S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

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Opinion No. 01-016

Status of Full-time Employees of the Board of Professional Responsibility for Purposes of Membership in the Tennessee Consolidated Retirement System

QUESTION

Whether full-time employees of the Board of Professional Responsibility of the Supreme Court of Tennessee are classified as state employees for purposes of membership in the Tennessee Consolidated Retirement System?

OPINION

Yes. Full-time employees of the Board of Professional Responsibility are included in the definition of "general employee[s]" under Tenn. Code Ann. § 8-35-101(a), and are thus eligible for and required to be members of the Tennessee Consolidated Retirement System.

ANALYSIS

This opinion addresses whether full-time employees of the Board of Professional Responsibility (BPR) are state employees for purposes of eligibility for the Tennessee Consolidated Retirement System (TCRS). The answer depends on whether the employees can be classified as "general employee[s]" under Tenn. Code Ann. § 8-35-101(a). It is the opinion of this Office that full-time employees of the BPR, including full-time Disciplinary Counsel, are employed in the service of, and compensated by, the State of Tennessee and are thus "general employee[s]" entitled and required to be members of TCRS.

Tenn. Code Ann. § 8-35-101(a) describes the eligibility requirements for membership in TCRS as follows: "Any person who becomes a teacher, *a general employee*, a state police officer, a wildlife officer, a firefighter or a police officer on or after July 1, 1972, shall become a member of the retirement system as a condition of employment." (emphasis added). The term "general employee" is defined in Tenn. Code Ann. § 8-34-101(18) as:

> [A]ny person who is a state official, including legislative officials elected by the general assembly, or *who is employed in the service of, and whose*

> *compensation is payable in whole or in part, by the state*, including employees under supervision of the state whose compensation is paid, in whole or in part, from federal or other funds, or any person in the employ of a political subdivision participating under chapter 35, part 2 of this title [Local Governmental Units], or of the Tennessee County Services Association . . . .

Thus, to determine whether the full-time employees of the BPR are "general employee[s]" for purposes of TCRS eligibility, two issues must be decided: first, whether the employees are "employed in the service of" the State of Tennessee; and, second, whether their "compensation is payable" by the state. Tenn. Code Ann. § 8-34-101(18). Both of these questions hinge on how the BPR is organized and funded.[1]

The BPR was created pursuant to the rule-making authority of the Tennessee Supreme Court under Supreme Court Rule 9, Section 5. The purpose of the BPR is to assist the Supreme Court in supervising the ethical conduct of attorneys. Members of the BPR are appointed by the Supreme Court and receive no compensation for their service other than reimbursement of expenses.[2] Tenn. Sup. Ct. R. 9, § 5.4. The BPR is given authority by the Supreme Court under Supreme Court Rule 9, Section 5.5(b) to appoint disciplinary counsel and staff. All costs for the BPR are paid for by licensing fees and cost reimbursements assessed against Tennessee attorneys by the Supreme Court through its rule-making authority, as opposed to funds appropriated by the legislature. Tenn. Sup. Ct. R. 9, §§ 24.1, 24.3.

Numerous facts and authorities indicate that full-time employees of the BPR are employed in the service of the State of Tennessee, thus satisfying the first requirement of classification as a "general employee" for TCRS purposes. Tenn. Code Ann. § 8-34-101(18). One such indication of state service is that, under certain circumstances, the BPR, its members, and its Disciplinary Counsel would have immunity from suit in civil cases by virtue of their BPR service. This Office has previously opined that the Commission on Continuing Legal Education (CLE Commission), another commission created pursuant to

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[1] Since the BPR was created by the Tennessee Supreme Court pursuant to Supreme Court Rule 9 in 1976, following the creation of TCRS on July 1, 1972, there is no need to examine the eligibility of BPR employees in the retirement systems that preceded TCRS.

[2] This opinion addresses only whether full-time employees of the BPR are eligible and required to be members of TCRS. Members and employees of boards and commissions, such as the BPR, who perform duties "intermittently or periodically" and whose service "does not provide that person's primary livelihood" or qualify as a lucrative office under the Tennessee Constitution, are not eligible for membership in TCRS based on such service. Tenn. Code Ann. § 8-35-113(a). If any doubt arises concerning whether an employee of a board or commission is exempted from TCRS pursuant to Tenn. Code Ann. § 8-35-113(a), the TCRS Board of Trustees shall determine whether that person is exempt by considering factors, including, but not limited to, the following: "the amount of compensation earned as compared to compensation from other employment or sources, the nature of service performed, and the time required in performing such services." Tenn. Code Ann. § 8-35-113(b).

a Supreme Court rule, is entitled to the defense of sovereign immunity as "an arm of the government of the State of Tennessee." Op. Tenn. Att'y Gen. 88-153, p. 3 (Aug. 24, 1988)(attached); *See Applewhite v. Memphis St. Univ.*, 495 S.W.2d 190, 196 (Tenn. 1973). Disciplinary Counsel of the BPR have been held to have "absolute quasi-judicial immunity" for actions within the scope of their authority. *Cawood v. Davis*, 680 S.W.2d 795, 796 (Tenn. Ct. App. 1984).

Other indicia of state service are discussed in the above-referenced Attorney General's Opinion concerning the similarly situated CLE Commission. In that opinion, this Office opined the following: that the Tennessee Attorney General would in all probability defend both the CLE Commission and its members against civil claims of inappropriate, official conduct; that members of the CLE Commission are "state employee[s]" for purposes of Tenn. Code Ann. § 8-42-101(3)(A)[Defense of State Employees]; and, that members of the CLE Commission, as "state employee[s]," could seek reasonable compensation from the Board of Claims for counsel, costs, and expenses in the event of such litigation under Tenn. Code Ann. § 8-42-103(a)(3). Op. Tenn. Att'y Gen. 88-153 (Aug. 24, 1988). It stands to reason that if the BPR, its members and its Disciplinary Counsel are entitled to the defense of sovereign or absolute immunity when they are acting on behalf of the State of Tennessee and are entitled to legal representation by the state for official acts, then full-time personnel of the BPR are clearly "employed in the service of" the state.

BPR employees also meet the second requirement of the "general employee" definition since they are compensated by the state. Tenn. Code Ann. § 8-34-101(18). The Tennessee Supreme Court stated in *Petition of Tenn. Bar Ass'n*, 539 S.W.2d 805, 807 (Tenn. 1976), that its "rule making authority embraces the admission and supervision of members of the Bar of the State of Tennessee." BPR employees are paid from funds raised under Supreme Court Rule 9, pursuant to the Court's rule-making authority. Tenn. Sup. Ct. R. 9, §§ 24.1, 24.3. The Supreme Court is, of course, part of the judicial branch of Tennessee government. Tenn. Const. Art. II, § 1; Tenn. Const. Art. VI, §§ 1, 2. Therefore, the full-time employees of the BPR are compensated pursuant to an assessment made by a branch of Tennessee government by way of its rule-making authority and are thus compensated by the State of Tennessee.[3]

Recognizing that the separation of powers doctrine is always a concern when one branch of government, in this case the legislative branch, involves itself in the administration of another branch of government, in this case the judicial branch, our Office has considered this issue and determined that the TCRS statutes do not infringe upon the inherent authority of the Supreme Court and are thus applicable to BPR employees. The BPR, of course, is an arm of the Supreme Court, created by rule of that Court

[3] It is the opinion of this Office that full-time employees of the BPR are compensated by the State of Tennessee as required in Tenn. Code Ann. § 8-34-101(18). However, these employees would also qualify as "general employee[s]" under a separate provision of the same statute. Tenn. Code Ann. § 8-34-101(18) states that "employees under supervision of the state, whose compensation is paid, in whole or in part, from federal or other funds" are also "general employee[s]" for TCRS purposes. Full-time BPR employees are clearly supervised by the Supreme Court and could be considered to be compensated from "other funds" since their positions are funded by licensing fees and cost reimbursements assessed pursuant to Supreme Court Rule 9.

to aid in its inherent authority to regulate the "admission and supervision of members of the Bar of the State of Tennessee." *Petition of Tenn. Bar Ass'n,* at 807. The Supreme Court has made clear that:

> [A]n act of the legislature in aid of the inherent power of the judiciary is constitutional; but one that conflicts with and supersedes the Court's declared requirements, and constitutes an attempted exercise of powers properly belonging to the judicial branch by the legislative branch of government violates Article II, Section 2 and Article VI, Section 1 of the Constitution of Tennessee.

Belmont v. Bd. of Law Examiners, 511 S.W.2d 461, 464 (Tenn. 1974); *Cantor v. Brading*, 494 S.W.2d 139, 141-143 (Tenn. Ct. App. 1973). The legislature, in establishing a retirement system that, by its own terms, clearly includes employees of the BPR, has acted in aid of the Supreme Court. The TCRS provisions contained in Tenn. Code Ann. §§ 8-35-101(a) and 8-34-101(18) do not conflict with Supreme Court Rule 9, § 5 that establishes the BPR, or with any other "declared requirement" established by the Court. Moreover, providing retirement benefits goes not to the inherently judicial disciplinary function of the BPR, but to the proper legislative role in matters of personnel and administration in state government.

The Tennessee Constitution empowers the legislature to provide compensation for judges of the Supreme and inferior courts, which cannot be increased or decreased during their term of office. Tenn. Const. Art. VI, § 7. It is clear that pension benefits are a type of compensation within the meaning of the Constitution. *Roberts v. Tenn. Consol. Ret.* Sys., 622 S.W.2d 544 (Tenn. 1981); *Blackwell v. Quarterly County Ct.*, 622 S.W.2d 535 (Tenn. 1981); *Miles v. Tenn. Consol. Ret. Sys.*, 548 S.W.2d 299 (Tenn. 1976). Therefore, matters of compensation and retirement of members of the judicial branch are clearly within the competence of the legislature. The Legislature, which bears the responsibility for general funding of the judicial branch of government, may include members of that branch in the state's consolidated retirement system, which also includes members of the executive and legislative branches of government. This legislative power encompasses employees of the judicial branch whose positions are created and funded by court rule as well as those created and funded by other specific provisions of the Constitution and statutes.

Thus, full-time employees of the BPR are eligible for and required to be members of TCRS pursuant to Tenn. Code Ann. § 8-35-101(a). The employees meet the statutory definition of "general employee[s]" for TCRS purposes since they are both "employed in the service of" and compensated by the State of Tennessee, and since the provision of retirement benefits to these employees by the legislature does not infringe upon the inherent authority of the Supreme Court to regulate the admission and supervision of members of the Tennessee Bar.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

WYLA M. POSEY
Assistant Attorney General

Requested by:

The Honorable Ronald L. Davis
District Attorney General
Williamson County Courthouse
P.O. Box 937
Franklin, TN 37064