

MEMORANDUM

FROM: Sid Hemsley, Senior Law Consultant  
DATE: March 18, 2008  
RE: Mayor's Salary

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You have the following questions: If the present and past mayor's salary reflects costs of living increases (COLA's) adopted by the City Council under the authority of the City Charter, and if those COLA's were unconstitutional under Article XI, ' 9 of the Tennessee Constitution:

1. What happens to the salary of the present mayor?
2. Is the present mayor liable for salary paid to him that he unconstitutionally received?
3. Is the former mayor liable for the salary paid to him that he unconstitutionally received during his term of office?

As I pointed out in my earlier memorandum to you, the constitutional conflict at issue arises under a provision of the City Charter and the Tennessee Constitution. The charter provision in question is ' 8(2), which provides that:

The compensation of the Mayor and Aldermen shall be set by ordinance, but the salary of the Mayor or any Aldermen shall not be changed during their term of office, except that the *Mayor* will receive the cost of living raise, if awarded to the employees.

Article XI, Section 9, of the Tennessee Constitution, provides that:

The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or *altering the salary prior to the end of the term for which such public officer was selected...* [Emphasis is mine.]

My memorandum to you also said that at first glance, the cost of living increase for the mayor under ' 8(2) of the City Charter violated Article XI, Section 9, of the Tennessee Constitution, but that Overton County v. State ex rel. Hale, 588 S.W.2d 282 (Tenn. 1979) upheld a COLA for judges in the face of Article VI, Section 7, of the Tennessee Constitution, which contains a salary change limitation similar to that found in Article XI, ' 9, as follows:

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.* They shall not be allowed any fees or perquisites of office nor hold any other office of trust or profit under this State or the United States. [Emphasis is mine.]

The primary question there was whether a statute under which county officials, including sessions judges, were entitled to annual salary adjustments tied to the consumer price index was legal. The County argued that the annual salary adjustments with respect to the sessions judges would violate Article VI, Section 7, of the Tennessee Constitution. The Court ruled in favor of the judges, declaring that:

It is universally recognized that the rationale undergirding such constitutional provisions is the maintenance of judicial independence from legislative action to punish or reward judges for decisions that

produce a favorable or unfavorable reaction. The key words of the Tennessee constitutional provision 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. [At 288.]

The Court also reasoned that:

The theory behind hinging an annual change in salary to the consumer price index is that the index accurately measures the change in the 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. The Tennessee Legislature has no power over the amount of index change and thus no power over the will of judges.... [At 289.]

The statute in question had been passed *before* the judge took office, and did not affect the salary of any judge then in office.

My memorandum went on to debate the question of whether the logic of State ex rel. Hale would apply to COLA's for municipal officials covered by Article XI, ' 9, of the Tennessee Constitution. I was notBand am still notBsure of the answer. But here I will try to outline the law regarding the liabilities of local government officials that have been “overpaid” in violation of the Tennessee Constitution, so that the city has a better idea of how to handle the above three questions .

Let me say here that this opinion is based upon the assumption that every COLA the mayors received had a counterpart in a COLA paid to the city's employees, as required by ' 8(2) of the City Charter.

Answer to Question 1:

In my opinion, assuming that the salary of the mayor reflecting the COLA's was paid in

“good faith,” it may continue to be paid until a court declares such payments unconstitutional. However, if such COLA’s are held to be unconstitutional, that holding would be limited: Any COLA’s made to the past or present mayors that were the adopted prior to the beginning of their terms would probably be held to not violate Article XI, ' 9, as to him. As I understand the facts, no COLA’s have been adopted during the term of the present mayor. For that reason, no previous COLA’s would be reduced from his salary.

Answer to Question 2:

In my opinion, assuming that the salary of the mayor reflecting the COLA’s was paid in “good faith,” the present mayor would not be held liable for the salary unconstitutionally paid to him until a court decides that the payment in question are indeed unconstitutional.

Answer to Question 3:

In my opinion, assuming that the salary of the former mayor reflecting the COLA’s was paid in good faith, he would not be held liable for the salary unconstitutionally paid to him during his term or terms of office.

Surprisingly, there appear to be no cases involving an attempt to recover salary unconstitutionally paid to local government officials under Article XI, ' 9 of the Tennessee Constitution. However, a number of cases involving the unconstitutional payments of salaries to general sessions court judges under Article VI, ' 7, of the Tennessee Constitution, (and to other county officials under other statutes), have arisen. I can think of no reason why those cases would not apply to the unconstitutional payments of salaries to mayors under Article XI, ' 9.

Franks v. State, 772 S.W.2d 428 (Tenn. 1989) appears to govern the question that pertains to your City about COLA’s paid to the mayor under ' 8(2) of the City Charter. In that case, the Williamson County Commission in 1982 approved a supplemental income for the general sessions judge who exercised juvenile court jurisdiction, under a state statute that authorized counties to provide that supplement in such situations. But as pointed out above, Article VI, ' 7 of the Tennessee Constitution says that:

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 decreased during the time for which they are elected.

The Court pointed out that even though general sessions courts are inferior courts within the meaning of Article VI, Section 7 of the Tennessee Constitution, general sessions judges are county, not state, officers, and that:

Under Article 6, Section 7 of the Constitution of Tennessee the power to ascertain and fix the compensation of County judges is vested in the Legislature and cannot be delegated to County Court or any other body. *Shelby County v. Six Judges*, 3 Shan.Cas. 508, 511, 516, 520; *Judges' Salary Cases*, 110 Tenn. 370, 381, 382, 75 S.W. 1061. [At 430]

The Court declared that the same law applied to juvenile court judges in response to the plaintiff's argument that as a county officer a juvenile court judge fell outside Article VI, ' 7.

For those reasons, concluded the Court, "The last sentence of T.C.A. ' 37-1-201 which permits counties to provide additional compensation to general sessions judges who also exercise juvenile court jurisdiction is unconstitutional." [At 430]

What, then, was the remedy for the unconstitutional salary supplement the general sessions judge got from 1982 to 1987? First, the Court reasoned that the unconstitutional provision of Tennessee Code Annotated, ' 37-1-210 could be elided from the statute and the remainder of the statute upheld:

....The doctrine of elision applies "if it is made to appear from the face of the statute that the Legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable,...provided, of course, there is left enough of the act for

a complete law capable of enforcement and fairly answering the object of its passage.” *Gibson County Special School Dist. v. Palmer*, 691 S.W.2d. 544, 551 (Tenn. 1985) (quoting *Davidson County v. Elrod*, 191 Tenn. 109, 232 S.W.2d 1, 2 (1950)). [At 430]

In addition, continued the Court, “Section 20 of the Act contains a severability clause...” [At 430] That clause, said the Court, “evinces an intent of the part of our Legislature to have the valid parts of the statute remain in force, unless observance thereof would frustrate the object of its passage. See e.g., *Catlett v. State*, 207 Tenn. 1, 336 S.W.2d 8 (Tenn.1960),” and

We do not find that the delegation to the county legislative bodies of authority to pay additional compensation is so interwoven with the remainder of the statute that it is void in its entirety. After exclusion of the impermissible provision the statute is complete and capable of enforcement. [At 430-31]

The general sessions judge argued that even if the salary supplements were found by the Court to be unconstitutional, the ruling should not apply to the judge’s current term, that applying the ruling to the judge’s current term would constitute a reduction in salary in violation of Article VI, ' 7 of the Tennessee Constitution. The Court rejected that argument, but spoke to the question of whether the judge was obligated to repay the unconstitutionally paid salary supplements:

Under the “void ab initio” approach, an unconstitutional act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 U.S. 425, 6 S. Ct. 1121, 30 L.Ed. 178 (1886). [At 431]

That sounded like bad news for the general sessions judge, but that was not the case. The Court went on to say:

However, in *Roberts v. Roane County*, 160 Tenn. 108, 23 S.W.2d

239 (1929) this Court recognized “that parties may so deal with each other upon the faith of such a statute that neither may invoke the courts to undo what they themselves have done.” *Id.* At 124, 23 S.W.2d at 243. Because of the presumption in favor of the constitutionality of statutes, the public and individuals are bound to observe a statute though unconstitutional, until it is declared void by an authoritative tribunal. *O’Brien v. Rutherford County*, 199 Tenn. 642, 28 S.W.2d 708 (1956). Defendants concede that plaintiffs were acting in good faith in paying and receiving the salary supplement fixed by the Williamson County legislative body and that plaintiff Franks should not be required to pay back the supplemental salary. In these circumstances it is appropriate to apply the principle that the unconstitutional act was voidable until condemned by judicial pronouncement. See *Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516 (Tenn. 1977). Based on the foregoing, the excess monies paid and received to the date of the release of this opinion cannot be recovered. [At 431]

With respect to the elision of the unconstitutional provision in ' 8(2) of the City Charter, that provision is a tiny part of the entire charter that the General Assembly would undoubtedly have passed without the unconstitutional provision. Moreover, even the COLA provision pertaining to the mayor in ' 8(2) can be elided without doing violence to that section. The city would still be able to give COLA's to city employees; the mayor simply would be unable to receive one. In addition, the City Charter has a severability clause [ ' 47].

Under Franks, statutes are presumed constitutional until a court declares them unconstitutional, assuming there has been good faith in the paying and receiving of the unconstitutional payment. For that reason, it appears that the payment of the COLA's to the former mayor are not recoverable, and that the payments of the COLA's to the present mayor can continue until a court rules the COLA provision in ' 8(2) of the City Charter pertaining to the mayor unconstitutional. But I will analyze the “good faith” language in that and other cases case below. .

Other cases support the application of Franks to COLA's paid to the mayors. In State v. Hobbs, 250 S.W.2d 549 (1952), the state sued Hobbs, the Lawrence County Clerk and Master, and others, to recover salaries unconstitutionally paid to them. The Tennessee Supreme Court did not allow the recovery of those unconstitutionally paid salaries, reasoning that:

The private acts complained of as authorizing the payment to the defendant of certain compensation have not as yet been held unconstitutional by a court of competent jurisdiction, although some similar Private Acts have been held invalid. While the bill alleges that defendant Hobbes knew that said acts were unconstitutional, there is no averment that he was advised of that fact by any competent authority; nor is there any averment as to who, if any competent legal authority, advised the County Judges that the Acts were unconstitutional. Conceding for the purposes of this decision that the Acts herein assailed were unconstitutional, they are presumed to be valid and must be so regarded until the contrary is made to appear by some competent judicial tribunal. In Wade v. Board of Com'rs, 161 Okla. 245, 17 P.2d 690, 692, it was held: >The general rule is that laws are presumed to be constitutional, and ministerial officers may safely rely thereon and follow them until they are held unconstitutional or until such officers are advised by the proper officers that they are unconstitutional.' [At 552] [Citations omitted by me.]

An often heard legal mantra is the persons are presumed to know that law. The Court had this to say about the application of that theory to judges:

We cannot consider that an issue is presented under the presumption that the defendant and the several County Judges of Lawrence County were presumed to know that law, and that they were violating it to the prejudice of Lawrence County. While a citizen is presumed to know the law he is not presumed to know that a statute, which the Supreme Court presumes to be



constitutional, is unconstitutional. So said the Supreme Court of the United States in *United States v. Realty Company*, 163 U.S. 427, 438, 16 S.Ct. 1120, 1125, 41 L.Ed. 215.... [At 553]

Further, continued the Court:

Finally, we think the case at bar is controlled by *Roberts v. Roane County*, 160 Tenn. 19, 123, 23 S.W.2d 239, 243, wherein it was held: >But it appearing that the validity of the salary was recognized by the financial agent of the county, the county judge, and by complainant, during the time the complainant served as sheriff, and that the payment of salary now sought to be recovered were paid and received in good faith, without collusion, and upon the faith of the statutory direction, we think that the authorities support the equitable estoppel asserted in the complainants answer to the county's cross-bill. [Citations omitted by me.] >The authorities cited do not question the general rule, that an unconstitutional statute is not a law, does not of itself confer any rights, duties, or obligations, and is in >legal contemplation, as inoperative as though it had never been passed.' [Citation omitted by me.] But it is recognized that parties may so deal with each other upon the faith of such a statute that neither may invoke the aid of the courts to undo what they themselves have done.' [At 553]

Here the Court also pointed out that:

certain of the alleged illegal payment of salaries to the defendant and his office were made more than 30 years prior to the bringing of the present suit; others 24, 25, and 18 years prior thereto, of which are barred by the statute of limitation of 10 years as provided in code Section 8601. [At 553]

Several general sessions judges and other county officials were also relieved by the Tennessee Supreme Court from paying back unconstitutional salary payments in Bayless v. Knox County, 286 S.W.2d 579 (1965), which relied on. State v. Hobbs. With respect to the judges, the Court declared that :

Appellants assert that these General Sessions Judges, and because they were judges, must be presumed to have known that the Act which purported to authorize a salary of \$6,000 per annum is unconstitutional. Hence, that they did not receive this salary in good faith. Aside from the violence of such a presumption, this insistence is rejected in the *Hobbs* case. There one of the officials involved in the payment of the salary under that unconstitutional Act was the County Judge. [At 584]

But the unreported case of State v. Harmon, 1993 WL 266880 (Tenn. Ct. App.) sounds an alarm about the part “good faith” might play in questions of whether an unconstitutionally paid salary is required by its recipient to be reimbursed. Unreported cases do not have the precedential value of reported cases, but they can still be used by the Courts of Appeal and the Supreme Courts. For that reason, they deserve attention. In Harmon a general sessions court judge for Sequatchie County was paid an expense allowance of \$400 per month from July 1, 1983 until November, 1990, under the authority of Private Acts 1983, Chapter 79. The trial court, held that Private Act unconstitutional, but citing Roberts v. Roane County, 23 S.W.2d 239 (Tenn. 1929), declared that the Act was presumed constitutional and binding on the parties, and held that the general sessions judge was not required to pay-back the expense allowance he received under that unconstitutional private act.

But the Tennessee Court of Appeals did not agree, declaring that:

*Roberts*, and *Franks* indicate that good faith is necessary to preclude one party from recovering payment submitted pursuant to an unconstitutional statute. See also *State v. Hobbs*, 25 S.W.2d 549, 553 (Tenn. 1952). In *Bayless*, the court ruled that taxpayer

could not recover the salary increases paid to the general sessions judges, saying that judges, simply because they are judges, cannot be presumed to have known that the statute authorizing the increases in their salaries was unconstitutional. [At 6]

But then the Court turned to the facts in State v. Harmon:

Returning to the facts of this case, plaintiff testified that at some time in 1983 the county commission requested that plaintiff assume additional judicial responsibilities after which time he quit his part time job with the Board of Education as a bus driver. Plaintiff had no formal legal education. Plaintiff testified that when he and the county attorney drafted Chapter 79 in 1973, he was aware or was advised by the county attorney that his compensation could not be increased during his term. Plaintiff also testified that he did not incur \$400 per month in expenses related to his judicial office. We conclude that this testimony distinguishes the facts of the present case from *Bayless*, *Franks* and *Roberts* and establishes a lack of good faith by plaintiff. [At 6]

It completely escapes me why Harmon is distinguished from Bayless, Franks and Roberts on the basis of the lack of good faith by the judge in Harmon. It appears to me that in Harmon, the general sessions judge was held liable for the unconstitutionally paid salary because he had no legal education; because he and the county attorney drafted the act in question; because he was either aware, or was advised by the county attorney at that time, that the act was unconstitutional; and because he did not document \$400 a month expenses. The trial court had held that "It is patently clear that the private Act was a thinly veiled stratagem [sic] to avoid the prohibition against increasing judicial compensation during term, and that it runs counter to the constitution." [At 2] I assume that the court's conclusion on that point was probably true.

But the judges in Bayless, Franks and Roberts were given free passes on the good faith

issue in their unconstitutional salary increases. It is likely that the unconstitutional payment in that least one or more of those cases were instigated by the judges; that the judges in all of those cases were aware from their own knowledge that Article VI, ' 7, of the Tennessee Constitution prohibited salary increases during their terms; and that they had probably been so advised by other attorneys or public officials. It is interesting that Bayless declared that good faith arose in Hobbs from the fact that, “[t]here, one of the officials involved in the payment of salary under that unconstitutional Act was the County Judge.” [At 584] Harmon does not reflect who paid the judge, but he obviously did not pay himself the extra \$400 expense allowance between July 1983 to November 1990! In addition, that case indicates that it was the Sequatchie County Commission that asked the judge to take on the additional duty of being the juvenile court judge. But for some reason the Harmon Court passed over those facts in finding the lack of good faith on the part of the judge. I am not trying to defend the judge in Harmon, only to question why his unconstitutional “salary” increase differed materially from the unconstitutional salary increases of the judges in the other cases. The distinction based on lack of good faith sounds thin. But one must take the cases on an issue where and how he finds them.

In addition, Harmon finds some support in the other three cases. Franks, citing Roberts, says that “Defendants conceded that plaintiffs were acting in good faith in paying and receiving the salary supplement fixed by the Williamson County legislative body...” [At 432] That concession closed any argument about good faith, but presumably left good faith as a requirement to being relieved from re-payment of unconstitutionally paid money intact. Hobbs says:

Conceding for the purposes of this decision that the Acts herein assailed were unconstitutional, they are presumed to be valid and must be so regarded until the contrary is made to appear by some competent judicial tribunal. In Wade v. Board of Com’rs, 161 Okla. 245, 17 P.2d 690, 692, it was held: >The general rule is that laws are presumed to be constitutional, and ministerial officers are may safely rely thereon and follow them until they are held unconstitutional or until such officers are advised by the proper officers that they are unconstitutional. [At 552] [Citations omitted by me.]

Note that Hobbs confuses the question of what standard applies to the question of whether a statute is unconstitutional, at least where a public official is concerned. The standard is either:

- The law is presumed to be constitutional until it is declared unconstitutional by a “competent judicial tribunal,” or

- The law is presumed to be constitutional until it is held unconstitutional or *until such officers are advised by the proper officers that they are unconstitutional.*

The proof in the Harmon case indicated that the county attorney told him that the expense allowance was in violation of Article VI, ' 7's prohibition on salary increases during his term. It does not appear that any proof was offered in the other cases relative to what advice the judges may have received about the constitutionality of the salary increases. In Bayless, there were only “averments” that the judges must know that the salary increases were illegal.

The alarm raised by Harmon about good faith with respect to the salary increases paid to the mayors under ' 8(2) of the City Charter requires that they look at their conduct relative to how that provision may have gotten into the charter, and to whatever advice they may have gotten about the possible unconstitutionality of that provision. I hasten to add that I know of nothing related to their conduct that is questionable from a standpoint of “fair play” within the meaning of the above cases. I have no idea what either mayor may have been told on that point by “competent authority,” or by “proper officers” mentioned in Hobbs. The present mayor has been informed by me through the MTAS Consultant that those pay raises are constitutionally suspect. But I am not sure that I qualify as a “competent authority” or as a “proper officer” in that context.

*Blacks Law Dictionary*, 6<sup>th</sup> Ed., 1990, defines “Competent authority” this way: “As applied to the courts and public officers, this term imports jurisdiction and due legal authority to deal with the particular matter in question.” It may be that a city attorney is a “competent authority” with respect to legal questions that affect the municipality, including those at issue in the City’s case. But I doubt that a mayor is required to make a legal inquiry of the city attorney or any other attorney as to the legality of the statute under which he is paid, especially if he played no part in drafting or obtaining the passage of the statute. I am less certain what duty a mayor has as a part of “fair play” to make a further legal inquiry about the constitutionality of a statute involving pay, if he is told by the city attorney, or any other attorney (such as an MTAS attorney), that the

constitutionality of the statute is open to question.

The point of the analysis of the part “fair play” analysis has in requesting a court to deny claims for the refund of pay made under an unconstitutional statute is that the present and past mayors who have been the beneficiary of the COLA’s should insure that their hands are clean in the passage of ' 8(2) of the City Charter. The problem is that I cannot really advise them as to what would constitute unclean hands, especially in light of Harmon. But as all the cases make clear, payments of money under unconstitutional statutes are clearly illegal. The legal doctrine that saves the person paid the illegal payments of money is equitable estoppel. Fair play is generally critical in making a claim for equitable relief of any kind. A person asking to be relieved of repaying money paid to him under an unconstitutional statute cannot have taken part in securing to himself the unconstitutional payment under conditions that appear to reflect bad faith. I have no idea from the above cases, except Harmon, what that means.

The question of what happens to the present mayor’s salary if ' 8(2) is held unconstitutional appears to be answered by Bayless v. Knox County, above. There a 1947 private act increased the salary of three general sessions judges, which increased their salaries during their terms in violation of Article VI, ' 7 of the Tennessee Constitution; the terms of the judges did not end until 1950. The Court held that while that Act could not increase the salaries of those judges during their terms, it could increase them for their new terms beginning in 1950. It reasoned that the illegal part of the statute could be elided because the remainder of the Act would be complete and capable of being executed in accordance with the intent of the Legislature. “It is reasonable to conclude,” said the Court:

That the 1947 Legislature would have enacted this statute effective at the commencement of the next term with the illegal provision omitted. It does not seem reasonable to conclude the contrary, because, if the Legislature thought an increase in 1947 desirable, certainly it would think the same as to the next term....

The legal propriety of this conclusion is also supported by the fact that it accords with the rule that the Court’s duty is to save, in so far as is constitutionally permissible, legislative enactments. [At 584]

It likewise seems reasonable to conclude that if the Legislature would have approved a private act authorizing the city to pay COLA's to the mayor in conjunction with city employees, but which did not take into account that under Article XI, ' 9 of the Tennessee Constitution the salary of the mayor could not be altered during his term of office, the Legislature would have approved a private act to pay COLA's to the mayor, such COLA's to start at the beginning of the mayor's next term. Such a reading of that statute also accords with the rule that it is the Court's duty to save, in so far as is constitutionally possible, legislative enactments.

It may still be advisable for the City to ask the General Assembly to adopt a private act either setting the salary of the mayor at whatever level it is now, with a provision in the act for COLA's that comply with Article XI, ' 9 of the Tennessee Constitution, or to do whatever it wants to do relative to the salary, and the setting of the salary, of the mayor.

Incidentally, Hobbs observed that certain of the alleged illegal payment of salaries to the defendant and his office were made more than 30 years prior to the bringing Aof the present suit; others 24, 25, and 18 years prior thereto, of which are barred by the statute of limitation of 10 years as provided in code Section 8601. [At 553]

I note that the City Charter is Private Acts 1999, Chapter 7, of which ' 8(2) is a part. The statute of limitations of 10 years found in Section 8601 referred to in Hobbs, is presently found in Tennessee Code Annotated, ' 28-3-110, which is entitled "Actions on public officers' and fiduciary bondsBActions not otherwise covered," applies to:

- (1) Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds;
- (2) Actions on judgments and decrees of courts of record of this or any other state or government;
- (3) All other cases not expressly provided for.

I have done no research on when that statute of limitations begins to run, but depending

on when some of the COLA's were adopted, that period may be well-advanced as to some of them.