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April 10, 2007

Opinion No. 07-46

Benton County Budget Act

QUESTIONS

The Benton County budgeting process is governed by 1939 Tenn. Priv. Acts Ch. 541, as amended by 1999 Tenn. Priv. Acts Ch. 32 (the "Budget Act").

1. Is the Budget Act in its entirety still valid since general laws provide for the budget system of counties?

2. Under Section 11 of the Budget Act, any Benton County official is personally liable for spending county funds in excess of funds held by the County Trustee to the credit of that official's department. Is this provision constitutional?

3. Under Section 12 of the Budget Act, a Benton County official who authorizes disbursement of funds in excess of those appropriated is liable to prosecution for official misconduct under Tenn. Code Ann. § 39-16-402. Similarly, under Section 13 of the Budget Act, any Benton County official who violates any provision of the Budget Act or fails to perform the duties the Act imposes is liable to prosecution for official misconduct under Tenn. Code Ann. § 39-16-402. Do these provisions violate Article XI, Section 8, of the Tennessee Constitution because they contradict statutes of statewide applicability?

4. Under Section 14 of the Budget Act, appropriations for which no provision was made in the budget as adopted must be approved by a two-thirds vote of the Benton County Commission. Does this provision violate Article XI, Section 8, of the Tennessee Constitution because it contradicts statutes of statewide applicability?

OPINIONS

1. We can find no law of general statewide applicability regarding the county budget process. For this reason, the Budget Act, in its entirety, does not violate Article XI, Section 8, of the Tennessee Constitution. Specific provisions may be invalid to the extent they contravene some other statute of general statewide applicability. This opinion addresses only the specific provisions referred to in Questions 2, 3, and 4.

2. To the extent Section 11 imposes personal liability on members of any county board or governing body, it is unconstitutional because it contradicts Tenn. Code Ann. § 29-20-201 and is not supported by a rational basis. To the extent it applies to other officers of county government, Section 11 of the Budget Act does not appear to contravene any statute of statewide applicability and, in fact, appears to reflect the common law. The latter application of Section 11, therefore, does not violate Article XI, Section 8, of the Tennessee Constitution.

3. To the extent that Sections 12 and 13 provide for prosecution of conduct that was not committed intentionally and knowingly, and with intent to obtain a benefit or to harm another, they appear to contradict Tenn. Code Ann. § 39-16-402 with no rational basis. To that extent, therefore, Sections 12 and 13 violate Article XI, Section 8, of the Tennessee Constitution. Similarly, since they attempt to impose criminal sanctions under a private act subject to local approval, they represent an invalid attempt to delegate legislative authority to the county commission.

4. While this provision is valid, the county commission may also amend its budget through any of the procedures described in Tenn. Code Ann. § 5-9-407. These procedures do not require an amendment to be approved by a two-thirds vote of the county commission.

ANALYSIS

1. Validity of the Budget Act

This opinion concerns the validity of 1939 Tenn. Priv. Acts Ch. 541, as amended by 1999 Tenn. Priv. Acts Ch. 32 (the "Budget Act"). The Budget Act governs adoption and administration of the Benton County budget. The first question is whether the Budget Act as a whole is valid since other statutes now address the county budget process. The only constitutional provision this question implicates is Article XI, Section 8, of the Tennessee Constitution. That section provides in relevant part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

The standards governing the validity of legislative classifications are the same under Article I, Section 8, of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution. *Brown v. Campbell County Board of Education*, 915 S.W.2d 407, 412 (Tenn. 1995), *cert. denied*, 116 S.Ct. 1852 (1996). These provisions guarantee that "all persons similarly circumstanced shall be treated alike." *State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000); *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993), (both quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed.2d 989 (1920)).

In order to trigger application of Article XI, Section 8, a statute must "contravene *some general law which has mandatory statewide application*." *Knox County ex rel. Kessell v. Lenoir City,* 837 S.W.2d 382, 383 (Tenn. 1992); *Leech v. Wayne County,* 588 S.W.2d 270, 273 (Tenn. 1979) (emphasis added). The question is whether the Budget Act as a whole violates Article XI, Section 8, of the Tennessee Constitution because it contradicts a law of statewide applicability governing the county budget process. We have found no such law. Two general county budgeting laws are local option laws and, therefore, apply only to counties that have adopted them. Tenn. Code Ann. §§ 5-12-101, *et seq.*; Tenn. Code Ann. §§ 5-12-201, *et seq.* The County Financial Management System of 1981, which also addresses the county budgeting process, is another local option act. Tenn. Code Ann. §§ 5-21-101, *et seq.* For this reason, the Budget Act, in its entirety, does not violate Article XI, Section 8, of the Tennessee Constitution. Specific provisions may be invalid to the extent they contravene some other statute of general statewide applicability. This opinion will examine only the specific provisions raised below.

2. Liability of County Officials for Unauthorized Payments of County Funds

The second question concerns the constitutionality of Section 11 of the Budget Act. That section states:

> If any official of Benton County who has the power, right or authority to expend county funds from the County Trustee or funds coming into the County Trustee from the State of Tennessee expends any sum in excess of the monies or funds then and there actually in the County Trustee to the credit of his department of the county government or in excess of the budget adopted by the County Legislative Body covering that certain period of time as shown by the budget, such county official making any overdrafts of the County Trustee or commitment in excess of the amount appropriated for the specific purpose for which the expenditure was made by the County Legislative Body of Benton County, shall be personally liable, together with the sureties of his official bonds, to Benton County for such overdraft, and/or the payee of any such warrant for the full amount of such overdraft or over-expenditure, and the county and/or payee of any such warrants, shall have cause of action of debt to recover from such official or officials and their bondsmen, the amount of the overdraft or over-expenditure, with interest from the date of issuance of such warrants.

The only constitutional provision Section 11 implicates is Article XI, Section 8, of the Tennessee Constitution. Under Tenn. Code Ann. § 29-20-201(b)(2), members of boards and other governing bodies are immune from suit arising from the conduct of that body's affairs. The immunity is removed when the conduct amounts to willful, wanton, or gross negligence. *Id.* To the extent Section 11 imposes personal liability on members of any county board or governing body that is inconsistent with the general immunity conferred upon such persons by Tenn. Code Ann. § 29-20-201(b)(2), therefore, Section 11 contradicts a law of general applicability. We are unable to formulate any rational basis for suspending this law in Benton County. For that reason, to the extent

Section 11 imposes personal liability on members of any county board or governing body that is inconsistent with the terms of Tenn. Code Ann. § 29-20-201(b)(2), it is unconstitutional.

Section 11 of the Budget Act, however, by its terms applies to all county officials, not simply to those who are board or commission members. To this extent, Section 11 does not contradict this provision of the general law. Tenn. Code Ann. § 29-20-310(c) provides in relevant part:

> No claim may be brought against an employee or judgment entered against an employee for injury proximately caused by an act or omission of the employee within the scope of the employee's employment for which the governmental entity is immune in any amount in excess of the amounts established for governmental entities in § 29-20-403, unless the act or omission was willful, malicious, criminal, or performed for personal financial gain[.]

Under Tenn. Code Ann. § 29-20-102(2), "employee" includes any official, whether elected or appointed, of a governmental entity. This statute, however, applies to claims for which the county is immune from suit — that is, in which the county and the county employee are potential defendants in an action by an injured third party. Section 11, however, applies to unauthorized expenditures by a county official. In an action under this section, the county would be the plaintiff, not the defendant. For this reason, Section 11 does not appear to contradict Tenn. Code Ann. § 29-20-310(c). We can find no other general law that confers personal immunity on county officials for unauthorized expenditures. A county officer is required to post a performance bond as a condition of taking office. Tenn. Code Ann. §§ 8-9-101, *et seq*. But this statutory scheme does not relieve the officer of personal liability for unauthorized expenditures. Generally, where funds are disbursed illegally by public officers or upon their authority, they are personally liable. 4 McQuillin, *Municipal Corporations* § 12.217 (3d ed. 2007). Thus, to the extent it applies to county officials who are not members of a county board or governing body, Section 11 of the Budget Act does not appear to contradict any statute of statewide applicability and, in fact, appears to reflect the common law.

3. Criminal Liability under Sections 12 and 13

The next question is whether Sections 12 and 13 of the Budget Act providing for criminal prosecution are constitutional. Section 12 of the Budget Act provides:

> It shall be unlawful for any official and/or employee of Benton County, to draw, sign, issue, deliver, or to authorize the drawing, signing, issuance or delivery of any purchase order, warrant, or other commitment during the appropriation year when such warrant, purchase order or other commitment, added to amounts previously expended, shall exceed the appropriation made by the County Legislative Body for the specific purpose for which the expenditure is made. A violation of this Section shall be punished as official misconduct pursuant to § 39-16-402. It shall be mandatory upon the members of the County Legislative Body to determine whether or not warrants or purchase orders, or other commitments have been issued or made

> in violation of the intent of this Act, and if warrants, purchase orders or other commitments are found to have been issued in violation of the intent of this Act, it shall be mandatory upon said Commission or its qualified representative to certify the facts to the District Attorney General for presentation to the Grand Jury at the next term of the Circuit Court, and it shall be the duty of the District Attorney General to present facts to the said Grand Jury and to institute such other proceedings that may be necessary to give full effect to the provisions of this act.

Section 13 of the Budget Act provides:

> It shall be unlawful for any official of the county, including the School Board, the Highway Superintendent, the County Superintendent, the County Executive, the County Clerk, Circuit Court Clerk, the Sheriff, the Trustee, the Register of Deeds, the Clerk and Master, the Property Assessor, or any other official of the county to violate any provision of this Act, to fail or refuse to perform any of the duties placed upon them or any of them by this Act, and any such official, or officials failing to perform the duties imposed by this Act, or otherwise violating this Act, or who procures, aids or abets in violation of any provision of this Act. [sic] Any violation of this Act shall be punished as official misconduct pursuant to § 39-16-402, provided further, that any county official convicted under this Act, shall be subject to removal from office under the ouster laws of the State of Tennessee, and it shall be mandatory upon the County Legislative Body to appropriate the necessary funds for the prosecution of such case.

Sections 12 and 13 both refer to Tenn. Code Ann. § 39-16-402. The statute provides:

> (a) A public servant commits an offense who, *with intent to obtain a benefit or to harm another, intentionally or knowingly*:
>
> (1) Commits an act relating to the servant's office or employment that constitutes an unauthorized exercise of official power;
> (2) Commits an act under color of office or employment that exceeds the servant's official power;
> (3) Refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the public servant's office or employment;
> (4) Violates a law relating to the public servant's office or employment; or
> (5) Receives any benefit not otherwise authorized by law.
>
> (b) For purposes of subdivision (a)(2), a public servant commits an act under color of office or employment who acts or purports to act in an official capacity or takes advantage of the actual or purported capacity.

> (c) It is a defense to prosecution for this offense that the benefit involved was a trivial benefit incidental to personal, professional or business contact, and involved no substantial risk of undermining official impartiality.
>
> (d) An offense under this section is a Class E felony.
>
> (e) Charges for official misconduct may be brought only by indictment, presentment or criminal information; provided, that nothing in this section shall deny a person from pursuing other criminal charges by affidavit of complaint.

(Emphasis added). Arguably, the conduct banned in Sections 12 and 13 of the Budget Act could fall under subdivisions (1) through (4) of subsection (a) of this statute. But subsection (a) imposes criminal penalties only if any of these acts is committed knowingly or intentionally and with intent to obtain a benefit or to harm another. By contrast, Sections 12 and 13 appear to provide for prosecution of any violation, whether or not deliberate, and whether or not with intent to obtain a benefit or to harm another. To the extent that Sections 12 and 13 provide for prosecution of conduct that was not committed intentionally and knowingly, and with intent to obtain a benefit or to harm another, they appear to contradict Tenn. Code Ann. § 39-16-402, the general law on the subject. To this extent, Sections 12 and 13 present two constitutional problems. First, they contradict the general law of the State in violation of Article XI, Section 8. We are unable to formulate any rational basis for singling out Benton County officials for strict criminal liability. *State v. Whitehead,* 43 S.W.3d 921 (Tenn. Crim. App. 2000). Second, Sections 12 and 13 were included in the 1999 private act amendments to the Budget Act. Under Section 3 of the 1999 act, these amendments were subject to the approval of the Benton County Commission. 1999 Tenn. Priv. Acts Ch. 32, § 3. The efficacy of a criminal statute cannot be made to hinge on the outcome of an election or the approval of the county legislative body. *Jones v. Haynes*, 221 Tenn. 50, 424 S.W.2d 197 (Tenn. 1968). To the extent that Sections 12 and 13 criminalize conduct that is not criminal under Tenn. Code Ann. § 39-16-402, they represent an invalid attempt to delegate legislative authority to the county commission.

4. Appropriations Not Included in the Budget

The last question is whether Section 14 of the Budget Act is constitutional. This section provides:

> Appropriations for which no provision was made in the budget as adopted, shall be made only from any surplus resulting from an unappropriated balance of the tax rate, and then only by a two-thirds (2/3) majority vote of the members of the County Legislative Body.

Specifically, the request asks whether Section 14 violates Article XI, Section 8, of the Tennessee Constitution because it contradicts a law of statewide applicability. As discussed in the answer to Question 1, we have found no law of statewide applicability on the county budget process. It appears, however, that Section 14 of the Budget Act is not the exclusive process by which the county

may amend a budget. Tenn. Code Ann. § 5-9-407 sets forth procedures for amending a county budget. Subparagraph (e)(2)(A) states that, "[i]n any county that has a private act or has adopted chapter 12 of this title, this section is *supplemental authority* for an amendment to the budget." (Emphasis added). Thus, in addition to the process described in Section 14 of the Budget Act, the Benton County Commission may also amend its budget through any of the procedures described in Tenn. Code Ann. §5-9-407. These procedures do not require an amendment be approved by a two-thirds vote of the county commission.

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