STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 10-112

Impairment of Judicial Compensation

QUESTIONS

1. If the language "without impairment of compensation" were removed from Tenn. Code Ann. § 17-5-301(f)(1), would the Tennessee Court of the Judiciary have the authority to order the offending judge to repay the jurisdiction that is required to pay for a substitute judge, contingent upon appropriate legislation being passed?

2. If Tenn. Code Ann. § 17-5-301 were amended to give the Court of the Judiciary the authority to assess a fine up to $25,000, would such an amendment be constitutional?

OPINIONS

1. No. Legislation giving the Tennessee Court of the Judiciary the authority to order repayment by the offending judge would be unconstitutional. The legislation would violate Article VI, Section 7, of the Tennessee Constitution because, as a result of such legislation, judicial compensation would not "be ascertained by law." The present "without impairment of compensation" language merely effectuates what the Constitution requires in any event.

2. No. Legislation giving the Tennessee Court of the Judiciary the authority to assess a fine of up to $25,000 relating to the performance of a judge would not violate the fifty dollar fine provision of Article VI, Section 14, of the Tennessee Constitution. Nevertheless, it would be unconstitutional because it would violate Article VI, Section 7, by causing judicial compensation not to "be ascertained by law."

ANALYSIS

1. Pursuant to Tenn. Code Ann. §§ 17-5-101 et seq., the General Assembly created the Tennessee Court of the Judiciary for the purpose of reviewing the fitness, performance, and conduct of Tennessee judges. The Court of the Judiciary has "broad powers to investigate, hear and determine charges sufficient to warrant discipline or removal" of judges. Tenn. Code Ann. § 17-5-301(a) (2009). It has the power to impose sanctions against judges, such as "[s]uspension without impairment of compensation for such period as the court determines" and "[e]ntry of judgment recommending removal of the judge from office." Tenn. Code Ann. § 17-5-301(f)(1) and (6) (2009). However, "[n]o sanction imposed by the court shall violate the

prohibition of" Article VI, Section 7, of the Tennessee Constitution, which concerns judicial compensation. Tenn. Code Ann. § 17-5-301(h) (2009). Article VI, Section 7, provides that "[t]he Judges of the Supreme or Inferior Courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected."

If the Court of the Judiciary imposes sanctions against a judge, the judge may appeal to the Tennessee Supreme Court. Tenn. Code Ann. § 17-5-310(a) (2009). If the Court affirms the decision of the Court of the Judiciary and that decision does not include a sanction recommending removal, the decision is final. Tenn. Code Ann. § 17-5-311(a) (2009). If the affirmed decision includes a recommendation of removal, "the question of removal shall be transmitted to the general assembly for final determination." *Id*.

The legislation proposed in the first question would remove the phrase "without impairment of compensation" from Tenn. Code Ann. § 17-5-301(f)(1) and authorize the Court of the Judiciary to require a suspended judge to repay to his or her jurisdiction an amount equal to the cost of the substitute judge hired by the jurisdiction during the suspension. The hypothetical legislation would not delete Tenn. Code Ann. § 17-5-301(h). More importantly, Article VI, Section 7, of the Constitution would remain unchanged. Thus, even though the "without impairment of compensation" language would be deleted, the authorization requiring repayment by a suspended judge would be invalid if it violates Article VI, Section 7. With regard to this opinion, it is assumed that the proposed legislation would take effect at the start of the next judicial term and apply to all judges, so that the uncertainty surrounding the "term versus time" debate concerning Article VI, Section 7, would not be an issue. *See* Op. Tenn. Att'y Gen. 05-090 (May 25, 2005).

Tennessee Supreme Court decisions demonstrate two ways in which legislation may violate Article VI, Section 7. First, legislation is unconstitutional if it results in judicial compensation not being ascertained or fixed. *Burch v. Baxter*, 59 Tenn. 601 (1873); *Pickard v. Henderson*, 83 Tenn. 430 (1885). In *Burch*, the statute in question required the pay of a substitute judge to be deducted from the compensation of a regular judge who "fails to attend, or if in attendance, can not properly preside in a case." *Burch*, 59 Tenn. at 601. The Court held that the statute was unconstitutional because the judge's "salary was not ascertained: it depended upon the Judge's subsequent good fortune and other uncertain events." *Id*. at 604. The Court limited its decision to the circumstances of that case, which concerned a judge who had fallen ill, noting that there was no need to "express an opinion whether the case would be different if the Judge had been willfully in default." *Id*. at 605. In *Pickard*, the Court held that a statute authorizing payment of a special judge out of the compensation otherwise due to the regular judge but only upon the consent of the regular judge did not violate Article VI, Section 7. *Pickard*, 83 Tenn. at 433.

Second, a statute is unconstitutional if it undermines the purpose of Article VI, Section 7, which is to maintain "judicial independence from legislative action to punish or reward judges for decisions that produce a favorable or unfavorable reaction." *Overton County v. State ex rel. Hale*, 588 S.W.2d 282, 288 (Tenn. 1979). Thus, if legislation enacted before the judicial term may result in a salary adjustment during a judicial term, the amount of the adjustment must be

beyond the control of the General Assembly. A statute that provided for annual salary adjustments based upon increases in the consumer price index did not violate Article VI, Section 7, because the General Assembly had "no power over the amount of the index change and thus no power over the will of judges." *Overton County*, 588 S.W.2d at 289.[1] The Court also held that tying judicial compensation to the index did not cause the compensation to be unascertained or unfixed.

> The theory behind hinging an annual change in salary to the consumer price index is that the index accurately measures the change in purchasing price of the dollar, with the result that by "indexing" judicial salaries, the "compensation" remains constant. That theory has a solid foundation in fact.

Id.

In discussing these cases, this Office opined that "to be „ascertained by law' merely means that the compensation is either expressly set by statute or capable of being computed pursuant to an objective statutory scheme." Op. Tenn. Att'y Gen. 93-30, at 2 (Apr. 2, 1993). Under the proposed legislation, compensation would not fall within either category. During the judicial term, the compensation could be reduced in an unknown amount based on uncertain events, such as the future conduct of a judge, the Court of the Judiciary's review of such conduct, the decision to suspend the judge and require repayment, the severity of the suspension and repayment, and the Tennessee Supreme Court's affirmation or denial of such sanctions. That the sanctions would be imposed only as a result of a finding of judicial misconduct, as opposed to illness, does not make the compensation any more ascertainable than the compensation in *Burch*, nor does it constitute a waiver of Article VI, Section 7, similar to the one that a judge was permitted to make in *Pickard*. Finally, compensation under the proposed legislation would not "remain[] constant" as in *Overton County*. Accordingly, the proposed legislation would be unconstitutional.

2. Legislation authorizing fines must not violate Article VI, Section 14, of the Tennessee Constitution, which prohibits the imposition of a fine in excess of fifty dollars against a person "unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars." Although the proposed legislation would authorize the assessment of fines of up to $25,000, it does not violate the fifty dollar fines provision. Article VI, Section 14, "applies only to the judiciary and not to the government as a whole." *Dickson v. State*, 116 S.W.3d 738, 742 (Tenn. Ct. App. 2003). While styled a "court," the Court of the Judiciary is actually not a court. Rather, it is an administrative and investigative agency that assists in ensuring proper conduct and discipline of judges. Indeed, this is readily apparent because the members[2] of the Court of the Judiciary are not

[1] Following that reasoning, this Office opined that a statute providing for an increase in judges' salaries due to a change in the population of their jurisdictions—and, thus, the judicial classification of their counties—as a result of a federal census would not violate Article VI, Section 7, because the General Assembly had "no power over the amount of change in the population of a county." Op. Tenn. Att'y Gen. 00-123, at 3 (Aug. 4, 2000).

[2] Tellingly, the sixteen members of the Court of the Judiciary are not styled as "judges." Tenn. Code Ann. § 17-5-201(a), (d), and (e) (2009).

elected to that position by the public and do not serve eight-year terms, as required of all judges of inferior courts by Article VI, Section 4, of the Tennessee Constitution. *See* Tenn. Code Ann. § 17-5-201(a) and (d) (2009). In 1987, the Tennessee Supreme Court considered this precise issue and held that the Court of the Judiciary

> is not a circuit or chancery court or "other inferior court" and it is not "assigned" any "district" in this state. *It is clearly and completely outside the state court system as established by Article VI, of the Constitution* and legislative action from time-to-time throughout our history. It is nothing more than an investigative body, limited in jurisdiction to the investigation of judges' conduct and the issuance of sanctions that do not affect the status of the office, *impose a fine*, or impair his or her liberty.

In re Murphy, 726 S.W.2d 509, 514-15 (Tenn. 1987) (emphasis added). Because Article VI, Section 14, does not apply to administrative agencies, *Dickson*, 116 S.W.3d at 741-42, and the Court of the Judiciary is an administrative agency and not a "court," *In re Murphy*, 726 S.W.2d at 514-15, the fifty dollar fines provision does not apply to the Court of the Judiciary and would not be violated by the proposed legislation.

Nevertheless, just as legislation giving the Court of the Judiciary the authority to order repayment by a judge of expenses resulting from his or her suspension would violate the judicial compensation provision of Article VI, Section 7, so would legislation giving the Court of the Judiciary the authority to assess a fine of up to $25,000. In both instances, judicial compensation would not be ascertained by law. Because the fine would relate to the judge's performance it would affect the judge's compensation. Similar to the repayment provision discussed in the first question, the fine would be in an unknown amount and based on uncertain events during the judicial term. Accordingly, such legislation would be unconstitutional.

ROBERT E. COOPER, JR.
Attorney General and Reporter

BARRY TURNER
Deputy Attorney General

NICHOLAS G. BARCA
Assistant Attorney General

Requested by:

The Honorable Don R. Ash
Presiding Judge
Tennessee Court of the Judiciary
511 Union Street, Suite 600
Nashville, Tennessee 37243-067