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OFFICE OF THE
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Opinion No. 05-090

Payment of Judges' Professional Privilege Tax by the Judicial Branch

QUESTIONS

1. May the judicial branch pay the professional privilege tax on behalf of elected judges effective September 1, 2006 (the beginning of the next eight-year term)?
2. May the judicial branch pay the professional privilege tax due on June 1, 2005, on behalf of judges who have been appointed to office since Tenn. Code Ann. § 67-4-1709(a) was amended in 2003?

OPINIONS

1. No. Under current law, the judicial branch may not decide to pay the professional privilege tax for any judges. Payment of this tax would be considered compensation, and under the Constitution, all judicial compensation must be "ascertained by law," a power possessed only by the legislature and not constitutionally delegable to another body, such as the judicial branch.
2. No, it may not, for the reasons stated above.

ANALYSIS

Article VI, Section 7, of the Tennessee Constitution provides in relevant part:

The 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.

As stated in the instant opinion request, this Office has previously concluded that "[p]ayment of the Professional Privilege Tax on behalf of the judges would constitute an increase in their compensation and violate Article VI, Section 7 of the Tennessee Constitution." Op. Tenn. Att'y Gen. No. 03-081 (June 25, 2003). Additionally, this Office opined that "[b]ecause judges maintain active law licenses, they are subject to the Professional Privilege Tax." *Id.*

Tenn. Code Ann. § 67-4-1709 provides that “[a]ny employer, including any governmental entity, may choose to remit the tax imposed by this part [that is, the professional privilege tax] on behalf of persons subject to the tax who are employed by the employer.” This statute would be ineffective, of course, to the extent that it violates the state constitution, if at all.

The essential requirement of Article VI, Section 7, for purposes of this opinion is 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.*” (emphasis supplied). The Tennessee Supreme Court has interpreted this requirement to mean that “[t]he law ascertaining this compensation must be enacted by the legislature, the only law-making power. This law-making power cannot be delegated to any other body.” *Shelby County v. Judges*, 3 Shannon’s Cases 508, 511 (Tenn. 1875). This case was quoted at length on this point with approval by the Court in *Colbert v. Bond*, 110 Tenn. 370 (1903). More recently, the Court has enunciated the same principle for county judges. See *Franks v. State*, 772 S.W.2d 428 (Tenn. 1989). The Franks case arose in the context “of a statutory provision authorizing certain county legislative bodies to provide additional compensation to general sessions judges for also serving as the juvenile court judge.” *Franks* at 429. The Court found this portion of the statute unconstitutional under Article VI, Section 7.

Therefore, because payment of the professional privilege tax on behalf of judges would constitute compensation, such payment must be “ascertained by law” under Article VI, Section 7, as with all other compensation provided for judges. Tenn. Code Ann. § 67-4-1709, however, makes payment of the tax for governmental employees optional. Should they decide to pay the tax on the judges’ behalf, administrators of the judicial branch would be deciding to increase judicial compensation. Such a method of determining judicial compensation is not contemplated by the Constitution. According to *Shelby County v. Judges*, such a law must be enacted by the legislature and the power to enact it is not delegable. Therefore, the state constitution prohibits the judicial branch from undertaking to increase the compensation of judges in this way without a legislative act mandating payment of the tax on behalf of judges.

The legislature has appropriated funds sufficient “for state agencies to pay the professional privilege tax levied in Tennessee Code Annotated, Title 67, Chapter 4, Part 17, on behalf of full-time state employees who are subject to the tax; and who use the certification in their job duties. The payment is subject to approval by the department or agency head.” 2003 Tenn. Pub. Acts 961, § 41. This appropriation is insufficient to meet the constitutional requirement that judicial compensation be ascertained by law because it still leaves the payment of this portion of the compensation to be decided by a government official other than the legislature (whether it would be interpreted in the case of judges to be the administrator of the courts, the chief justice, or some other official). According to *Shelby County v. Judges*, this decision cannot be delegated by the legislature.

While Article VI, Section 7, does bar payment of the professional privilege tax by the judicial branch without legislative authorization, it does not otherwise bar the increase in compensation at the beginning of the next judicial term. As stated in the constitution, only an increase in compensation “during the time for which [judges] are elected” is prohibited. Any increase falling outside of such a time would therefore be constitutionally permissible. By the plain

language of Article VI, Section 7, the legislature is free to adjust the compensation of the judiciary for elected terms which are not yet underway. *See generally* Op. Tenn. Att’y Gen. No. 89-051 (April 10, 1989). Therefore, as long as the payment of the professional privilege tax on behalf of judges went into effect at the beginning of the judges’ elected term and remained in effect for the entirety thereof, it would not violate Article VI, Section 7, and would be within the scope of Tenn. Code Ann. § 67-4-1709, provided, of course, that the payments were mandated by the General Assembly and merely carried out by the paymasters for the judicial branch under § 67-4-1709.

Whether, with proper legislative authorization, the tax could be paid for judges who thereafter assume office within the same judicial term is less certain. This depends upon what one Tennessee court has termed “the ‘Term’ v. ‘Time’ Issue” within the language of Article VI, Section 7. *Cornelius v. McWilliams*, 641 S.W.2d 508, 513 (Tenn. Ct. App. 1982), appeal denied (Tenn. 1982). The crux of the debate is whether the language “shall not be increased or decreased during the time for which they are elected” means the “time during which [the judge is] appointed and elected to serve” so that “so long as his compensation was not increased or diminished during that *time period* the constitutional prohibition has been satisfied,” or whether that constitutional language “refer[s] to the judicial term.” *Cornelius* at 513-14. Under the latter construction, the “time period” is taken to mean the full eight-year term and a newly-appointed judge would assume the same posture as the judge originally elected for that term with respect to any increase or diminution of his or her compensation.

This Office has previously opined that “a statutory change in judicial salary cannot change the salary of a judge who took office *before* it becomes effective, but a statutory change in salary may apply to a judge who takes office *after* it is passed, even if he or she is filling out an unexpired judicial term that began before the statute took effect.” Op. Tenn. Att’y Gen. 02-047 (April 15, 2002) (emphasis in original). This opinion relied on *Gaines v. Horrigan*, 72 Tenn. 608 (1880), in which our Supreme Court was first presented with the “term v. time” issue. The Judge in that case, Horrigan, was appointed to his seat in 1879 after a vacancy occurred among the slate of judges elected to the full term in 1878. *Id.* at 609. Prior to this appointment but subsequent to the 1878 elections, the legislature lowered the compensation for judges of Horrigan’s rank from \$2,500 to \$2,000 per year. Horrigan argued that, in accordance with Article VI, Section 7, the new pay level could “only apply to Judges who may be elected in 1886,” the start of the next judicial term. *Id.* at 613. In other words, Horrigan was arguing for the “term” interpretation of Section 7. Noting that the framers of Article VI, Section 7, specifically mentioned “the time for which they are elected,” the *Horrigan* Court concluded that “[t]his obviously means during the time and not the term for which the Judge is elected.” *Id.* at 614. The Court then observed that “[i]f the change takes place before the Judge is elected or appointed, the evils intended to be guarded against cannot well result as to him. He accepts the office with a knowledge of the salary as fixed, and no injustice is done to him.” *Id.* at 615. The *Horrigan* Court therefore, over a strong dissent, firmly adopted the “time” interpretation of this clause, so that a change in judicial compensation adopted in the midst of a term may apply within that term, but only to judges who take office after the change is authorized.

In *Overton County v. State ex rel. Hale*, 588 S.W.2d 282 (Tenn. 1979), however, the Tennessee Supreme Court cast some doubt on *Horrigan* and its approach to the “term v. time” debate.

That case dealt with the constitutionality of automatic judicial salary adjustments tied to the consumer price index. In addressing this question, the Court stated that “[t]he key words [of Article VI, Section 7] are ‘during the time’ which obviously means legislative action taken within the time period of a judicial term of eight years, to increase or diminish compensation.” *Id.* at 288. The Court in *Overton County* cited *Shelby County v. Judges* as holding “squarely to that effect.” This is of course a “term” reading of the section, contrary to that in *Horrigan*. Although it asserted that the rulings in *Shelby County v. Judges* and *Horrigan* differed, the Court in *Overton County* declined to comment on this difference because the rationale of both cases produced the same result under the facts with which the Court was confronted, and so *Horrigan* was not overruled. These comments were later interpreted to mean “that the *Overton County* court recognized as unsettled the issue of whether the constitutional prohibition [in Article VI, Section 7] could apply to those judges elected or appointed after the enactment of the questioned legislation.” *Cornelius* at 514.

The *Cornelius* court could not disregard *Horrigan*, but it did strike down an attempt to alter judicial compensation as unconstitutional. *Cornelius* involved a 5% limit on the annual salary adjustment for judges that was enacted during a judicial term. Under *Horrigan*, such an act would be constitutional if applied to judges appointed after its enactment, such as *Cornelius*. The *Cornelius* court, however, found the act unconstitutional as to all judges because it did not specify that the change in compensation was intended only for those judges appointed after the passage of the act, and the court could not alter the language of the law as written. Any attempt to change the compensation of as-yet unappointed judges during a judicial term would thus have to comport with this holding as well.

While *Horrigan* directly addresses this issue of “term v. time” and has not been overruled, *see* Op. Tenn. Att’y Gen. 02-047 (April 15, 2002), the opinions in *Overton County* and *Cornelius* evidence some uncertainty and indicate that the courts might be willing to reexamine the issue. To reach that issue in this context, however, the legislature would have to direct that the State pay the professional privilege tax on behalf of judges appointed or elected after the passage of such legislation but within the same judicial term.

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