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Opinion No. 10-35

Performance Audit of the State Trial Courts for the 20th Judicial District

QUESTIONS

1. Does the Metropolitan Government of Nashville and Davidson County ("Metro") have the authority to conduct a performance audit of the State Trial Courts for Davidson County as described in Metro's Request for Proposal 10-02 ("RFP"), as amended February 2, 2010?

2. May the audit, if authorized, include state employees paid solely or partially by the State of Tennessee?

3. If Metro is authorized to conduct the audit, are there any limitations to that authority because of the separation of powers clause of the Tennessee Constitution?

4. Is the RFP, as written, so overbroad in the scope and nature of the performance audit as would require its withdrawal, with a new RFP being issued within any legal restrictions that may be identified in your opinion to questions 1-3?

5. What, if any, effect would there be on the legal opinions issued above if the findings and recommendations resulting from the RFP were advisory only and, therefore, non-binding on the trial court operations?

OPINIONS

1. Metro has the authority to conduct a performance audit of the physical space that Metro provides to the trial courts, programs that Metro funds or partially funds for the trial courts, and the personnel whom Metro funds or partially funds to administer the trial courts and their programs. If a trial court official or employee is not funded by Metro and is not performing an activity associated with a function or program funded by Metro, we believe that Metro would be without authority to conduct a performance audit in this instance.

2. If a trial court official or employee is paid by the State (solely or partially, as long as the other source of compensation is not Metro) and the official or employee is not performing an activity associated with a function or program funded by Metro, we believe that Metro would be without authority to conduct a performance audit in this instance. Thus, for example, we think Metro lacks authority to conduct an evaluation of the operating effectiveness of the core functions performed by trial court judges, who are elected state officials. To the extent the trial

court judges supervise personnel or programs that are funded, in whole or in part, by Metro, we think that Metro may conduct a performance audit with respect to these personnel and programs, subject to the constraints of the separation of powers clause. If a trial court official or employee is paid partially by the State, but also paid partially by Metro, the audit may include those officials and employees, again subject to the constraints of the separation of powers clause.

3. The proposed performance audit, at least on its face, appears to be administrative in nature and, therefore, not constitutionally impermissible. With that said, if the performance audit of those programs and personnel funded by Metro that are supervised by the trial court judges were to be implemented in such a manner that frustrated or interfered with the adjudicatory function of the trial court judges, such an implementation would be constitutionally impermissible. Moreover, even if the proposed performance audit is implemented in a purely administrative manner, the trial courts' inherent powers may be invoked to prevent an aspect of the audit upon a showing of reasonable necessity by clear, cogent, and convincing proof.

4. Withdrawal of the RFP, in light of this opinion, appears to be a policy or business decision of Metro to be made in consultation with its legal advisors.

5. Our analysis as to Metro's authority to conduct the performance audit is not affected by whether the findings and recommendations resulting from the audit are advisory only and, therefore, non-binding on the trial court operations. But, we do believe that the trial courts' ability to successfully invoke their inherent authority to prevent an aspect of the audit would be affected. If the findings and recommendations of the performance audit are advisory and non-binding, a showing of reasonable necessity by clear, cogent, and convincing proof would be more difficult to demonstrate.

ANALYSIS

This opinion concerns a performance audit of the Trial Courts for the 20th Judicial District as set forth in RFP 10-02 issued by Metro as amended February 2, 2010. The RFP proposes an audit to "include analysis of Criminal Courts (6 judges), Circuit Courts (8 judges) and Chancery Courts (4 judges) as well as the following additional functions that are part of the Trial Courts: Probation, Community Corrections (felony offender diversion program), Drug Court (outpatient and inpatient treatment), Forensic Drug Testing Unit, Jury Duty and Parenting Education Program." RFP at pg. D-4. The RFP states that the performance audit "will use established criteria as a basis for conducting objective analysis in order to make recommendations to improve performance, reduce costs, facilitate decision making and contribute to public accountability. The final product will consist of an audit report that details all criteria used, analysis performed and includes the recommendations referred to above." *Id.* The scope of services of the proposed audit includes the following requirements:

> Evaluate the overall organizational design structure of the Trial Courts with respect to best practices and operational effectiveness.
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> Compare the Criminal Courts, Circuit Courts and Chancery Courts operations to best practices, peer organizations and established criteria.

> For each significant area of operations of the Trial Courts, determine how employee performance and efficiency is monitored.
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> For each significant area of operations of the Trial Courts, determine whether staffing levels are appropriate or should be adjusted when compared to best practices, peer organizations and established criteria.
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> For the Criminal Courts, Circuit Courts and Chancery Courts, evaluate the operating effectiveness and costs of providing all significant functions and compare to best practices, peer organizations and established criteria.
>
> Identify strengths and weaknesses of all operational areas of the Trial Courts and describe significant contributing factors.
>
> Identify any instances noted of non-compliance with laws and regulations, fraud and illegal acts in the Trial Courts.

RFP at pp. D-4 & D-5. Metro amended the RFP on February 2, 2010, to include questions from prospective bidders and Metro's responses. This document clarifies that the Criminal Court Clerk, Circuit Court Clerk, and Clerk and Master are not included in the audit. The performance audit is to be conducted by an external contractor who would be required to follow the Field Work Standards for Performance Audits as outlined by *Government Auditing Standards*, July 2007 Revision, which is issued by the Comptroller General of the United States. RFP at pp. D-5 & D-6. According to these standards, "[p]erformance audits provide objective analysis so that management and those charged with governance and oversight can use the information to improve program performance and operations, reduce costs, facilitate decision making by parties with responsibility to oversee and initiate corrective action, and contribute to public accountability." RFP at pg. D-5.

The trial judges for the 20th Judicial District have adopted a resolution that stays the performance audit but agrees to cooperate with a financial audit of the following:

> Policies, procedures and overall control environment related to expenditures made by the State Trial Courts.
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> Policies, procedures and overall control environment related [to] the payroll cycle at the State Trial Courts.
>
> Policies, procedure[s], control environment and contractual compliance with any grant contracts received and administered by the State Trial Courts.

Resolution; Entrance Conference Agenda dated February 11, 2010, at pg. 1. The RFP indicates that Metro budgeted approximately $9.8 million to support the State Trial Courts in fiscal year 2009-2010, and this figure appears to include 172 budgeted personnel positions. RFP at pg. D-7. The trial judges' resolution states they will "cooperate fully and completely in providing

necessary books, records and information for the Fiscal Audit." But the trial judges and Metro have agreed the performance audit will not proceed pending issuance of this opinion.

The threshold question is whether Metro is authorized to conduct the proposed performance audit. It is well established in Tennessee that cities and counties have only those powers expressly granted by or necessarily implied from state statutes. *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988); *Bayless v. Knox County*, 199 Tenn. 268, 286 S.W.2d 579, 585 (Tenn. 1956). A metropolitan government is no different in this regard. *Entertainer 118 v. Metropolitan Sexually Oriented Bus. Licensing Bd.*, 2009 WL 2486195*2 (Tenn. Ct. App.) (citing *Haines v. Metropolitan Gov't of Davidson County*, 32 F.Supp.2d 991, 994 (M.D. Tenn. 1998)). Article XI, Section 9, of the Tennessee Constitution authorizes consolidated local governments like Metro, but this constitutional provision is not self-executing and requires implementing legislative enactments. *Frazer v. Carr*, 210 Tenn. 565, 360 S.W.2d 449 (Tenn. 1962). Accordingly, pursuant to the authority granted by Article XI, Section 9, the legislature enacted the statutes governing the consolidation of county and city governments; these statutes are codified at Tenn. Code Ann. §§ 7-1-101, *et seq*. The sources of authority for consolidated governments are set forth in Tenn. Code Ann. § 7-1-102(c):

> After consolidation of a county and a municipal corporation or corporations under § 7-1-103, no functions of the governing bodies of the county and the municipal corporation, or of the officers thereof, shall be retained and continued, unless chapters 1-3 of this title or the charter of the metropolitan government expressly so provide, or unless such retention and continuation are required by the Constitution of Tennessee. After the consolidation, no officer or agency of the county or of the municipal corporation shall retain any right, power, duty or obligation, unless chapters 1-3 of this title or the charter of the metropolitan government expressly so provide, or unless such retention and continuation are required by the Constitution of Tennessee.

Thus, Metro's sources of authority are the Tennessee Constitution, chapters 1-3 of Title 7 of the Tennessee Code (and any subsequent legislative acts applying to Metro), and prior functions of the city and county retained by the Metro Charter. *Entertainer 118*, 2009 WL 2486195*3. In considering these sources of authority, we particularly note that Metro's authority includes any and all powers that cities and counties are authorized or required to exercise under the Constitution and general laws of this state. *See* Tenn. Code Ann. § 7-2-108(a)(1).

Having identified the sources of Metro's authority, we address whether these sources provide Metro with express or implied authority to conduct a performance audit of the resources that Metro provides to the trial courts in Davidson County. These resources include the physical space that Metro provides to the trial courts, programs that Metro funds or partially funds for the trial courts, and the personnel whom Metro funds or partially funds to administer the trial courts and their programs.

With respect to the physical space that Metro provides to the trial courts, Tenn. Code Ann. § 7-3-101 provides:

> Any metropolitan government created and established pursuant to chapters 1-3 of this title shall acquire and succeed to all rights, obligations, duties and privileges of the county and of the cities consolidating; and, without the necessity or formality of deed, bill of sale or other instrument of transfer, the metropolitan government shall be and become the owner of all property previously belonging to the county and cities.

In considering the "rights, obligations, duties and privileges of the county" that Metro "acquire[s] and succeed[s] to" by virtue of Tenn. Code Ann. § 7-3-101, we initially observe that county buildings, including the courthouse, are to be erected and kept in order and repair, at the expense of the county, under the direction of the county legislative body. Tenn. Code Ann. § 5-7-106; *Driver v. Thompson*, 49 Tenn. App. 646, 358 S.W.2d 477 (1956). Further, we note that Tenn. Code Ann. § 5-7-101 provides:

> Each county may acquire and hold property for county purposes, and make all contracts necessary or expedient for the management, control and improvement thereof, and for the better exercise of its civil and political powers, and may make any order for the disposition of its property.

In light of these provisions, we think that Metro clearly has authority to issue an RFP for a performance audit of the trial courts of the 20th Judicial District to the extent that the audit considers the functioning of the physical space that Metro provides to the trial courts, because the resulting contract would be "necessary or expedient for the management, control and improvement" of its property and "for the better exercise of [Metro's] civil and political powers." *See* Tenn. Code Ann. § 5-7-101.

We also think Metro has authority to conduct a performance audit of the programs that Metro funds or partially funds for the trial courts for the 20th Judicial District. A municipality is expressly authorized to expend money of the municipality for lawful purposes. Tenn. Code Ann. § 6-2-201(7). Similarly, a county is expressly authorized to expend money of the county for lawful purposes. *See* Tenn. Code Ann. § 5-1-118(a)(1). By virtue of Tenn. Code Ann. § 7-2-108(a)(1), Metro is likewise authorized to expend money of Metro for lawful purposes. We think that a performance audit that examines the trial court programs and functions that Metro funds or partially funds is consistent with its obligation to expend money for lawful purposes. *See Board of Educ. of Memphis City Schs. v. Shelby County*, 207 Tenn. 330, 359, 339 S.W.2d 569 (1960) ("[I]t [is] the plain duty of any [school] board to exercise every legal means for the protection and preservation of funds that may belong to the school system it operates."); *Wadsworth v. Board of Sup'rs of Livingston County*, 124 N.Y.S. 334 (1910) (county possesses inherent authority to perform acts to preserve or benefit the corporate property of the county entrusted to it).

Finally, we think Metro has authority to conduct a performance audit of personnel whom Metro funds or partially funds to administer the trial courts and their programs. The Tennessee Supreme Court has stated that "a municipality has the inherent authority to investigate the activities of its several departments and employees." *Leahy v. City of Knoxville*, 193 Tenn. 242, 245, 245 S.W.2d 772 (1945). We note that private actions of employees were at issue in *Leahy*;

thus, a performance audit of personnel whom Metro funds or partially funds to administer the trial courts and their programs certainly appears to fall within Metro's authority. *See* 20 C.J.S. Counties § 224 (2009) (county has inherent authority to deny the use of county property to any county officer if such county property is used by the officer in a wasteful, negligent, or ineffective manner).

In sum, we think Metro has the authority to conduct a performance audit of the physical space that Metro provides to the trial courts, programs that Metro funds or partially funds for the trial courts, and the personnel whom Metro funds or partially funds to administer the trial courts and their programs. We recognize that certain trial court positions are not funded, in whole or in part, by Metro. If a trial court official or employee is not funded by Metro and is not performing an activity associated with a function or program funded by Metro, we believe that Metro would be without authority to conduct a performance audit in this instance. For example, we think Metro lacks authority to conduct an evaluation of the operating effectiveness of the core functions performed by trial court judges, who are elected state officials.[1] To the extent the trial court judges supervise personnel or programs that are funded, in whole or in part, by Metro, we think that Metro may conduct a performance audit with respect to these personnel and programs, if the performance audit of such personnel or programs does not frustrate or interfere with the adjudicative function of the courts, as explained below.

The Tennessee Constitution, Article II, Section 1, states that "[t]he powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial,"[2] 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." The Constitution does not define in express terms what are legislative, executive, or judicial powers, but the Tennessee Supreme Court has said that 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. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975); *Richardson v. Young*, 125 S.W. 664, 668 (Tenn. 1909).

On several occasions, the Tennessee Supreme Court has observed that the three branches of government are interdependent. *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001); *Petition of Burson*, 909 S.W.2d 768, 774 (Tenn. 1995); *Underwood*, 529 S.W.2d at 47; *Richardson*, 125 S.W. at 668.

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[1] While the trial court judges of the 20th Judicial District are elected by the voters of Davidson County, it is well established that circuit judges and chancellors, no matter where elected or by whom, are officers for the state at large, and not merely for their own circuits or divisions. *McCulley v. State*, 102 Tenn. 509, 53 S.W. 134 (1899); *see Mid-South Milling Co., Inc. v. Loret Farms, Inc.*, 521 S.W.2d 586, 590 (Tenn. 1975) (Tennessee has only one circuit court); *Metropolitan Dev. and Hous. Agency v. Brown Stove Works, Inc.*, 637 S.W.2d 876, 879 (Tenn. Ct. App. 1982) (Tennessee has only one chancery court).

[2] These three departments or functions are recognized by local governments, as well. *See Lotspeich v. Mayor and Alderman of Town of Morristown*, 141 Tenn. 113, 119-122, 207 S.W. 719, 721 (1918); *Johnson v. Brice*, 112 Tenn. 59, 69-70, 83 S.W. 791, 793-94 (1903).

> Despite the clear expression of the separation of powers doctrine in Article II and elsewhere, however, "it is impossible to preserve perfectly the 'theoretical lines of demarcation between the executive, legislative and judicial branches of government.' Indeed there is, by necessity, a certain amount of overlap because the three branches of government are interdependent."

Mallard, 40 S.W.3d at 481 (quoting *Petition of Burson*, 909 S.W.2d 768, 774 (Tenn. 1995)); *see also Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875, 878 (Tenn. Ct. App. 1978): ("[U]nless ... [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, as essential to a free government, can never in practice be duly maintained.") (citation omitted).

Accordingly, the Tennessee Supreme Court has found that there must be a frustration or interference with the adjudicative function of the courts for there to be an impermissible encroachment on the judicial branch. For instance, the Court found in *Mallard* that an evidentiary statute unconstitutionally encroached on the authority of the judiciary to control court practice and procedure. The Court observed that the judiciary's inherent power includes the power to hear facts, decide issues of fact made by the pleadings, and to decide questions of law. As an essential corollary to this observation, the Court further stated that any determination of what evidence is relevant to a fact in litigation is a power that is entrusted solely to the care and exercise of the judiciary. Consequently, the Court concluded that any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of the government and no such measure can be permitted to stand. *Mallard*, 40 S.W.3d at 483.

In contrast to *Mallard*, the Court in *Underwood* found that a statute permitting one who has successfully defended a criminal charge to have all public records of the case expunged upon filing a petition is not a violation of the separation of powers doctrine. The Court observed that the making and keeping of records of court proceedings requires the cooperative action of the judicial, the legislative, and the executive branches of the government. The Court determined that the statute was not unconstitutional because it did not frustrate or interfere with the adjudicative function of the court. The Court found the instant statute to be "no less administrative nor any more encroaching than dozens of other record regulating statutes found throughout the Code." *Underwood*, 529 S.W.2d at 47.

While *Mallard* and *Underwood* addressed legislative encroachment upon the judicial branch, as opposed to executive encroachment upon the judicial branch, these cases are instructive here. Administrative governmental actions, as opposed to those that impinge on court practice and procedure, generally do not frustrate or interfere with the adjudicatory function of the courts and therefore are constitutionally permissible. *See Mallard*, 40 S.W.3d at 483; *Underwood*, 529 S.W.2d at 47. With that said, the court in *Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875 (Tenn. Ct. App. 1978) recognized that courts do have inherent powers included within the scope of their jurisdiction that include the administration of the courts. As the court observed, these inherent powers have been invoked to support a court's authority to determine the necessity and choice of court employees, to mandate

modernizing, remodeling and air conditioning of a courthouse, and in some instances to control courthouse space. *Id*. at 879. Thus, there are occasions when the courts' inherent powers may be successfully invoked where the administration of the court is concerned. But, the use of inherent powers is limited by the requirement that the court asserting the power must establish reasonable necessity by "clear, cogent and convincing proof." *Id*. at 881.

The RFP for the proposed performance audit, at least on its face, appears to be administrative in nature and, therefore, not constitutionally impermissible. If the performance audit of those programs and personnel funded by Metro that are supervised by the trial court judges were to be implemented in such a manner that did frustrate or interfere with the adjudicatory function of the trial court judges, such an implementation would be constitutionally impermissible. Moreover, even if the proposed performance audit is implemented in a purely administrative manner, the trial courts' inherent powers may be invoked to prevent an aspect of the audit upon a showing of reasonable necessity by clear, cogent, and convincing proof. Whether this showing could be made would be influenced by whether the findings and recommendations of the performance audit are advisory and non-binding. If they are, a showing of reasonable necessity by clear, cogent, and convincing proof would be more difficult to demonstrate.

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