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Opinion No. 06-099

Constitutionality of Governor's Authority to Transfer Functions Between Departments

QUESTION

Under Tenn. Code Ann. § 4-4-102, the Governor is authorized to transfer functions between state departments created by the General Assembly, except to or from the Department of Audit, "in the interest of a more economical and efficient state service." Does this power violate the Separation of Powers Clause in the Tennessee Constitution?

OPINION

This Office has concluded in the past that transfers under this statute may not render the statutes creating the department inoperative nor so alter the functions as to abolish a statutorily created department. Under this interpretation, Tenn. Code Ann. § 4-4-102 does not unconstitutionally delegate legislative powers to the Governor in violation of the Separation of Powers Clause.

ANALYSIS

This opinion concerns the constitutionality of Tenn. Code Ann. § 4-4-102, which provides:

> (a) The governor has the authority to transfer any functions between the departments created and established by chapter 3 of this title, except to or from the department of audit, in the interest of a more economical and efficient state service.
>
> (b) The governor shall make each such transfer by an executive order, a copy of which shall be filed with the secretary of state.

The question is whether, by giving this authority to the Governor, the General Assembly has unlawfully delegated its legislative authority to an executive official. The Tennessee Constitution, Article II, Section 1, expressly states that "[t]he powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial," and Article II, Section 2, provides that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted."

In Tennessee, the Governor has no prerogative powers and possesses only those powers conferred by the State Constitution or by statutes. *Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664, 669 (1909). Article III, Section 1, of the Tennessee Constitution vests the "Supreme Executive power of this State" in the Governor, and Section 10 provides: "He shall take care that the laws be faithfully executed." The executive power is the authority to administer and enforce the laws, and the legislative power is the authority to make, order, and repeal laws. *Richardson v. Young*, 125 S.W. at 668. In general, "legislative power" is "the authority to make, order and repeal law." *Gallaher v. Elam*, 104 S.W.2d 455, 464 (Tenn. 2003) quoting *State v. Edwards*, 572 S.W. 917, 919 (Tenn. 1998). While the General Assembly may not delegate to an executive branch the exercise of the legislature's discretion as to what the law shall be, it may delegate the authority to implement the expressed policy of particular statutes. *Id.*

The functions of the three departments are not mutually exclusive. The judicial, executive, and legislative branches of state government are "coordinate, independent, coequal, and potentially coextensive." *Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875, 877 (Tenn.Ct.App. 1978). But,

> unless . . . [the three branches of government] be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, can never in practice be duly maintained.

The Federalist No. 48 (J. Madison), cited in *Anderson County Quarterly Court at* 878. It is impossible to preserve perfectly theoretical lines of demarcation between the executive, legislative, and judicial branches of government and there is, by necessity, a certain amount of overlap because the three branches of government are interdependent. *Petition of Burson*, 909 S.W. 2d 768 (Tenn. 1995); *see also State v. Mallard*, 40 S.W.3d 473 (Tenn. 2001) (the three branches of government are interdependent).

Determining which agency would most efficiently carry out a particular function implicates both legislative and administrative powers. The statute authorizes the Governor to transfer functions "in the interest of a more economical and efficient state service." The statute, therefore, expresses a policy that the Governor may implement. Further, the statute requires the Governor to transfer functions by executive order, and to file the order with the Secretary of State. The General Assembly remains free to reverse such change by an appropriate statute. This Office has noted in the past that, in exercising authority under this statute, the transfers may not render the statutes creating the department inoperative nor so alter the functions as to abolish a statutorily created department. Op. Tenn. Att'y Gen. 98-041 (February 9, 1998). Under this interpretation, Tenn. Code Ann. § 4-4-102 does not unconstitutionally delegate legislative powers to the Governor in violation of the Separation of Powers Clause.

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