A. § 41-2-148(d)(1).

Any private citizen, corporation, partnership or other business knowingly and willfully using inmate labor in violation of T.C.A. § 41-2-148(b) commits a Class A misdemeanor and, upon conviction, shall be punished by a fine of \$1,000 and by imprisonment for not more than 11 months and 29 days. Each day inmate labor is used in violation of T.C.A. § 41-2-148(b) constitutes a separate offense. T.C.A. § 41-2-148(d)(2).

In the case of *In re Williams*, 987 S.W.2d 837 (Tenn. 1998), the Tennessee Supreme Court heard the appeal of Judge Billy Wayne Williams from the Court of the Judiciary's judgment recommending that he be removed from the office of general sessions court judge of Lauderdale County. Judge Williams had, among other things, used an inmate from the county jail to help build a house for his son. "Judge Williams asserted that he was unaware that the practice of using prison labor for personal work was illegal. He believed that he had committed no impropriety because other county officials had also used prison labor as an 'informal work release program.' Although several other witnesses testified that private individuals in Lauderdale County had a long standing practice of using inmate labor for personal work, it was undisputed that Lauderdale County did not have a formal, approved work release program." *Id.* at 838-839.

Noting that the use of an inmate for a private purpose is a criminal offense, the court found that neither assertion constituted a defense to the disciplinary charges and held that the judge's use of an inmate from the county jail to help build a house for his son violated several canons of the Code of Judicial Conduct. *Id.* at 841-842. The Supreme Court affirmed the Court of the Judiciary's recommendation that Judge Williams be removed from office. *Id.* at 844. See *also Jordan v. State ex rel. Williams*, 397 S.W.2d 383 (Tenn. 1965) (approving the ouster from office of a county commissioner for utilizing for his own benefit equipment and supplies of the county penal farm and labor of its inmates).

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