

**STATE OF TENNESSEE**

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April 11, 2003

Opinion No. 03-041

“Legislative Education Initiative Fund” for Unclaimed Lottery Prize Funds

**QUESTIONS**

House State and Local Government Committee Amendment 1 to House Bill 0001 establishes the Tennessee Education Lottery Corporation to operate a state lottery. State Government Subcommittee Amendment 8, Drafting Code Number 00500318, provides that some unclaimed prize money will be placed in a “legislative education initiative fund.” Money in the account will be divided equally among all members of the General Assembly, “to be allocated by such member for educational purposes and projects consistent with the provisions of Article XI, § 5 of the Constitution” within the member’s district. The funds must be appropriated and may only be obligated and expended in accordance with appropriations made by the General Assembly for such purposes and projects.

1. Is the proposed subcommittee amendment an unconstitutional delegation of legislative authority?
2. Does the proposed subcommittee amendment violate the separation of powers clause at Article II, Section 2 of the Tennessee Constitution?
3. Is the proposed subcommittee amendment unconstitutional on any other grounds?

**OPINIONS**

1. So long as the appropriation bill specifically lists the projects on which the funds will be expended, this legislation is not an unconstitutional delegation of authority. But, if the appropriations bill simply accords discretion to an individual legislator to disburse funds allocated to him or her, the legislation is an unconstitutional delegation of legislative authority because it provides no standards to enable a legislator to choose among competing projects and recipients.

2. So long as the appropriation bill specifically lists the projects on which the funds will be expended, this legislation is not an unconstitutional delegation of authority. But, if the appropriations bill simply accords discretion to an individual legislator to disburse funds allocated to him or her, delegation of this authority to a member of the General Assembly violates the Separation of Powers Clause at Article II, Section 2 of the Tennessee Constitution. Under that clause, no person belonging to the legislative, executive or judicial branch may exercise any of the

powers properly belonging to another branch of government except where expressly permitted under the State Constitution. No provision of the Tennessee Constitution would permit this exercise of administrative authority by a member of the General Assembly. A court could also conclude that delegation of this authority to single members of the General Assembly violates Article II, Section 10 of the Tennessee Constitution, which provides in part that no member of the General Assembly is eligible to any office or place of trust, appointment of which is vested in the Executive or the General Assembly.

3. The source of the discretionary funds created under the proposed subcommittee amendment is unclaimed lottery prizes. These funds are lottery revenues, and must be allocated and expended under the restrictions established in Article XI, Section 5. Therefore, these funds must be used to “supplement, not supplant, non-lottery educational resources for educational programs and purposes.” The Initiative Amendment does not clearly contain this requirement. Further, the Initiative Amendment provides no way to ascertain that the financial assistance program has been fully funded and that monies in the Initiative Fund may, therefore, be appropriated for the other purposes listed in Article XI, Section 5. These defects render the Initiative Amendment, as currently drafted, unconstitutional.

### ANALYSIS

This opinion concerns State Government Subcommittee Amendment 8, Drafting Code Number 00500318, (the “Initiative Amendment”) to House State and Local Government Committee Amendment 1 to House Bill 0001 (the “Lottery Bill”). Article XI, Section 5 of the Tennessee Constitution, as recently amended, provides in relevant part:

The legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this state, except that the *legislature* may authorize a state lottery if the net proceeds of the lottery's revenues are allocated to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within *this* state. The excess after such allocations from such net proceeds from the lottery would be *appropriated* to:

- (1) Capital outlay projects for K-12 educational facilities; and
- (2) Early learning programs and after school programs.

Such appropriation of funds to support improvements and enhancements for educational programs and purposes and such net

proceeds shall be used to supplement, not supplant, non-lottery educational resources for educational programs and purposes.

\* \* \* \*

A state lottery means a lottery of the type such as in operation in Georgia, Kentucky and Virginia in 2000, and the amendment to Article XI, Section 5 of the Constitution of the State of Tennessee provided for herein does not authorize games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like.

The state lottery authorized in this section shall be implemented and administered uniformly throughout the state in such manner as the legislature, by general law, deems appropriate.

(Emphasis added).

The Lottery Bill establishes the Tennessee Education Lottery Corporation to operate a state lottery. Section 2 of the Lottery Bill, proposed Tenn. Code Ann. § 4-51-123(b)(4), provides that if a valid claim is not made for a cash prize within certain specified periods, the prize will be an unclaimed prize.

Subsection (h) of the same proposed statute provides:

Unclaimed prize money shall not constitute net lottery proceeds. A portion of unclaimed prize money, not to exceed two hundred thousand dollars (\$200,000) annually, shall be directed to the department of mental health and developmental disabilities for the treatment of compulsive gambling disorder and educational programs related to such disorder; provided that any unclaimed prize money in excess of such amount may be added to the pool from which future prizes are to be awarded or used for special prize promotions. The department of mental health and developmental disabilities shall prepare an annual report for the board and select committee concerning its efforts in the treatment of compulsive gambling. The provisions of title 66, chapter 29 shall not apply to unclaimed prize money of the corporation.

Under Tenn. Code Ann. §§ 66-29-101, *et seq.*, property that has remained unclaimed for a certain period of time must be turned over to the Treasurer and is held indefinitely pending claims by the rightful owner. The Initiative Amendment would delete the language “provided that any unclaimed prize money in excess of such amount may be added to the pool from which future prizes are to be awarded or used for special prize promotions[,]” and substitute the language “provided that any unclaimed prize money in excess of such amount shall be earmarked for and deposited in the

special agency account created in the general fund in accordance with § 4-51-111(f).” The Initiative Amendment adds a new subsection (f) to proposed Tenn. Code Ann. § 4-51-111 in the Lottery Bill. As currently written, that section of the Lottery Bill establishes a “lottery for education account” in the state treasury into which net proceeds of the lottery must be deposited. The section, as currently written, provides for budgeting and appropriating funds in the lottery for education account.

The proposed subsection (f) in the Initiative Amendment provides that unclaimed prize money in excess of the amount earmarked to the Department of Mental Health and Developmental Disabilities under proposed § 4-51-123(h) shall be deposited in a “special agency account.” This Initiative Amendment creates a “legislative education initiative fund”(the “Fund”). Subdivision (f)(3) provides:

(A) Moneys in the fund shall be divided equally among all one hundred thirty-two (132) members of the general assembly to be allocated by such member for educational purposes and projects consistent with the provisions of Article XI, § 5 of the Constitution of Tennessee within the district of the state represented by the member. Such moneys must be appropriated and shall only be obligated and expended in accordance with appropriations made by the general assembly for such purposes and projects.

(B) Any moneys in the fund not appropriated during the fiscal year in which the moneys were deposited shall remain in the fund and shall be available for allocation and appropriation by all members of the general assembly in the subsequent fiscal year for the purposes and projects specified in subdivision (3)(A).

Unexpended Fund balances at the end of a fiscal year are carried forward into the subsequent fiscal year. *Id.*, at subdivision (4).

#### 1. Delegation of Appropriation Authority

The first question is whether the Initiative Amendment is an unconstitutional delegation of legislative authority. Under the Initiative Amendment, portions of the Fund would be appropriated as directed by a single member of the General Assembly. The amendment does state that “[s]uch moneys must be appropriated and shall only be obligated and expended in accordance with appropriations made by the general assembly for such purposes and projects.” This language suggests that the General Assembly is free to refuse to appropriate funds as a member directs. But the amendment also provides that unappropriated funds will simply be divided among members the next year to be appropriated as each member directs.

It is not clear how the proposal would actually be implemented. If the appropriations bill appropriating money in the Fund actually specifies the projects recommended by the individual

member for which funds may be disbursed, then the proposal does not unconstitutionally delegate appropriation authority. But if the appropriations bill simply accords discretion to an individual legislator to disburse funds allocated to him, or her, the legislation is an unconstitutional delegation of legislative authority because it provides no standards to enable a legislator to choose among competing projects and recipients. As implemented in this manner, therefore the proposal would delegate the authority to determine how state funds will be spent to a single member of the General Assembly.

Under Article II, Section 3 of the Tennessee Constitution, legislative authority of the State is vested in a General Assembly, composed of a Senate and a House of Representatives. The exclusive control of the expenditure of the public moneys is vested in the legislative branch of the 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, 539, 221 S.W. 491 (1919). Under Article II, Section 3, the General Assembly may not delegate its lawmaking powers. But the General Assembly may, consistent with this provision, delegate discretionary power to administrative agencies or local governments to promulgate rules and enforce laws. *Bean v. McWherter*, 953 S.W.2d 197 (Tenn. 1997), *rehearing denied* (1997); *Lobelville v. McCanless*, 214 Tenn. 460, 463-64, 381 S.W.2d 273 (1964); *Tasco Developing and Building Corp. v. Long*, 212 Tenn. 96, 104-05, 368 S.W.2d 65 (1963). The test for determining whether a statute is an unlawful delegation is whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent. *Bean*, 953 S.W.2d at 199. In that case, the Tennessee Supreme Court stated:

Governing standards need not be expressed provided such standards can be reasonably ascertained from the statutory scheme as a whole. The necessity of expressed standards is contingent upon the statute's subject matter and on the degree of difficulty involved in articulating finite standards. Detailed or specific legislation may be neither required nor feasible when the subject matter requires an agency's expertise and flexibility to deal with complex and changing conditions.

The requirement of expressed standards may also be relaxed when the discretion to be exercised relates to or regulates for the protection of the public's health, safety, and welfare.

*Id.*

Under the Initiative Amendment, each legislator is authorized to allocate a portion of funds within the Fund "for educational purposes and projects consistent with the provisions of Article XI, § 5 of the Constitution of Tennessee within the district of the state represented by the member." If the appropriations act does not specifically list the projects for which the funds will be spent, but simply provides that the funds will be expended as each individual member directs, then each

legislator will be free to expend the moneys subject only to the requirements in the Initiative Amendment. As quoted above, Article XI, Section 5 provides that net proceeds of the lottery may be used “to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state[;]” for capital outlay projects for K-12 educational facilities; and for early learning programs and after school programs. Expenditures must supplement, and not supplant, non-lottery educational resources for educational programs and purposes.

Clearly, as a general matter, and assuming the appropriation complies with other constitutional limitations, the General Assembly could appropriate funds for specific projects that fall within these definitions. Further, we think it could be argued that these purposes are sufficiently detailed so that both a member of the General Assembly and a reviewing court could determine whether a particular allocation was within these requirements. But the legislation provides no standards by which a legislator could choose among competing projects and recipients. If, therefore, the appropriations act does not specify the particular projects for which funds may be disbursed, but simply delegates the authority to choose the projects to an individual member, we think a court could well conclude that, by enacting this legislation, the General Assembly has delegated its powers of appropriation to a single member without providing sufficient standards directing its distribution. Implemented in this manner, we think the Initiative Amendment would unconstitutionally delegate legislative authority to appropriate funds to individual members of the General Assembly. *See also* Op. Tenn. Atty. Gen. 99-040 (February 24, 1999) (constituent accountability funds).

## 2. Separation of Powers

The second question is whether the Initiative Amendment violates the Separation of Powers Clause in Article II of the Tennessee Constitution. Article II, Section 1 of the Tennessee Constitution provides:

The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

Tenn. Const. Art. II, § 1. Article II, Section 2 of the Tennessee Constitution provides:

No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Tenn. Const. Art. II, § 2 (the “Separation of Powers Clause”). As a general matter, the legislative power is to make, order, and repeal laws; the executive power is to administer and enforce laws; and the judicial power is to interpret and apply laws. *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664 (1909). This Office has recognized that there may be some overlap among the functions that may be constitutionally exercised by the different branches of government. *See* Op. Tenn. Atty. Gen. 82-115 (March 11, 1982). In that opinion, this Office concluded that the General Assembly

may, in a statute, delegate rulemaking authority to an administrative agency; or it may, by enacting a statute, directly amend rules promulgated by an agency. But the General Assembly may not, under the Separation of Powers Clause, constitutionally authorize a legislative standing committee to disallow or suspend regulations lawfully promulgated by an administrative agency. *Id.* More recently, this Office concluded that legislation allowing a legislator to create a “constituent accountability fund” from which the member could make donations to charitable organizations within the member’s district, violates the Separation of Powers Clause because it delegates legislative authority to appropriate funds to a single member of the General Assembly. *Op. Tenn. Atty. Gen. 99-040* (February 24, 1999). If the appropriations bill appropriating moneys in the Fund specifically lists the projects recommended by the member, then the Initiative Act does not violate the Separation of Powers Clause because the General Assembly retains the appropriation authority. But if the bill does not list the projects, but simply delegates the authority to disburse the funds to individual legislators, then the bill would violate the Separation of Powers Clause.

In addition, Article II, Section 10 of the Tennessee Constitution provides in part:

No Senator or Representative shall, during the time for which he was elected, be eligible to any office or place of trust, the appointment to which is vested in the Executive or the General Assembly, except to the office of trustee of a literary institution.

Tenn. Const. Art. II, § 10. This Office has concluded that the legislation discussed in the 1999 opinion regarding a “constituent accountability fund” could violate Article II, Section 10 of the Tennessee Constitution because the powers it grants to individual members are an “office or place of trust” within the meaning of that provision. *Op. Tenn. Atty. Gen. 99-040* (February 24, 1999). If the appropriations bill appropriating moneys in the Fund specifically lists the projects recommended by individual legislators, then the Initiative Act would not be unconstitutional because the General Assembly retains the appropriation power. But if the bill simply delegates authority to individual members to disburse funds, then we think a court could conclude that the powers granted to a member of the General Assembly under the Initiative Amendment are an “office or place of trust” within the meaning of Article II, Section 10 of the Tennessee Constitution. Under that reasoning, the General Assembly is constitutionally prohibited from granting such powers to a member. *See also, Op. Tenn. Atty. Gen. 82-199* (April 5, 1982) (legislation requiring certain budgetary matters to be approved by the Speakers of each House or a legislative committee violates Article II, Section 10).

### 3. Other Constitutional Provisions

The last question is whether the Initiative Amendment violates any other constitutional provisions. As quoted above, the Lottery Bill, providing for unclaimed prize money, states that “[u]nclaimed prize money shall not constitute net lottery proceeds.” This language is not sufficient, however, to remove the constitutional limits on the use of these funds. Clearly, unclaimed lottery prizes would be included in the term “lottery’s revenues,” which, under Article XI, Section 5, must

be allocated to specific educational purposes after expenses incurred to offer the lottery have been subtracted. Funds to pay the prizes will come from the proceeds of the sale of lottery tickets or shares. The fact that the prizes are not claimed does not change their status as “lottery’s revenues” within the meaning of Article XI, Section 5 of the Tennessee Constitution. Therefore, unclaimed lottery prizes, like other lottery revenues, must be allocated and expended under the restrictions established in Article XI, Section 5.

The Initiative Amendment specifies that funds in the Fund must be allocated “for educational purposes and projects consistent with the provisions of Article XI, Section 5 of the Tennessee Constitution.” As discussed above, Article XI, Section 5 requires that net lottery revenues be used for three different educational purposes. Article XI, Section 5 imposes two other requirements on expending net lottery proceeds. First, these funds must be used to “supplement, not supplant, non-lottery educational resources for educational programs and purposes.” The Initiative Amendment does not clearly contain this requirement. Second, Article XI, Section 5 creates a clear priority in favor of the first purpose, that is, “. . . financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state.” Op. Tenn. Atty. Gen. 03-015 (February 10, 2003). Once the financial assistance program established by the legislature is fully funded, then any remaining net proceeds may be appropriated for the other purposes listed in Article XI, Section 5. *Id.* The Initiative Amendment provides no way to ascertain that the financial assistance program has been fully funded and that monies in the Fund may, therefore, be appropriated for the other purposes listed in Article XI, Section 5. These defects render the Initiative Amendment, as currently drafted, unconstitutional.

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Page 9

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