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Opinion No. 03-037

Abolishing the Memphis City School Board

QUESTION

1. Did the Board of Education of the Memphis City Schools legally terminate in 1968 under the terms of the private act that created it?

2. Under Tenn. Code Ann. § 49-2-1002, the governing body of a city maintaining a separate school system may transfer administration of the system to the county superintendent of education. A referendum must be conducted before the transfer can become effective. Does this statute, or any other statute, authorize the Memphis City Council to schedule a referendum for city residents to vote to abolish the Board of Education of the Memphis City Schools?

OPINIONS

1. No.

2. No statute provides this authority. Since the Memphis City School Board is a special school district, and not a city school system, Tenn. Code Ann. § 49-2-1002 does not apply.

ANALYSIS

1. Continued Existence of the Board of Education of the Memphis City Schools

This opinion concerns the Board of Education of the Memphis City Schools (the "School Board)". The School Board was created under 1869 Tenn. Priv. Acts Ch. 30. Section 1 of that act provides in relevant part:

> Be it enacted by the General Assembly of the State of Tennessee, That the Memphis City Schools shall hereafter be placed under the exclusive management and control of a Board of Education consisting of two members from each ward of the said city, elected as hereinafter directed, and that said Board are hereby created and constituted a body politic and corporate by the name and style of the Board of Education of the Memphis City Schools *who shall have succession for ninety-nine years . . ..*

(Emphasis added).

In 1883, the General Assembly passed a private act that abolished the office of member of the Board of Education and created the office of School Commissioner. 1883 Tenn. Priv. Acts Ch. 17. Section 2 of the 1883 act provides:

> Be it further enacted, That said Commissioners shall be elected by the qualified voters of such Taxing District, and their election shall take place at the same time and place as that of the officers of said Taxing Districts, at the first election to take place on the first Thursday after the first Monday in January in the year 1884; three of said Commissioners shall be elected for two years, and two for four years, and *thereafter* said Commissioners shall be elected for a term of four years.

(Emphasis added). The 1883 act repealed the 1869 act to the extent the two conflict. 1883 Tenn. Priv. Acts Ch. 17, § 10. It can be argued that, by reorganizing the School Board and placing no limit on the succession of the Commissioners, the General Assembly repealed the ninety-nine year term of succession placed on the School Board in the 1869 act. The 1869 act, however, in addition to the ninety-nine year limit, also provides that elections for members would be held "each year thereafter" and that one person from each ward would be chosen to be a member for two years "at every subsequent election." 1869 Tenn. Priv. Acts Ch. 30, §§ 3, 4.

The General Assembly later expressly amended the 1869 act to provide that the School Board is permanent and perpetual. 1959 Tenn. Priv. Acts Ch. 24. We have been informed that the constitutionality of this act has been questioned because Section 3 requires the act to be approved by a two-thirds vote of the School Board and of the Board of Commissioners of the City of Memphis. The act provides:

> *Be it further enacted,* That this Act shall become effective when and not before the same shall have been approved by a vote of not less than two-thirds of the five School Commissioners who compose the Board of Education of the Memphis City Schools and constitute the regular legislative body thereof, and shall also have been approved by a vote of not less than two-thirds of the members of the Board of Commissioners of the City of Memphis, which Board is the regular legislative body of said City; such approval to be made by the said School Commissioners and by said Board of Commissioners of the City of Memphis within ninety (90) days after the sine die adjournment of the regular session of the General Assembly of the State of Tennessee for the year 1959, the public welfare requiring that this Act become effective when so approved, and not before such approval.

According to the Secretary of State, this act was properly ratified.

Every act of the General Assembly comes to the courts with a strong presumption in favor of its constitutionality. *West v. Tennessee Housing Development Agency*, 512 S.W.2d 275, 279 (Tenn. 1974). Thus, when a constitutional attack is levied on a statute, courts must indulge every presumption in favor of its validity and resolve any doubt in favor of, rather than against, the constitutionality of the act. *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga*, 580 S.W.2d 322, 325 (Tenn. 1979).

Article XI, Section 9 of the Tennessee Constitution provides in relevant part:

> . . . any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Thus, private acts affecting a county or a city must generally provide for local approval in order to be effective. Several years after this provision of Article XI, Section 9 was added to the Tennessee Constitution, the Tennessee Supreme Court ruled that it does not apply to an act expanding the territory and amending the powers of a special sanitary district. *Fountain City Sanitary District v. Knox County Election Commission,* 203 Tenn. 26, 308 S.W.2d 482 (1957). In that case, the challenged act provided that it would become effective only upon its approval by a majority of those voting in the district. The Court acknowledged that, unless the approval provision could be elided, the act would be an unconstitutional delegation of legislative authority. But the Court found that the provision could be elided because the legislative history of the statute and its amendments indicated that the local approval requirement was included only because the General Assembly thought it was constitutionally required under Article XI, Section 9. 203 Tenn. at 33-34. The Court noted that the act contained a severability clause. The Court also found that, even without the local approval requirement, the statute was a law "capable of enforcement and fairly answering the object of its passage." 203 Tenn. at 34. The Court, therefore, elided the local requirement and found the rest of the act to be constitutional.

In 1959, the Tennessee Supreme Court ruled that this provision of Article XI, Section 9 does not apply to special school districts. *Perritt v. Carter,* 204 Tenn. 611, 325 S.W.2d 233 (1959). In that case, the Court considered the constitutionality of a private act enlarging the Huntingdon Special School District. The act required the approval of voters living within the affected area of the county before it could become effective. Taxpayers argued that the act violated Article XI, Section 9 because it did not require the approval of the county commission or the voters of the county. The Court concluded that a special school district does not come within the definition of a municipality as contemplated in this constitutional provision. The Court, however, did not find that the act was

void because it unconstitutionally delegated its effectiveness to a local vote of a limited number of voters in the county. Instead, the Court elided the approval requirement as "surplusage." 204 Tenn. 614. The Court reasoned that the referendum was included in the act "because of the erroneous impression that the District might come within the Home Rule Constitutional Amendment requiring an election referendum before the Act would be enforceable." The Court agreed with the Trial Court's conclusion that the General Assembly would have passed the act even if the local approval requirement had been omitted. The Court does not explain the basis for the Trial Court's conclusion, and the act in question did not contain a severability clause.

The 1959 act making the School Board's existence perpetual is conditioned on the approval of a two-thirds vote of the School Board and a two-thirds vote of the Memphis City Commissioners. We have concluded in the past that the approval of the city legislative body for a private act applicable to the School Board is required under Article XI, Section 9 if the change affects the duties of the city officers. Op. Tenn. Atty. Gen. 00-149 (October 4, 2000). Moreover, because the City of Memphis did not adopt Home Rule until 1963, the act did not violate the rule that the General Assembly may act as to a home rule city only by general law. The question then becomes whether the act is unconstitutional because it conditions its effectiveness on the approval of the School Board, and that approval is not mandated by Article XI, Section 9 of the Tennessee Constitution.

Under the cases discussed above, we are confident that the courts would elide from the act the provision requiring School Board approval. We have found nothing in the legislative journals to indicate that the local approval requirement was included solely because the General Assembly thought it was constitutionally required, nor does the act contain a severability clause. But we have found no private acts regarding the School Board that contain the requirement of School Board approval before 1955 or after 1959. All of the private acts directly affecting the School Board enacted between 1955 and 1959, on the other hand, contain a local approval requirement by both the School Board and the Memphis City Commissioners. 1955 Tenn. Priv. Acts Ch. 350 (consolidation of facilities or functions); 1959 Tenn. Priv. Acts Ch. 24 (perpetual duration); 1959 Tenn. Priv. Acts Ch. 179 (retirement); and 1959 Tenn. Priv. Acts Ch. 226 (election of School Board members). A 1961 act, by contrast, is conditioned only on the approval by the City Commissioners. 1961 Tenn. Priv. Acts Ch. 375 (surrender of charter authorized).[1] We think a court would infer from these circumstances that the General Assembly included the provision that the School Board approve the acts under the mistaken impression that this approval was constitutionally required. We think this inference is valid in light of the fact that 1959 Tenn. Priv. Acts Ch. 24 was passed January 30, 1959, and the Supreme Court did not issue its opinion in *Perritt* until May that same year. *See Gibson County Special School District v. Palmer*, 691 S.W.2d 544 (Tenn. 1985) (the local approval requirement for a tax to be levied by a special school district would not be elided; the General

[1] In addition, 1955 Tenn. Priv. Acts Ch. 351 changed the division of local school funds between Shelby County and the School Board. This act provided for approval by the legislative bodies of Memphis and Shelby County, apparently over the opposition of the School Board. *Board of Education of the Memphis City Schools v. Shelby County*, 207 Tenn. 330, 339 S.W.2d 565, 574 (1960). The Court found that this act was unconstitutional, but not because the local approval requirement omitted the School Board.

Assembly could not have mistakenly thought that local approval was constitutionally required since the Supreme Court had settled the issue in *Perritt* twenty-five years earlier).

It should also be noted that, in and since 1967, when the School Board, theoretically, might have gone out of existence, the General Assembly has passed at least four private acts relating to it. 1967 Tenn. Priv. Acts Ch. 260; 1970 Tenn. Priv. Acts Ch. 340; 1995 Tenn. Priv. Acts Ch. 67; 2000 Tenn. Priv. Acts Ch. 141. In *Muse v. Town of Lexington*, 110 Tenn. 655, 76 S.W. 481 (1903), resident taxpayers of the Town of Lexington sued to invalidate city bonds on the ground that the city's incorporation had not complied with statutory incorporation requirements. The Court found that any defects in the city's incorporation were cured when the General Assembly passed two acts recognizing the corporate existence of the city and ratifying the bonds in question. Section 2 of the 1967 act expressly provides: "The next election for the office of said School Commissioners shall be held on the first Thursday following the first Tuesday in October, 1967, and subsequent elections every four (4) years thereafter . . .." 1967 Tenn. Priv. Acts Ch. 260, § 2. It can be argued that, by enacting this provision as well as later acts, the General Assembly recognized and ratified the continued existence of the School Board.

In any case, absent a final ruling by a court of competent jurisdiction that the 1959 act is unconstitutional and void, the School Board legally continues to exist under the terms of its creating private acts. An unconstitutional act is not void, but voidable only, until condemned by judicial pronouncement. *Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516, 540 (Tenn. 1977).

2. Abolition of the School Board

The second question concerns the authority of the Memphis City Council to schedule a referendum to abolish the School Board. Section 49-2-1002(a)(1) of the Tennessee Code provides as follows:

> (a) (1) The city council, board of mayor and aldermen or other duly constituted governing body of any town or city in this state maintaining a separate school system is authorized and empowered to transfer the administration of such *town or city school system* to the county board of education of the county in which such town or city is located. Before such a transfer is effectuated however, a referendum shall first be conducted on the subject, and the school system of such town or city shall not be transferred to the county unless a majority of the voters who cast votes in the referendum shall vote in favor of such transfer.
>
> (2) The referendum required by the preceding subdivision shall be held by the county commissioners of elections when requested by the governing body of the town or city, and the expenses of the election shall be paid by the town or city.

(Emphasis added).

This Office has concluded that the School Board is not a city school system, but is a special school district with its boundaries coterminous with the boundaries of the City of Memphis. Op. Tenn. Atty. Gen. 96-055 (March 27, 1996); *Barnett v. City of Memphis*, 196 Tenn. 590, 594, 269 S.W.2d 906 (1954), *rehearing denied* (1954), *cert. denied*, 348 U.S. 974, 75 S.Ct. 536, 99 L.Ed. 758 (1954) ("an incorporated school district is not a municipal corporation but is in the same class with counties and occupies the same legal status"). Tenn. Code Ann. § 49-2-502 provides the method by which a special school district may transfer its system to the county school board. This statute states:

> The *school board, school commissioners, school trustees or other duly constituted administrative officials of any special school district* are authorized and empowered to transfer the administration of the schools in the special school district to the county board of education of the county in which such special school district is located. Before a transfer is effectuated however, a referendum shall first be conducted on the subject, and the school system of such special school district shall not be transferred to the county unless a majority of the voters who cast votes in the referendum shall vote in favor of such transfer. The referendum shall be held by the county commissioners of elections when requested by the school board of the special school district, and the expenses of the election shall be paid from the funds of the special school district.

(Emphasis added). Under this provision, therefore, a special school district may transfer its system to the county after a referendum. Tenn. Code Ann. § 49-2-1002 expressly refers to this section twice. Subsection (b) provides:

> A town, city *or special school district transferring the administration of schools to the county board of education by authority of § 49-2-502 and this section* is authorized to devote the school funds of such town, city or special school district to the payment of the proportionate part of the cost of the maintenance and operation of such schools.

Tenn. Code Ann. § 49-2-1002(b) (emphasis added). Subsection (d) provides in part:

> The county board of education shall operate the schools of any town, city or *special school district transferred to them by authority of § 49-2-502 and this section*, as a coordinated part of the county school system to the end that a unified and balanced school system may be maintained in the county.

Tenn. Code Ann. § 49-2-1002(d) (emphasis added). For this reason, while a city may transfer its school system to the county board of education by a vote of the city governing body and a referendum under Tenn. Code Ann. § 49-2-1002(a)(1), transfer of a special school district must be authorized by a vote of the governing body of the school district and a referendum under Tenn. Code Ann. § 49-2-502.

This Office has concluded in the past that Tenn. Code Ann. § 49-2-1002, and not Tenn. Code Ann. § 49-2-502 (then codified as § 49-404 and § 49-403), applies to the transfer of a "special city school district." Op. Tenn. Atty. Gen. 77-99 (March 31, 1977). That opinion, however, dealt with a "separate school district" operated by the City of Harriman under its private act charter. By contrast, the School Board is separately incorporated. The reasoning of the 1977 opinion, therefore, does not apply to the School Board's transfer of its system. This Office is unaware of any other authority under which the Memphis City Council may call a referendum to abolish the School Board.

Material we have received in connection with another opinion request on a related topic raises the argument that, under Tenn. Code Ann. § 49-2-1002, the Memphis City Council may transfer administration of the Memphis City School System to the county board of education, even though the system is directly administered by the School Board, a special school district. This argument is based on subdivision (a)(1) of that statute. Under the provision, "[t]he city council . . . of any town or city in this state *maintaining a separate school system* is authorized and empowered to transfer the administration of such town or city school system to the county board of education of the county in which such town or city is located." (Emphasis added). The School Board is funded by taxes levied by the City of Memphis. It can be argued, therefore, that the City of Memphis is "maintaining a separate school system" within the meaning of this statute, even though the schools, by private act, are administered by the School Board, an independently elected governing body. Under this argument, therefore, the Memphis City Council would be authorized to transfer control of the school system to the county school board, whether or not the School Board consents.

We do not think the statutory language supports this interpretation. By private act, administration of the Memphis City Schools is vested in the School Board, a governing body that is independently elected. Under the proposed interpretation, a city council would be authorized to initiate the transfer of a system it does not directly control and, in effect, deprive an independently created governmental entity of its powers. This interpretation of the statute, therefore, would directly conflict with the private acts placing the Memphis City Schools under the "exclusive management and control" of the original Board of Education in 1869, and transferring those powers to the School Board in 1883. It is the duty of the courts to avoid a construction that will place one statute in conflict with another, and the courts should resolve any possible conflict between the statutes in favor of each other, whenever possible, so as to provide a harmonious operation of the laws. *Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 883 (Tenn. 1996) (quoting *State ex rel. Boone v. Sundquist*, 884 S.W.2d 438, 444 (Tenn. 1994)). This conflict is avoided if Tenn. Code Ann. § 49-2-1002(a)(1) is interpreted to apply only to a city school system that is directly controlled by a city legislative body or a city agency under a general law or the city charter.

It should also be noted that, under 1961 Tenn. Priv. Acts Ch. 375, the School Board is authorized to surrender its charter. The statute does not require a referendum. This act, however, may be subject to challenge on the grounds that it conflicts with Tenn. Code Ann. § 49-2-502 because it accomplishes the same end without a referendum. The act could only be upheld if there is a rational basis for the different method. *See Board of Education of the Memphis City Schools v. Shelby County*, 207 Tenn. 330, 339 S.W.2d 565, 574 (1960).

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