

November 15, 2010

Mr. Sam Elliott, Esq.  
City Attorney  
City of Soddy-Daisy  
320 McCallie Avenue  
Chattanooga, Tennessee 37402

Dear Mr. Elliott:

You have the following question: Can the aldermen of the city decline to accept the salary prescribed for them by Section 6-106 of the Soddy-Daisy Municipal Code, which reads, "The salary of each commissioner shall be three hundred dollars (\$300) per month," then subsequently demand the payment of that salary? The periods the commissioners have declined to accept their salaries varies; one has declined his salary for 13 years.

Unfortunately, the answer is yes.

While the salary of the commissioners of the city is set by ordinance, those salaries are authorized, and their parameters prescribed by, Tennessee Code Annotated, § 6-20-204. For that reason, the salaries of commissioners are undoubtedly fixed by law.

It is said in 160 A.L.R. 490, *Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or acceptance of reduced amount*, that "As stated in the original annotations [70 A.L.R. 972 and 118 A.L.R. 1458], according to the great weight of authority a contract whereby a public official or employee agrees to perform services required of him by law for less compensation than that fixed by law is contrary to public policy, and so also is the acceptance by him of less compensation than that fixed by law."

As will be seen below, the Tennessee Supreme Court appears to have expressly adopted the "great weight of authority" position on that question.

What makes the law on this question somewhat confusing is that in Tennessee many of the cases involve promises by candidates for public office who agree to accept a lesser salary for the public office than the salary set by law for that office. In *Moore v. White*, 122 S.W.2d 451 (1938), state statute set the salary of a member of the Dyer County Court at \$5,000. White agreed to serve in that office for \$2,500. After White died insolvent and incompetent, his creditors were allowed to recover the difference in the salary authorized by state law and the salary White was paid, the Tennessee Supreme Court holding that agreements of the kind made by White

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were void as against public policy. In *Carmichael v. Hamby*, 217 S.W. 2d 934 (1948) are Tennessee Supreme Court held void an agreement made by a candidate for the clerk of the court of general sessions to accept an annual salary of \$1,2000 when the salary for that office was set by state law at \$5,000 per year. Both those cases pointed to other cases in which candidates for various offices had made promises of similar kinds and those promises were held void as against public policy.

In *Saylor v. Trotter*, 255 S.W.590 (1923), Saylor campaigned on the promise to run his office in conformity with Public Acts 1921, Chapter 101, which was the Anti-Fee or Official Salary Law. But after he was elected he filed a suit alleging that Act was unconstitutional. The Tennessee Supreme Court held that he was estopped from challenging that Act, reasoning that:

.... The people, by the Act of 1921, offered a salary of \$6,000 a year for the performance of the duties of sheriff of Knox County, the offer containing other particulars heretofore mentioned. With the express purposes of discharging the duties of the office according to the terms of the office, the complainant was selected by the people for the place. He qualified and took office. Under the terms of the office, the sheriff might be allowed certain deputies to assist him, to be paid out of funds otherwise going to the county, and the complainant availed himself of this advantage, thereby waiving for a consideration any right to deny this agreement.... How then, can the complainant be permitted to say at this time that he is entitled to hold office on different terms, or with greater reward... [At 593]

Important in this case is that the Court distinguished its facts from others in which it was held that estoppel did not apply:

In these cases [where estoppel did not apply] candidates promised to remit all or part of the salaries to which they were entitled by law, if elected. Such agreements were held to be against sound policy, as a sort of bribery of the candidates for office—a purchase of office by promises of money or services or both. Practices like these tend toward the selection of the lowest bidder among the candidates regardless of his merit.

The case before us is entirely different. The candidate here only expressed his purpose to do what the act required. This was his legal and moral duty as long as the act remained in force. He did not promise to donate or give up to the county anything, but only proposed to be satisfied with the compensation and perform the duties of the office upon terms which the Legislature had fixed. [At

594].

The above cases where estoppel was held not to apply raise the question of whether estoppel applies in cases where the public officials voluntarily agree to serve without the salary provided by law.

The answer to that question is that it appears that the motive behind the agreement to decline the salary set by law for a public office, , even where the agreement it is voluntary, does not negate the general rule that such agreements are void as against public policy. That conclusion is supported by *Lane v. Sumner County*, 298 S.W.2d 708 (1957). There the circuit court clerk entered into an agreement with the chairman of the county court under which the circuit court clerk would not make any claims for excess fees after September 1, 1950, to satisfy deficits in compensation prior to that date. That case does not initially reveal what, if any considerations supported the agreement; indeed, it ultimately concluded that under the facts, there were none. The Court simply relied on the public policy to overturn the agreement:

“Contracts made for the purpose of controlling or affecting official conduct of the exercise of legislative, administrative and judicial functions, are plainly opposed to public policy. They strike at the very foundations of government and intend to destroy the confidence in the integrity and discretion of public action which is essential to the preservation of civilized society. *The principle is universal and is applied without any reference to the mere outward form and purpose of the alleged transaction.*” [Citing *Osborne v. Allen*, 143 Tenn. 343, 352, 226 S.W. 221, 224.... [Section 935.] [Emphasis is mine.]

The Court continued in language worth quoting at length:

The problem naturally in the instant case is one of application. In considering the problem, too, *it makes no difference whether or not the contract can be “purged of its illegality by the fact that the act of the officials was not harmful, nor by the fact that it was done in good faith.”* *Osborne v. Allen*, supra. And as the Chancellor says:

“Public officials of the class here shown are entitled to apply fees collected during any term of their office to salary deficiencies occurring in prior terms; that is, the fees available for the payment of salaries of such officers under the Anti-Fee Bill are all fees collected by such officer during the term or terms of his office, without

reference to the origin of the date of creation of the fee or charge.  
[Citations omitted by me.]

“I am of the opinion that the agreement entered into by the complainant and the Chairman of the County Court of Sumner County, in which it was attempted to change or fix the compensation of complainant as Circuit Court Clerk of said county different from that provided by statute, is against public policy, contrary to the law as interpreted by our highest courts, and void ab initio. Moore et al v. White et al .... Carmichael v. Hamby, .... Gregory v. Trousdale County, .... [Citations to Tennessee cases cited in full above omitted by me.] [Maryland Casualty Company v. State of Texas [130 Tex. 206], 107 S.W.2d 865; and 1189 A.L.R. 1468; MacMath v. U.S., 248 U.S. 151 [39 S.Ct. 31, 63 L.Ed. 177]; Peterson v. Parsons, 139 Kan. 701 (33 P.2d 715); Winchester v. Abzill, 255 Ky. 389 [9 S.W.2d 51]; Grant v. Rochester [70 App. Div. 460], 80 N.Y.S. 522; and numerous citations of authorities in 118 A.L.R. 1467. It is stated in the last mentioned authority, ‘That the rule in most jurisdictions is that inasmuch as a contract by a public officer or employee to render services for compensation less than that fixed by law is invalid, and recovery of the whole legal compensation may be had.’ This statement is supported by citation of authorities of numerous states.”

And this:

“.... Since it appears that the clerk was entitled to a deputy at said time, and that a salary of \$200 per month was reasonable compensation, and that the Clerk had the right to apply to the Circuit Judge for authority to employ such deputy, there was nothing that would any way prejudice the rights of the County in said matter. So this fact again places the County in the position of having no consideration to offer the Clerk for the making of the agreement to reduce the latter’s salary.”

And further:

“The principles of waiver and estoppel are not applicable in this case, and nothing appears to preclude the Complainant from claiming that which is rightfully his under the law—that is, the fees and commissions collected by his office during his tenure of office until the maximum annual salary provided by statute for the Clerks

of Circuit Court of the class embracing Sumner County has been satisfied, any agreement to the contrary notwithstanding. ‘Many recent decisions have held that there was no waiver or estoppel on the part of a public official or employee precluding his recovery of the difference between the salary actually received by him and that to which he was legally entitled, notwithstanding an agreement to accept smaller compensation.’ [At 710-11] [Citations omitted by me, many of which are already listed above.]

The Court adopted the Chancellor’s opinion that the agreement was null and void.

It seems clear in this case that the Court adopted the majority opinion contained in what is now 160 A.L.R. 490. I have found no subsequent Tennessee case to the contrary. There are cases, such as *Steele v. City of Chattanooga*, 84 S.W.2d 590 (1923) that appear to support the proposition that estoppel can be raised to deny a public officer or employee to recovery money to which he was entitled under a statute. But whatever traction those cases could have gained in the past, they can gain none today in the face of *Lane v. Sumner County*.

Two of the cases cited in *Lane v. Sumner County* in 160 A.L.R. 490 arose in Tennessee’s sister State of Kentucky. To an extent not already done so by *Lane v. Sumner County*, they directly address the question of whether a public officer whose salary is fixed by statute can voluntarily waive all or a part of that salary. In *City of Winchester v. Azbill*, 9 S.W.2d (1928), it was held that a jailer, whose fees were established by statute, could not contract to keep prisoners for less than the statutory jail fees. Reasoning that “It is a general rule that an agreement by an officer to accept less than the fixed salary of an office to which he is elected or appointed for his compensation is void, as against public policy,” the Court declared that:

*The rule is equally well settled that an officer cannot estop himself from claiming full payment for his salary as fixed by statute, and where part of his salary has been withheld under an illegal agreement, recovery is allowed...*

An agreement by a public officer to accept less than the fees or salary prescribed by law being contrary to public policy, the courts should not give effect to it by spelling out a waiver or estoppel. At 52]

That case was followed by *City of Louisville v. Thomas*, 78 S.W.2d 767 (1935), in which a police clerk, who that case held to be an officer with under the state constitution and a fixed salary set by statute, had made an agreement to accept less salary, which agreement the city argued reflected no coercion, claimed the difference in his statutory salary and the salary he had received under the agreement. The city strongly argued that:

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.... although appellee may have been a public officer and that any reduction in his salary would be violative of the section of the Constitution invoked by him, nevertheless he might waive claim to the salary provided by statute or ordinance...Counsel for appellant most earnestly insist that, because of the absence of any coercion on the part of the city or any objection by appellee to acceptance of the reduced salary, he is estopped from setting up or asserting any claim growing out of such reduction [citing several Kentucky cases]. [At 769]

Citing Abzill, above, the Court rejected the city's defense.

If a public officer's salary and term is fixed by law he is unable by contract or agreement, voluntary or otherwise, to waive his salary, and he is not estopped from subsequently claiming it. That result is consistent with what the Tennessee Supreme Court said in Hamby v. Carmichael, above, about the legal foundation underlying the pay of public officers:

The obligation to pay county officers is not a contractual obligation of the county, *but it is attached to the office by law*. "It is uniformly held that the public enters into no agreement with officers that they shall receive any specific compensation during the term." [Citation omitted by me.] Accordingly, no estoppel can

be predicated on the theory that the county contracted with complainant to pay the salary fixed in the statute for services performed. [ At 938] [Citation omitted by me.]

I know of no reason that language does not apply to municipal officers.

It is the fixing of the public officer's salary by statute that precludes estoppel to be raised to deny the public officer the right to claim any portion of the salary denied to him, whether his agreement to take a lesser salary reflects a campaign promise, a contract in which he obtains consideration of some kind for such an agreement, or altruism (obviously temporary in some cases). Estoppel does not apply to any of those cases because public policy denies its application. Obviously the public policy is stronger in some cases than others, but it applies equally to all cases involving public officers with fixed salaries and fixed terms.

Frankly, I think the rule that a public officer with a fixed term and salary cannot freely waive his salary where that waiver has been made free of campaign promises and duress and coercion of any kind, is a bad rule, which, as we have seen, even allows the public officer to subsequently renege on his waiver. I fail to see in what way salary waivers made in those

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circumstances harms public policy. However, I didn't make the rule.

Sincerely,

Sidney D. Hemsley  
Senior Law Consultant

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