S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 00-083

Failure to Enact Appropriations Act

QUESTIONS

The current appropriations act, 1999 Tenn. Pub. Acts Ch. 539, is effective until the end of the current fiscal year, July 1, 1999 — June 30, 2000. If the General Assembly does not pass an appropriations bill before July 1, 2000:

1. Does any state agency have authority to spend any funds after June 30?

2. Is there any authority for any agency to continue to operate after June 30?

3. Is there authority for public health and safety agencies, such as the Department of Correction, the Department of Health, or the Highway Patrol, to continue to operate?

4. Is there authority for essential government services agencies such as the Department of Revenue, the Department of Personnel, or the Department of Finance and Administration to operate?

5. Since the compensation of certain state officials, such as the governor, judges, attorneys general, commissioners, and state legislators, are set by statute, could such officials continue to be paid?

6. Could state employees be compelled to continue to work without compensation? If so, what rights would employees have?

7. Is there authority to continue to make payments from designated accounts or programs, such as the Highway Fund, Tennessee Consolidated Retirement System, the Basic Education Program Account, state-shared taxes, the Tennessee Infrastructure Improvement Program, or statutorily-mandated grants?

8. Is there authority to continue to make other payments required by law or contract, such as payments to health care providers through state insurance programs including TennCare, bond interest payments, utility bills, tax refunds, or lease/rental payments?

OPINIONS

1. As a general matter, absent the enactment of an appropriations bill for fiscal year 2000 — 2001, there will be no authority in most circumstances for the State of Tennessee to spend money. An agency could spend funds appropriated by another act and in accordance with its terms, and only pursuant to a work program established by the Governor under Tenn. Code Ann. §§ 9-4-5110 — 9-4-5112. Whether any particular act besides the appropriations act is an appropriation would depend on the particular act and its terms.

2., 3., and 4. These agencies may continue to carry out their statutory responsibilities beyond June 30, 2000, even if no annual appropriations act has been passed. Their authority to spend any state funds, however, would be limited as discussed in the answer to Question 1.

5. Whether any particular official's salary may be paid if an appropriations act has not been enacted would depend on whether the statute setting that official's salary and authorizing its payment itself constitutes an appropriation. Statutes setting the salaries of the Governor, state court judges, district attorneys general, and the Attorney General and Reporter, appear to constitute appropriations, and these salaries could therefore continue to be paid. At least a portion of the salary of some commissioners, which is set at the Governor's discretion, could not be paid without an appropriations bill. Since the salary of the Commissioner of Economic and Community Development is set by the Governor and expressly required to be paid out of the appropriation to that Department, it could not be paid unless the General Assembly enacts an appropriations bill. Although the status of the statute setting the salaries for members of the General Assembly as an appropriation is less clear, we think it can be argued that these salaries could continue to be paid even if the General Assembly fails to pass an appropriations act.

6. This Office is unaware of any authority under which state employees could be compelled to continue to work without compensation.

7. Authority to make any of these payments depends on whether they must be made pursuant to an appropriation and whether the statutes allocating funds or authorizing payments for these programs are themselves appropriations. No appropriations act is required to authorize the Board of Trustees of the Tennessee Consolidated Retirement System to continue to pay retirement benefits to members. But funds for the Basic Education Program, the Tennessee Infrastructure Improvement Program and from the state highway fund may not be disbursed unless an appropriations act is passed. Other statutorily-mandated grant funds could not be paid unless the statutes authorizing their payment constitute appropriations. We think an argument can be made that each of the statutes authorizing the distribution of state-shared taxes is itself an appropriation of those funds and, therefore, the State could continue to distribute state-shared taxes in accordance with those statutes even if an appropriations act is not passed.

8. These payments may only be made if the statute authorizing the obligation is itself an appropriation. Of the examples in the question, the only payment that appears to be authorized

by a statute that constitutes an appropriation is for general obligation bonds issued under Tenn. Code Ann. §§ 9-9-101, *et seq.*

ANALYSIS

1. Authority to Spend Funds in the Absence of an Appropriations Bill

You have asked a series of questions regarding the operation of state government in the event the General Assembly fails to enact an appropriations bill for fiscal year July 1, 2000 to June 30, 2001 before the current fiscal year ends on June 30, 2000. Article II, Section 24 of the Tennessee Constitution provides in relevant part that "[n]o public money shall be expended except pursuant to appropriations made by law." The exclusive control of the expenditure of the public moneys is vested in the legislative branch of government and is the subject of limitation by the courts only so far as provided by the Constitution. *State ex rel. Weldon v. Thomason,* 142 Tenn. 527, 221 S.W. 491 (1919). The language of Article II, Section 24 does not distinguish between monies generated by the State's own taxing powers and monies received from other sources such as the federal government. Thus, under Article II, Section 24, all state revenues, whatever the source, must be appropriated by the General Assembly before those monies may be spent. Op.Tenn.Atty.Gen. 84-79 (March 7, 1984) (funds paid to the Tennessee Housing Development Authority by the United States Department of Housing and Urban Development for a subsidized housing program must be appropriated by the General Assembly). Under Tenn. Code Ann. § 9-4-601(a):

> No money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law. Every disbursement from the state treasury, except as hereinafter provided, shall be upon the authorization of the commissioner of finance and administration, which authorization shall be in the form of a warrant, drawn in favor of the payee, and the warrant shall, upon being signed by the commissioner and delivered to the payee, become a draft on the treasury of the state.

Tenn. Code Ann. § 9-4-601(a)(1999). Development of the annual budget for the State and its implementation in an appropriations act are set forth in Tenn. Code Ann. §§ 9-4-5101, *et seq.* Tenn. Code Ann. § 9-4-5114 provides:

> No appropriation shall confer authority to incur an obligation after the termination of the fiscal year to which it relates. No appropriation to any state department, institution, office, or agency, excepting the general assembly, *shall become available for expenditure* until allotted upon the basis of a work program, duly approved by the governor, as provided in §§ 9-6-110 — 9-6-112 [now §§ 9-4-5110 — 9-4-5112].

Tenn. Code Ann. § 9-4-5114 (1999) (emphasis added). Under Tenn. Code Ann. § 9-4-5110, no later than June 1 of each year, the Governor must require the head of each "department, office, and agency of the state government" to submit to the Commissioner of Finance and Administration a work program for the ensuing fiscal year, "such program to include all appropriations made by the general

assembly to such department, office, or agency for its operation and maintenance and for capital projects, and to show the requested allotments of the appropriations by quarters for the entire fiscal year." Our Office has concluded in the past that, absent the enactment of an appropriations bill for the ensuing fiscal year, there is no authority for the State of Tennessee to spend money as of the beginning of the next fiscal year. Op.Tenn.Atty.Gen. 91-60 (June 20, 1991). The appropriations act for fiscal year 1999 — 2000 reflects no general intent to make appropriations for any subsequent year. In fact, the caption of 1999 Tenn. Pub. Acts Ch. 539 expressly states an intent to make appropriations for the fiscal years beginning July 1, 1998, and July 1, 1999. *See also* 1999 Tenn. Pub. Acts Ch. 539, § 1 (fiscal year beginning July 1, 1999). As in 1991, the statutes relating to the appropriations process continue to display an intent to have an annual appropriations act. Therefore, as a general matter, absent the enactment of an appropriations bill for fiscal year 2000 — 2001, there will be no authority in most circumstances for the State of Tennessee to spend money.

But an appropriation may also be "made by law" in an enactment separate and apart from the general appropriations act if the language of the enactment is sufficient to constitute an appropriation. *State ex rel Noonan v. King*, 108 Tenn. 271, 67 S.W. 812 (1902). In that case, the Tennessee Supreme Court concluded that a statute creating the office of Shop and Factory Inspector and providing "[t]hat the salary of said inspector shall be twelve hundred dollars per annum, payable monthly, on warrant of Comptroller, as other salaries are paid" was itself an "appropriation made by law" within the meaning of Article II, Section 24 of the Tennessee Constitution. The Court defined an appropriation as an authority from the legislature, given at the proper time and in legal form, to the proper officers, to apply sums of money, out of that which may be in the treasury, in a given year to specified objects or demands against the State. 108 Tenn. at 276.

This Office has concluded that Tenn. Code Ann. § 8-7-201 creating positions on the staffs of the districts attorneys general and the salaries they are to be paid constitutes an "ongoing appropriation for an indefinite period" of the salaries specified in that statute. Op.Tenn.Atty.Gen. 81-287 (May 4, 1981); Op.Tenn.Atty.Gen. 82-168 (March 31, 1982). *See also* Op.Tenn.Atty.Gen. U93-05 (January 11, 1993) (the appropriations act cannot prohibit salary increases mandated by a statute). Similarly, this Office concluded that Tenn. Code Ann. § 67-5904 (now 67-7-107 — 109) and Tenn. Code Ann. § 67-5905 (now 67-7-110) specifically directing the expenditure of designated funds for the purpose of administering the coal severance tax, were appropriations, and the General Assembly could not appropriate funds inconsistently with these provisions without amending them. Op.Tenn.Atty.Gen. 82-197 (April 5, 1982). That opinion notes that each statute allocating funds must be examined to determine whether it is an appropriation. Any statute authorizing a proper officer to apply sums of money to a specified object or demand against the State could, therefore, be found to be an appropriation as required by law. Because, under Tennessee law, authority to expend state funds belongs to the General Assembly, we think a statute would have to designate a specific sum or one that could be calculated without discretion or a specific finite source of payment to defray a specific cost or obligation in order for it to constitute an appropriation. *See also* Op.Tenn.Atty.Gen. 86-96 (May 12, 1986) (authority of a department to guarantee loans up to ten times a total reserve of funds available for other purposes is not, by itself, an appropriation of those funds if they have been appropriated for other purposes). A statute enacted after 1977, when the

General Assembly passed legislation discussed in further detail below specifying the requirements for an act to be an appropriation, would also have to be examined to determine whether the bill of which it was a part met those requirements.

Questions 2., 3., and 4. Authority to Operate

Questions 2., 3., and 4. ask whether state agencies, generally, and public health and safety and various administrative agencies, in particular, will be authorized to continue to operate after June 30, 2000, if the General Assembly does not enact an annual appropriations act. The form of the annual appropriations bill is set forth in Tenn. Code Ann. § 9-4-5108. Under that statute, the general appropriations act authorizes only lump sum appropriations to meet the expenditure needs of the various spending agencies of the state government for the next fiscal year. Tenn. Code Ann. § 9-4-5108(a)(1). For the expenses of operation and maintenance in each department, division, institution, office, or other agency, the general appropriations bill must contain not more than two appropriations, one for personal services and one for other expenses. Tenn. Code Ann. § 9-4-5108(a)(2). The appropriations bill may not contain any provisions of general legislation. Tenn. Code Ann. § 9-4-5108(c). The duties and responsibilities of the various state agencies are set forth in general statutes, and not in the appropriations act. As a result, unless it is expressly forbidden by statute, these agencies may continue to carry out these duties and responsibilities regardless of whether an appropriations act has been enacted. But the money that may be expended to support these activities is subject to the limitations discussed in Question 1.

5. Payment of Salaries Set by Statute

The next question is whether the salaries of certain officials set by statute may continue to be paid even if the General Assembly does not enact an annual appropriations act. We think the answer to this question would depend on whether the particular statute setting the official's salary and authorizing its payment itself constitutes an appropriation. As discussed above, the Tennessee Supreme Court has held that an act setting an official's salary at a particular amount and authorizing its payment monthly on warrant of the Comptroller itself constituted an appropriation and therefore could be paid even though the annual appropriations act did not provide for it. In 1977, the General Assembly enacted a statute setting specific formal standards for a bill to be considered an appropriation. Tenn. Code Ann. § 9-4-5108(d) provides:

> The title of any bill making appropriations from the treasury shall include the phrase, "This act makes appropriations for (here insert the object)." The title shall also state whether the act shall be for a limited period of time or for an indefinite period. If it is for a limited period of time, the title shall state that time period.

Tenn. Code Ann. § 9-4-5108(d). We think this statute should be interpreted as a rule of construction applicable to any bill enacted after it became effective. This Office concluded that an act enacted before 1977 setting the pay scale for assistant district attorneys general would continue to constitute an appropriation even if the act had been later amended to change the level of the pay scale,

regardless of whether the later amendment conformed to the requirements of Tenn. Code Ann. § 9-4-5108 (then § 9-6-108). Op.Tenn.Atty.Gen. 81-287 (May 4, 1981). This conclusion is based on the reasoning that such an amendment simply raised the amount the act appropriated. Based on this reasoning, any statute setting a nondiscretionary salary and authorizing its payment on warrant of the Commissioner of Finance and Administration would constitute a continuing appropriation, so long as amendments since 1977 did not affect the nature of the original statute as an appropriation. Statutes setting the salaries of the Governor (Tenn. Code Ann.§ 8-1-102); state court judges (Tenn. Code Ann. § 8-23-103); district attorneys general (Tenn. Code Ann. § 8-7-105) and the Attorney General and Reporter (Tenn. Code Ann. §§ 8-6-104 and -105) appear to meet these requirements. Tenn. Code Ann. § 8-23-101 establishes base salaries for a list of commissioners, but also provides that after July 1, 1984, salary increases for these officials shall be fixed by the Governor. Tenn. Code Ann. § 8-23-101(f)(1). We think this statute constitutes a continuing appropriation of the adjusted base salary, but not of any increases made at the Governor's discretion; that portion of the salary would continue to be payable only subject to annual appropriations. Further, the statute provides that the compensation of the Commissioner of Economic and Community Development is fixed by the Governor and paid "from the appropriation available to the department of economic and community development." Tenn. Code Ann. § 8-23-101(e). That statutory language is not an appropriation, and therefore payment of the salary of the Commissioner of Economic and Community Development is subject to annual appropriation.

Under Article II, Section 23 of the Tennessee Constitution, each member of the General Assembly receives an annual salary of $1,800 payable in equal monthly installments from the date of his or her election, but the General Assembly may reduce or increase it by law. Legislators' salaries are now set under Tenn. Code Ann. § 3-1-107. That statute has been amended three times since 1977 by bills whose captions did not meet the requirements of Tenn. Code Ann. § 9-4-5108(d). One amendment deleted the section in its entirety and substituted new language. 1988 Tenn. Pub. Acts Ch. 972. But we think it can be argued that since the statute was never repealed but simply amended, it still retains its function as an appropriation.

6. State Employees

The next question is whether state employees may be compelled to work without compensation. This Office is unaware of any authority for this arrangement. The question of their rights in that event is therefore moot.

7. Disbursements

The next question is whether payments from a series of different types of funds may be made after the close of this fiscal year if the General Assembly does not enact an annual appropriations act for the next fiscal year. You ask specifically about payment of retirement benefits from the Tennessee Consolidated Retirement System; payments from the Basic Education Program Account, the Tennessee Infrastructure Improvement Program, and the highway fund; payments of state-shared taxes; and any other statutorily-mandated grants. Authority to make any of these payments depends

on whether they must be made pursuant to an appropriation and whether the statutes allocating funds or authorizing payments for these programs are themselves appropriations.

Our initial examination of each of these statutory schemes yields the following results. The Tennessee Consolidated Retirement System is funded by annual contributions from the State and other governmental members. Although the State Treasurer has custody of the funds, investment and disbursement authority is vested in a board of trustees under an elaborate statutory scheme. For these reasons, no appropriations act is required to authorize the continued payment of Tennessee Consolidated Retirement System benefits. But an appropriations act would be required to authorize the State to make its annual contribution on behalf of current state employees to the system. Statutes authorizing the Basic Education Program appear to refer to the annual appropriations bill for calculations and disbursement, and therefore such funds cannot be disbursed unless an appropriations act is passed. Tenn. Code Ann. § 49-3-351(d). Authority for payments from the Tennessee Infrastructure Improvement Program is contained largely in the annual apropriations act. 1999 Tenn. Pub. Acts Ch. 539, § 32. Funds for that program therefore may not be disbursed unless an appropriations act is passed. Various statutes allocate funds from a specified source to be paid into the state highway fund. *See, e.g.*, Tenn. Code Ann. § 67-3-2001 (gas tax revenues). Further, statutes authorizing the disbursement of highway funds suggest that payment of salaries and personal expenses need not be authorized by the general appropriations act. Tenn. Code Ann. § 54-2-105. But we have found no statute authorizing the use of these funds for any specific purpose that could constitute an appropriation. Moreover, the current general appropriations act contains a general appropriation of "such receipts of highway revenues as are now provided by law" to be expended by the Commissioner of Transportation according to an itemized schedule. 1999 Tenn. Pub. Acts Ch.539, § 1.III.28. For this reason, we think a court would conclude that the Department of Transportation may not expend funds from the state highway fund after June 30 unless an annual appropriations bill is enacted. Other statutorily-mandated grant funds could not be paid unless the statutes authorizing their payment constitute appropriations.

The request also asks whether the State may continue to make distributions of state-shared taxes. These taxes include the sales tax, apportioned under Tenn. Code Ann. § 67-6-103; gross receipts tax from the Tennessee Valley Authority apportioned under Tenn. Code Ann. §§ 67-9-101(a)(2) and 67-9-102(a); the Hall Income Tax, apportioned under Tenn. Code Ann. § 67-2-119; the tax on petroleum products apportioned under Tenn. Code Ann. § 67-3-2001; the beer tax distibuted under Tenn. Code Ann. § 57-5-205; the alcoholic beverages tax apportioned under Tenn. Code Ann. § 57-4-306(2)(B); and the tax on wine and spirits apportioned under Tenn. Code Ann. § 57-3-306. None of these statutes expressly states that these sums "are appropriated." Further, some of these statutes have been enacted, amended, or rewritten since 1977 by legislation that may not meet the formal requirements for an act appropriating funds under Tenn. Code Ann. § 9-4-5108(d). But each contains a nondiscretionary formula for calculating the amounts to be distributed to local governments and provides that that portion of the tax receipts is "allocated," "earmarked," "shall be appropriated," "shall be paid," or "shall be distributed" to local governments in the manner provided in the statute. Moreover, except for the tax on petroleum products, all of these taxes were in effect before 1977. We think it can be argued that each of these statutes is sufficiently specific

to constitute an appropriation of that portion of the tax receipts directed to be distributed to local governments. For this reason, we think the State could probably continue to distribute state-shared taxes even if the General Assembly does not enact a general appropriations act.

8. Authority to Make Other Payments without an Annual Appropriations Act

Finally, the request asks whether, in the event the General Assembly does not enact an annual appropriations act, agencies would be authorized to make other payments required by contract, including payments to health care providers through state insurance programs including TennCare, bond interest payments, utility bills, tax refunds, or lease/rental payments. Authority to make any of these payments in the absence of an appropriations act would depend on whether the particular statute authorizing the contract or other obligation is itself an appropriation. Of the examples listed in the request, the only authorizing statute that appears to meet this requirement is for the payment of principal and interest on long-term general obligation bonds issued under Tenn. Code Ann. §§ 9-9-101, *et seq.* That statutory scheme pledges particular tax receipts to payment of principal and interest and authorizes the Treasurer to disburse funds in an amount certified by the State Funding Board for that purpose. Tenn. Code Ann. § 9-9-106.

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