Enclosure No.5

OPINION 84-157

TO: Michael L. Kernell
State Representative

May 8, 1984

QUESTIONS

I.

What is the legal status of a state statute that the Attorney General has opined to be unconstitutional, but that has not been declared unconstitutional by a Tennessee Court?

II.

In such circumstances, what are the obligations and functions of the public official who was charged with performing ministerial duties pursuant to the statute that the Attorney General has opined to be unconstitutional?

OPINIONS

I.

It is the opinion of this Office that under relevant constitutional principles, the public, individuals, and ministerial officers must presume a state statute to be constitutional until it is declared unconstitutional by a court of competent jurisdiction. Where the Attorney General has opined with supporting legal authorities that a particular statute is in violation of an express constitutional provision, a public officer who possesses discretionary authority under such statute, may elect either to take appropriate action to comply with the Constitution, as suggested by the Attorney General's opinion, or to initiate court action to determine the constitutionality of such statutes and/or any action that such officer may be required to take under such statutes.

II.

It is further the opinion of this Office that the legal responsibilities of the public official who is charged with duties under the statute that the Attorney General has opined to be unconstitutional, will depend upon the nature of the officer's legal duties. For public officers with ministerial duties, the legal presumption of the constitutionality of a statute obtains until the statute is declared otherwise by a court of competent jurisdiction. For public officials with discretionary duties under the questionable statute, such officer may elect to conform his conduct to comply with the Constitution or may initiate a judicial action for a declaratory judgment as to his legal responsibilities. The characterization of whether the public officer has ministerial or discretionary duties under the statute will depend upon an examination of the particular statute at issue and the nature of the public office at issue.

ANALYSIS

Your request for this Opinion was without guidance as to the type of statute, the type of constitutional violation or the identity of the public officer and his other duties under the statute. Without such information on these material factors, we are unable to give you as meaningful a legal opinion as we would have been with a description of the specific statute, the

opinion of the Attorney General at issue, and the identity of the public officer who has responsibilities under the statute at issue. However, we will provide you with our opinion as to the relevant constitutional principles on these issues. Our opinion is based upon our research of Tennessee judicial precedents and relevant judicial precedents in other jurisdictions.

At the outset, we make it clear that only Courts have the constitutional authority to declare a statute unconstitutional. Attorney General opinions are not the equivalents of judicial declarations. *Gershman Investment Corp. v. Danforth,* 517 S.W.2d 33, 36 (Mo. 1974). Accordingly, Attorney General opinions are not binding upon the courts. *Blanchard v. Mitchell,* 146 S.2d 50, 52 (La.App. 1962); *Kirby v. Callen County,* 212 S.W.2d 494, 497 (Tex.App. 1948). However, as discussed below, in certain instances, an Attorney General's opinion can serve as the legal basis for certain public officials' conduct, particularly on constitutional issues.

The Tennessee case law, as a general rule, is that a legal presumption of constitutionality attaches to state enactments. This judicial standard was reviewed and restated by the Tennessee Supreme Court in *Cumberland Capital Corp. v. Patty,* 556 S.W.2d 516 (Tenn. 1977). In this decision involving private parties, our Supreme Court declared unconstitutional certain sections of the state's Industrial Loan and Thrift Companies Act, former Tenn. Code Ann. § 45-2007. In the request for a rehearing of its decision, the Supreme Court was presented with the question of the legal status of the unconstitutional statute as applied to commercial transactions not before the Court, and whether its ruling would be given prospective or retrospective application. The Court noted that there were two legal doctrines on the status of the unconstitutional statutes.

> "Under the *void ab initio* approach the statute is given no effect and treated as though it never existed, whereas under the presumption of validity approach, it must be presumed valid until invalidated by a court of competent jurisdiction." *Cumberland Capital Corp. v. Patty,* 556 S.W.2d at 538.

After an analysis of the Tennessee case law, the Court stated that

> "We think the better, more equitable and more realistic rule is that 'an unconstitutional act "is not void but voidable only," *until condemned by judicial pronouncement.*'" *Cumberland Capital Corp. v. Patty,* 556 S.W.2d at 540 (Emphasis added).

However, once a statute or regulation is declared unconstitutional by the courts, parties "may not invoke the aid of the courts to undo what they themselves have done." *State ex rel. Eads v. Humphries,* 562 S.W.2d 805, 807 (Tenn. 1978).

In its decision in *Cumberland Capital Corp. v. Patty, supra,* the Supreme Court cited with approval its earlier decisions on the legal presumption of constitutionality of state statutes, including *Bricker v. Sims,* 195 Tenn. 361, 368, 259 S.W.2d 661,664, (1953); *State v. Hobbs,* 194 Tenn. 323, 250, S.W.2d 549 (1952); *Rust, et al. v. Newby,* 171 Tenn. 127, 100 S.W.2d 989 (1937); *Claybrook v. State,* 164 Tenn. 440, 51 S.W.2d 499 (1932); *Roberts v. Roane County,* 160 Tenn. 109, 23 S.W.2d 239 (1929); *Beaver v. Hall,* 142 Tenn. 416, 217 S.W. 649 (1919); and *Collier v. Montgomery County,* 103 Tenn. 705, 54 S.W. 989 (1900).

The principles in these cases and case cited therein that were relied upon by the Supreme Court in *Cumberland Capital Corp. v. Patty*, reflect that there are limited exceptions to this legal presumption of constitutionality principle. In *Spec v. State*, 66 Tenn. 46 (1872), that appears to be the seminal decision of this line of decisions, our Supreme Court observed:

> "No rule of law is better settled than that which declares every act of the Legislature, *which is not palpably unconstitutional on its face*, is binding as a law until its constitutionality is judicially determined in a proceeding instituted for that purpose, or until some proceeding is instituted to enforce the act, or to declare some right under the act affecting life, liberty or property ..." *Speck v. State*, 66 Tenn. at 53. (Emphasis added).

In *Bricker v. Sims, supra*, that was in cited in *Cumberland Capital Corp. v. Patty, supra*, the Supreme Court, citing its earlier precedents, stated:

> "An unconstitutional act is not void, but voidable only, and *ministerial officers* are authorized to treat every act of the Legislature as *prima facie* valid and they are not liable for any acts committed under an unconstitutional statute on account of its unconstitutionality. *Bricker v. Simms*, 195 Tenn. at 398. (Emphasis added).

As to the public and individuals, the Supreme Court observed:

> "... the *public and individuals are compelled*, by judicial construction, to assume toward a legislative enactment, precisely the same attitude [that the statute is presumed to be constitutional] whether it be constitutional or unconstitutional. [Citing *Beaver v. Hall, supra.*]." *Bricker v. Sims*, 195 Tenn. at 368. (Emphasis added).

However, the Supreme Court also noted that "[m]inisterial officers are not *as a general rule* permitted to question the validity of a statute or ordinance ... While *there are some exceptions to the foregoing general rule* none are applicable to the case before us." *Bricker v. Sims*, 195 Tenn. at 368. (Emphasis added).

From our research, there is at least one judicially recognized exception to this general rule under Tennessee case law. This case involved a situation wherein the State Attorney General had advised the State Comptroller, a state constitutional officer, that a particular statute was unconstitutional. In *Cummings v. Beeler*, 189 Tenn 151 (1949) the Supreme Court considered a declaratory judgment action brought by the Secretary of State against the State Attorney General and the State Comptroller. The Secretary of State sought a judicial declaration as to the constitutionality of a state statute under which the Secretary was required to expend funds in connection with a special election. As noted, the Attorney General had opined that the state statute at issue was unconstitutional.

The Supreme Court held that the suit was a proper declaratory judgment action. In its holding, the Court observed that the Secretary of State was "required to spend large sums of money" from the State treasury, but if the Act were unconstitutional, then he had no right to spend these funds. *Cummings v. Beeler*, 189 Tenn. at 157. The Attorney General who had

advised State officials in an official opinion that the proposed special election was "illegal, void, and unconstitutional," was described by the Court as "... the offcial interpreter of the laws for the Secretary of State..." *Cummings v. Beeler*, 189 Tenn. at 157.

Critical to the Court's holding that there was a proper dispute for the declaratory judgment action as to the State Comptroller and the Attorney General, were the following findings:

> Under these clear statutory enactments setting forth the duties of the state officers, it seems to us clearly that they are interested in the matter, and interested in advising the other officers of the State as to whether or not they should spend these funds. *It likewise seems clear that the Comptroller of the State would not authenticate or approve the payments of warrants for State funds paid out under an invalid or an unconstitutional statute. The Attorney General of the State, who is his official legal adviser, is naturally the one that he would go to before he pays out warrants under a legislative act.* State officials are presumed to do their duty and we feel sure and have no hesitancy in saying that they will and do do their duty as they see fit. *Would it not be the duty of the Comptroller to refuse to approve these warrants when he knows that his official legal adviser has held that the act under which these warrants were to be issued was illegal, invalid and unconstitutional?* It therefore seems clear to us that these two state officials, who are made defendants hereto, are proper parties and have parties who have an interest in the matter." *Cummings v. Beeler*, 189 Tenn. at 159-60 (Emphasis added).

Our reading of the above cited language leads us to the conclusion that the Supreme Court clearly indicates that it would have been the Comptroller's legal duty not to pay out funds under a state statute that the Attorney General had advised him was illegal and unconstitutional.

In our opinion, *Cummings v. Taylor* represents an exception to the general rule that a state officer must presume a state law is constitutional and act accordingly.

Judicial validation of this concept that a state official may permissibly undertake performance of discretionary legal duties in conformance with the opinion of the Attorney General has been recognized in other contexts by the Tennessee Supreme Court. In, *Murfreesboro Bank and Trust v. Evans*, 193 Tenn, 34, 38 (1951), the Supreme Court rejected a construction of a state revenue statute by the former Department of Finance and Taxation where it was "acting without legal advice prior to 1942, and [contrary to] what appears to be the well considered opinion of the Attorney General's Office which, for the first time, had been asked to construe this statute ...". The Supreme Court ultimately accepted a "construction of the statute, which was given by the Attorney General on May 22, 1942 and consistently followed by the Department since that time," and stated that such a practice "should be given persuasive weight by the Court, and especially in view of our holding in *Mitchell v. Carson*, 186 Tenn. 228, 209 S.W.(2)(d), wherein the opinion of the Attorney General was, in substance at least, approved." *Murfreesboro Bank and Trust v. Evans*, 193 Tenn. at 38-39. The Supreme

Court later altered this holding. See, *Pierce v. Woods,* 597 S.W.2d 295 (Tenn. 1980).

If the public official were to act upon the Attorney General's advice on a constitutional issue to the alleged detriment of any person, there is a remedy. In such an instance where the public officer's action or inaction turns upon a constitutional question, the officer would be subject to a mandamus proceeding in the state courts. *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg,* 636 S.W.2d 430, 434 (Tenn. 1982).

Under these Tennessee decisions, it is our opinion that our courts require the public, individuals, and ministerial public officers[1] to consider all state laws constitutional until declared otherwise by the courts. This same rule obtains for public officials with discretionary legal duties except in rare situations. These judicial exceptions are: (1) where the State officer has discretionary functions under the statute at issue; (2) where the statute is "palpably unconstitutional;" and (3) where the State official had been advised by the opinion of the Attorney General, with supporting legal authorities, that the state statute is unconstitutional.

The concept that public officials with discretionary authority may act upon the advice of the Attorney General in the proper performance of their duties is supported by court decisions in other states. In *Gray v. Main,* 309 F.Supp. 207 (Ala. 1968) a United States District Court observed in a civil rights action brought in the district court that under Alabama statutes, that are strikingly similar to Tennessee statutes, Tenn. Code Ann § 8-6-109(b)(5)-(6) "... a public official may act on an Attorney General's ruling if the courts have not decided the question." *Gray v. Main,* 309 F.Supp. at 220.

In *Van Riper v. Jenkins,* 45 A.2d 844, 845 (N.J. 1946), New Jersey's highest Court also ruled that "... in the absence of judicial decision his [the Attorney General's] opinions become the guide for such [public] executives."

In *Rasure v. Sparks,* 750 Okla. 181, 183 P. 495 (1919), the Oklahoma Supreme Court observed in an action concerning the legality of a public official's action that was contrary to the opinion of the State Attorney General that

> "It is the duty of public officers, such as county superintendents, when in doubt as to the construction of an Act of the legislature, to follow, and not disregard the advice of the Attorney General, charged with the duty of giving 'opinions in writing upon all questions of law submitted to him ... by any state official, commission, or department.'" *Rasure v. Sparks,* 183 P. at 498.

The Oklahoma Supreme Court has since held consistently that the public official is legally bound to follow the Attorney General's opinion until relieved of that duty by a court of competent jurisdiction. *Grand River Dam Authority v. State,* 645 P.2d 1011, 1016 (Okla. 1982); *Pan American Petro Corp. v. Board of Tax-Roll Cor.,* 510 P.2d 680, 681 (Okla. 1973); *State v. District Court of Mayes County,* 440 P.2d 700, 707 (Okla. 1968).

[1] A ministerial officer's duty was described by our Supreme Court as follows: "... an act is ministerial, in the sense we are talking about, when there is no room for the exercise of discretion because the act is a positive command of the law. When we come to distinguish a ministerial act from a discretionary act the question is not always easy of solution. One involves the exercise of judgment and the other merely carrying out the command of law." *Lamb v. State ex rel Kisabeth,* 207 Tenn. 159, 163 (1960).

In *State ex rel. Reeder v. Municipal Civil Service Commission of Columbus,* 165 N.E.2d 490, 492 (Ohio Ct. Comm. Pleas 1958), in an action challenging the legality of a municipal board's action in an employment situation where the municipal agency had sought the opinion of its legal adviser, the Court observed:

> "Public bodies and officers have the right, duty, and privilege in time of uncertainty to seek and receive advice and opinions from their duly constituted legal advisor, and when given that advice, they are under moral and ethical, if not legal obligation, to act accordingly ..."

This decision was affirmed by the Ohio Court of Appeals that was "in complete agreement with the able opinion of the Ohio trial court." *See State of Ohio ex rel. Reeder v. Municipal Civil Service Commission,* 166 N.E.2d 264 (Ohio App. 1959).

To be sure, there are court decisions that take a less expansive view of State Attorneys General opinions. An opinion of a State Attorney General on a legal matter has been described by one Court as persuasive, but neither conclusive nor binding on the state officer, rather the opinion is merely "for the information of the officer, he can follow it or not." *Dodd v. State,* 18 Ind. 56, 66-67 (1862). Accord, *Sullivan v. Local Union 1926 of AFSCME,* 464 A.2d 899, 901, n.3 (Del.Supr. 1983); *State ex rel. Davis v. Wooley,* 9 Terry 34, 97 A.2d 239 (1953); *Wilfekuhle v. State,* 234 Kan. 241, 671 P.2d 547, 553 (1983); *Greenwood v. Estes,* 210 Kan. 655, 504 P.2d 206, 211 (1972); *Senske v. Fairmont & Waseca Canning Co.,* 232 Minn. 350, 45 N.W.2d 640, 646-47 (1951).

The reasoning of these decisions appears to be best expressed in *Follmer v. State,* 94 Neb. 217, 142 N.W. 908, 910 (1913), wherein the Supreme Court of Nebraska observed that state officers "are entitled to the opinion and advice of the Attorney General upon questions of law relating to their several departments, but they are not necessarily controlled by that advice in matters especially committed to their care. If the law were otherwise, any executive officer of the state could be controlled by an Attorney General specifying what the law requires to be done in that office."

Other courts have recognized that where a state official acts pursuant to the advice of the Attorney General, the state official enjoys immunity from personal liability for acts taken pursuant to such advice. *State ex rel. Smith v. Leonard,* 95 S.W.2d 86, 88-89 (Ark. 1936); *Gilbertson v. Fuller, 40 Minn. 413, 42 N.W. 203, 204 (1889); State v. Martin,* 392 P.2d 435, 441 (Wash. 1964).

Exceptions to these rules have been stated for the instances where the Attorney General's opinion lacked citation to supporting legal authorities or was contrary to a plain, unambiguous and valid state statute. In such instances, the Attorney General's opinion will not protect the state officer from liability. *State v. Conley,* 190 S.E. 908, 917 (W.Va. 1937). Other courts have observed that where an Attorney General's opinion "seems to be without authoritative legal support, it should not be approved or followed." *Leddy v. Cornell,* 120 P. 153, 156 (Colo. 1912).

In summary, in our opinion based upon our analysis of the Tennessee case law and the relevant case law of other jurisdictions, the public, individuals, and ministerial public officials are required to consider a state statute as constitutional until declared otherwise by a court of competent jurisdiction. However, a public official with discretionary functions under a

state statute that has been declared to be unconstitutional by an opinion of the Attorney General with citations to supporting legal authorities may take appropriate action based upon that legal advice to conform his or her conduct to the particular constitutional mandate, particularly if the statute appears to be "palpably unconstitutional." The foregoing opinion is our statement of the relevant constitutional principles responsive to your request. How these principles should be applied depends upon the particular statute, the public official, the nature of his or her duties under that statute, and the particular Attorney General opinion at issue.

OPINION 84-158

TO: William C. Koch, Jr.
Counsel to the Governor

May 8, 1984

QUESTION

Whether the State Board of Education is required to meet on the days set out in Chapter 6 of the Public Acts of the First Extraordinary Session of the 93rd General Assembly?

OPINION

The provision in Chapter 6 concerning the days for State Board of Education meetings is directory. Strict compliance is not required, however, the Board of Education should attempt to meet on these days or as close to them as possible.

ANALYSIS

Chapter 6 of the Public Acts of the First Extraordinary Session of the 93rd General Assembly, Section 3, states in pertinent part that:

> The Board shall hold at least four (4) meetings each year on Fridays after the first Monday in the months of February, May, August and November.

It is a well established rule of statutory construction that the word "shall" is normally construed as being mandatory, not discretionary. *Stubbs v. State,* 216 Tenn. 567, 393 S.W.2d 150 (1965). It is also well established that statutory provisions relating to the mode or time of doing a prescribed act are directory rather than mandatory. *Big Fork Mining Co. v. Tenn. Water Quality Control Board,* 620 S.W.2d 515 (Tenn. Ct. App. 1981); *Lansing v. Lansing,* 53 Tenn. App. 72, 378 S.W.2d 786 (1963); *Trapp v. McCormick,* 175 Tenn. 1, 130 S.W.2d 122 (1939). Also,

> Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly regarded as mandatory
> ...

Winston v. Railroad Co., 60 Tenn. 60, 79 (1873), quoted in *Richardson v. Young,* 122 Tenn. 471, 125 S.W. 664 (1909). No consequences follow a failure to comply with a discretionary statutory provision. 1 A *Southerland Statutory Construciton,* § 25.03.

Applying these rules to the above quoted provision of Section 3 of Chapter 6, it is the opinion of this office that the State Board of Education is required to meet at least four times a year. The next portion of the provision, concerning the days for the required meetings, is directory. This does not mean that the listed meeting days may be totally disregarded. Rather, it means that strict compliance with these exact days is not required. The Board of Education should, however, attempt to meet on these days or as close to them as possible.

OPINION 84-159

TO: Robert L. King
State Representative

May 8, 1984

QUESTION

1. What is a "regular" teacher as that term is used in T.C.A. § 49-5-503(1)(C)?
2. What is the tenure eligibility status for administrators, supervisors, and other non-classroom personnel holding certification as classroom teachers, under T.C.A. § 49-5-503?
3. What is the tenure eligibility status of part-time personnel, under T.C.A. § 49-5-503?
4. Must the last year of employment as a regular teacher extend through the end of the academic year, under T.C.A. § 49-5-503(1)(C)?

OPINIONS

1. A "regular" teacher is a teacher as defined in T.C.A. § 49-5-501(10) who is regularly employed.
2. Any non-classroom employee who falls within the definition of "teacher" pursuant to T.C.A. § 49-5-501(10) is eligible for tenure.
3. Part-time personnel are "regular" teachers, and hence are eligible for tenure.
4. Pursuant to T.C.A. § 49-5-503(1)(C), the last year of employment as a regular teacher need not coincide with a full academic year.

ANALYSIS

1. T.C.A. § 49-5-501(10) defines "teacher" as follows:

> (10) "Teacher" includes teachers, supervisors, principals,