S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 09-60

Provision by Counties of Cars and Car Allowances to Salaried County Officials

QUESTIONS

1. According to the first sentence of Tenn. Code Ann. § 8-26-113, which counties may provide cars for the use of salaried county officials as set out in Tenn. Code Ann. § 8-26-112?

2. Are there other counties, in addition to those expressly granted such authority and identified in your answer to the first question, that may provide cars for the use of salaried county officials as set out in Tenn. Code Ann. § 8-26-112?

(a) If so, which other counties may provide cars for the use of County Officials and from what source does such express or implied authority come?

3. Does the second sentence of Tenn. Code Ann. § 8-26-113 apply only to Knox County and Dyer County?

(a) If so, may Knox County and Dyer County furnish a car ***and*** provide a car allowance to salaried county officials as set out in Tenn. Code Ann. § 8-26-112?

(b) If not,

(i) Which other counties may provide a monthly car allowance in lieu of furnishing such officer a county car and from what source does such express or implied authority come?

(ii) May these counties furnish a car ***and*** provide a car allowance to salaried county officials?

4. In any county authorized to provide a car allowance to a county officer, may the county authorize a car allowance in one year and then elect not to provide a car allowance in subsequent years?

5. Does the Tennessee Consolidated Retirement System ("TCRS") consider a car allowance as "earn[ed] compensation . . . payable to a member for services rendered to an employer" pursuant to Tenn. Code Ann. § 8-34-101 and, thus, subject to TCRS deduction and county retirement contribution?

6. If a car allowance is authorized for an elected or appointed county official, must it be included as additional "salary" or "earned compensation" for that official and, thus, be subject to FICA and Medicare deductions and required county matching FICA and Medicare contributions?

7. Does Tenn. Code Ann. § 8-24-102(j)(1) require that a county legislative body approve ***by resolution*** any salary/car allowance that increases the existing salary of a county official above the minimum level established for that county official?

OPINIONS

1. The following counties may provide cars for the full-time use of salaried county officials: Bedford, Blount, Dyer, Davidson, Hamilton, Knox, Montgomery, Rutherford, Shelby, Sullivan, Sumner, Washington, and Williamson.

2. Other than Tenn. Code Ann. § 8-26-113 (2002), the Attorney General is aware of no authority permitting counties to provide cars for the full-time use of salaried county officials. Absent the existence of other authority, such as a private act, only those counties authorized under Tenn. Code Ann. § 8-26-113 (2002) may provide cars for the full-time use of salaried county officials.

(a) Other than Tenn. Code Ann. § 8-26-113 (2002), the Attorney General is aware of no authority permitting counties to provide cars for the full-time use of salaried county officials. Accordingly, subpart (a) of the second question is moot.

3. No. The second sentence also applies to Bedford County, which had a population of 30,411 in the 1990 federal census, and thus fell within one of the population brackets described therein. Bedford, Dyer, and Knox Counties may furnish a car to some salaried county officials and provide a car allowance to other salaried county officials. Because the car allowance would be "in lieu of furnishing such officer a county-owned car," the counties may not furnish a salaried county official with both a car and a car allowance at the same time.

4. Yes. A county may authorize a salaried county official to receive a car allowance but then choose not to provide it in subsequent years.

5. A car allowance provided by a county under Tenn. Code Ann. § 8-26-113 (2002) constitutes "earnable compensation" and is subject to TCRS deduction and contribution.

6. In accordance with longstanding policy, this Office is not able to opine on federal tax law, including FICA and Medicare provisions. This Office does not have the power to authoritatively interpret federal laws or regulations relating to FICA and Medicare.

7. Yes. Because the car allowance is compensation, a county legislative body must comply with Tenn. Code Ann. § 8-24-102(j)(1) (Supp. 2008) when authorizing it.

ANALYSIS

1. Pursuant to Tenn. Code Ann. § 8-26-113 (2002), certain counties may provide cars for the full-time "use of the salaried county officials set out in [Tenn. Code Ann.] § 8-26-

112." For a county to do so, it must have a population of at least 100,000 according to the last federal census or a population of 30,400 to 30,500 according to the 1970 federal census or any subsequent federal census. Tenn. Code Ann. § 8-26-113 (2002). According to the 2000 federal census, the following counties have a population of 100,000 or more: Blount, Davidson, Hamilton, Knox, Montgomery, Rutherford, Shelby, Sullivan, Sumner, Washington, and Williamson. Tenn. Code Ann. Vol. 13, 255-56 (Supp. 2008). According to the 1970 federal census, Dyer County had a population of 30,427. Tenn. Code Ann. Vol. 13, 1013 (1995). According to the 1990 federal census, Bedford County had a population of 30,411. Tenn. Code Ann. Vol. 13, 255 (Supp. 2008). These counties may provide cars for the full-time use of salaried county officials.

2. Other than Tenn. Code Ann. § 8-26-113 (2002), the Attorney General is aware of no authority permitting counties to provide cars for the full-time use of salaried county officials. Absent the existence of other authority, such as a private act, only those counties authorized under Tenn. Code Ann. § 8-26-113 (2002) may provide cars for the full-time use of salaried county officials.

(a) Other than Tenn. Code Ann. § 8-26-113 (2002), the Attorney General is aware of no authority permitting counties to provide cars for the full-time use of salaried county officials. Accordingly, subpart (a) of the second question is moot.

3. Pursuant to Tenn. Code Ann. § 8-26-113 (2002), certain counties may provide a monthly car allowance to "any county officer who is authorized by such county legislative body or by a court providing salaries in salary suits of county officers" in lieu of furnishing a car:

> [I]n any county having a population of not less than two hundred seventy-six thousand (276,000) nor more than two hundred seventy-seven thousand (277,000) or any county having a population of not less than thirty thousand four hundred (30,400) nor more than thirty thousand five hundred (30,500) according to the 1970 federal census or any subsequent federal census, any county officer who is authorized by such county legislative body or by a court providing salaries in salary suits of county officers may receive a monthly car allowance in lieu of furnishing such officer a county-owned car.

The counties that fall within these population brackets are (i) Knox County, which had a population of 276,293 in the 1970 federal census, (ii) Dyer County, which had a population of 30,427 in the 1970 federal census, and (iii) Bedford County, which had a population of 30,411 in the 1990 census. Tenn. Code Ann. Vol. 13, 1013-14 (1995). Tenn. Code Ann. Vol. 13, 255 (Supp. 2008). Thus, only Knox County, Dyer County, and Bedford County may provide a monthly car allowance to salaried county officials under Tenn. Code Ann. § 8-26-113 (2002).

The second sentence of Tenn. Code Ann. § 8-26-113 (2002) sets forth which county officers may receive a monthly car allowance:

> [A]ny county officer who is authorized by such county legislative body or by a court providing salaries in salary suits of county

> officers may receive a monthly car allowance in lieu of furnishing such officer a county-owned car.

Based on the statute's language, there is no limitation on the ability of a county authorized to provide a car allowance to furnish a car to some salaried county officials while providing other salaried county officials with a monthly car allowance. Thus, such a county may either furnish a car or provide a car allowance to its salaried county officials. Of course, because the car allowance would be "in lieu of furnishing such officer a county-owned car[,]" such a county may not furnish a salaried county official with both a car and a car allowance at the same time. *Id.*

4. Pursuant to Tenn. Code Ann. § 8-26-113 (2002) (emphasis added), "any county officer who is authorized by such a county legislative body . . . ***may*** receive a monthly car allowance." The use of the word "may" instead of "shall" suggests that a county may authorize a salaried county official to receive a car allowance but then elect not to provide it in subsequent years. Thus, a county may provide a salaried county official with a car allowance in one year and then discontinue it in subsequent years.

5. As stated in Tenn. Code Ann. §§ 8-34-201 and -202 (2002), the General Assembly established the TCRS "for the purpose of providing retirement allowances and other benefits" to state employees. Pursuant to Tenn. Code Ann. § 8-35-116(a) and (b) (Supp. 2008), certain county officials may become members of the TCRS. Contributions to the TCRS are based on the "earnable compensation" of the official. Tenn. Code Ann. § 8-35-116 (Supp. 2008), § 8-35-206(a)(1) (Supp. 2008), and § 8-37-302 (2002). "Earnable compensation" is defined as "the compensation payable to a member for services rendered to an employer." Tenn. Code Ann. § 8-34-101(14)(A) (Supp. 2008).

The provision of a car allowance under Tenn. Code Ann. § 8-26-113 (2002) is earnable compensation. Unlike amounts received by salaried county officials under Tenn. Code Ann. § 8-26-112 (2002), the car allowance is not for the reimbursement of expenses or otherwise tied to actual expenses incurred by such officials as part of the performance of their duties. Tenn. Code Ann. § 8-26-113 (2002) does not limit the use of the car, or the car allowance, to official duties only. Furthermore, the General Assembly defined earnable compensation to include "any non-cash compensation falling under Internal Revenue Service Regulation Section 1.61-2T(d) as such section exists on July 17, 2002." Tenn. Code Ann. § 8-34-101(14)(B)(ii) (Supp. 2008). Temp. Treas. Reg. § 1.61-2T(d) (as amended in 1992) determines the value of an automobile provided by an employer to an employee for the federal income taxation of fringe benefits. If earnable compensation includes the "non-cash compensation" of a car, a car allowance—which is cash compensation in lieu of a car—must constitute earnable compensation as well.

6. In accordance with longstanding policy, this Office is not able to opine on federal tax law, including FICA and Medicare provisions. This Office does not have the power to authoritatively interpret federal laws or regulations relating to FICA and Medicare.

7. The General Assembly has established the minimum compensation to be paid to certain county officers based on the population of that officer's county. Tenn. Code Ann. § 8-24-102(b) (Supp. 2008). For example, "general officers" in a county with a population of 250,000 to 274,999 shall receive at least $77,805 per year while those in a county with a

population of less than 11,999 shall receive at least $39,305 per year. *Id*. Pursuant to Tenn. Code Ann. § 8-24-102 (Supp. 2008),

> (i) The county legislative body of each county may increase or decrease compensation of county officials so long as the compensation is maintained at, or above, the minimum levels established herein.
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> (j)(1) Any action by a county legislative body to exceed the minimum level of compensation for county officials established pursuant to this section must be included in a resolution scheduled for consideration on the agenda of the meeting. All meetings of the county legislative body shall comply with the requirements of the open meetings act contained in title 8, chapter 44, part 1.

As discussed in response to the fifth question, the car allowance constitutes earnable compensation. Because the car allowance constitutes "compensation payable to a member for services rendered to an employer," Tenn. Code Ann. § 8-34-101(14)(A) (Supp. 2008), it necessarily follows that the car allowance is compensation. Thus, a county legislative body must comply with Tenn. Code Ann. § 8-24-102(j)(1) (Supp. 2008) when authorizing the car allowance.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

NICHOLAS G. BARCA
Assistant Attorney General

Requested by:
The Honorable Stacey Campfield
State Representative
113 War Memorial Building
Nashville, Tennessee 37243