September 22, 2008

Dear Chairman of the Board:

You have several questions related to the relative powers of the Utilities Board and the superintendent of the Utilities Board, which I hope I correctly state:

1. Can the utility board exercise authority over personnel ("hiring, firing, promotions, etc.") decisions?

2. Can the utility board approve positions and budgets associated with those positions?

3. Can the utility board change the superintendent's policy of paying compensatory time for overtime, some of which is supported by contracts, apparently approved by the utility board?

4. Is there a "pass-through" requirement in the contract between the City and TVA for the former to pass-through rate increases?

I have also chosen to add peripheral personnel questions that occurred to me in answering Questions 1 and 2, and which I will address before I address Question 1, because they have some relevance to that question.

Questions 1 and 2 are obviously related. I will try to answer those together below. I will handle Questions 3 and 4 separately below.

Generally

The legal foundation of the Utilities Board is the Municipal Electric Plant Law of 1935, codified in Tennessee Code Annotated, ' 7-52-101, et seq. Although I find nothing in the city's charter or municipal code that supports that conclusion, it is supported by Smith v. Harriman Utility Board, 26 S.W.3d 2000 (Tenn. Ct. App. 2000) (Application for permission to appeal denied by Tennessee Supreme Court July 17, 2000). In that case, the Municipal Electric Plant Law is the statutory scheme under which Court analyzed the question of whether the general manager (superintendent) of the Utility Board had the right to enter into a contract with an employee (Smith) of the utility board without the approval of the utility board.

Surprisingly, few Tennessee cases have interpreted the Municipal Electric Plant Law of 1935 generally, let alone its provisions governing the distribution of personnel authority between the electric power board and the superintendent. Unfortunately, I can find no case that addresses the question of whether the electric board (whether it is the city's governing body or an

independent board), can adopt personnel rules and regulations that govern the superintendent's authority to hire and fire personnel, without intercepting his rights in those areas.

Statutory Outline of Distribution of Authority
Between Utility Board and Superintendent

Smith v. Harriman Utility Board

Holding that the superintendent of the Utility Board did not have the authority to enter into a contract with an employee of the utility board without the approval of the utility board, the Court in Smith v. Harriman Utility Board, above, listed the personnel powers of the superintendent and of the utility board, under Tennessee Code Annotated, ' 7-52-117, one of which was contained in Subsection (d): AThe superintendent shall let all contracts, subject to the approval of the supervisory body, but may without such approval, obligate the electric plant on purchase orders up to an amount to be fixed by the supervisory body, but not to exceed fifty thousand dollars ($50,000). The Court held that the contract between the superintendent and the employee was not approved by the utility board, and for that reason was illegal.

Distribution of powers between superintendent and utility board in Municipal Electric Plant Law of 1935

Among the other powers of the superintendent contained in Tennessee Code Annotated, ' 7-52-117 the Court mentioned were:

- "The superintendent shall have charge of all actual construction, the immediate management and operation of the electric plant and the *enforcement and execution of all rules, regulations, programs, plans and decisions made or adopted by the supervisory board.*" [Subsection (a)]

- "The superintendent shall appoint all employees and fix their duties and compensation, excepting that the appointment of all technical consultants and advisers and legal assistants shall be subject to the approval of the supervisory body." [Subsection (c)]

The powers of the utility board are listed in the Municipal Electric Plant Law as follows:

- *Tennessee Code Annotated*, ' 7-52-114(a)(1): The general supervision and control of the acquisition, improvement, operation and maintenance of the electric plant shall be in charge of the following agency, referred to as the "supervisory body" in this part:

(A) The board, or if there be no board, then
(B) The governing body of the municipality.

- Tennessee Code Annotated, ' 7-52-114(b): The utility board appoints the

superintendent, who “shall serve at the pleasure of the supervisory body and may be removed by such body at any time.”

- Tennessee Code Annotated, ' 7-52-114(c): “Within the limits of the funds available, all power to acquire, improve, operate and maintain, and to furnish Electric service, and all powers necessary or convenient to furnishing electric service, conferred by this part shall be exercised on behalf of the municipality *by the supervisory body and superintendent respectively.*”

- Tennessee Code Annotated, ' 7-52-115(a): “Subject to the provisions of applicable bonds or contract, the supervisory body shall determine programs and make all plans for the acquisition of the electric plant, shall make all determinations as to improvements, rates and financial practices, may establish such rules and regulations as it may deem necessary or appropriate to govern the furnishing of electric service, and may disburse all moneys...”

Peripheral Personnel Issues Left Open by Smith

Can superintendent fire employees of utility board?

If we were to assume here that there had been no illegal contract between the superintendent and the employees, Smith v. Harriman Utility Board would still have left open the question of whether the superintendent could have fired the employee. Subsection (b) says that the superintendent of the electric plant “*shall* appoint all employees, fix their duties and compensation, excepting that the appointment of all technical consultants and advisers and legal assistants shall be subject to the approval of the supervisory body.” It says nothing about the authority of the superintendent to fire utility board employees.

But ample case law also supports the proposition that the power to hire also includes the power to dismiss unless a statute provides otherwise. In Gambling v. Town of Bruceton, 803 S.W.2d 690 (Tenn. App. 1990), the town recorder argued that he was an employee, hoping to obtain the protection provided to employees under the town’s personnel policies. Holding the recorder to be an officer, the Court declared that with respect to officers, “The right of removal from office is an incident to the right of appointment unless the term of the official is fixed by law for a definite period. See *Brock v. Foree*, 168 Tenn. 129, 778 S.W.2d 314 (1934).” [At 693]

Similarly, the Tennessee Supreme Court in Gillespie v. Rhea County, 235 S.W.2d 4 (1950), said with respect to an officer appointed by the county governing body and for whose office no term was prescribed by statute or the constitution, that:

> The Statute authorizing the appointment of Service Officers did not specify that they could or should be elected for a specified term of office. It is perfectly obvious to us that these officers were appointed at the will of the County Court or the governing body of the City who appointed them as was the chief Service Officer who was appointed by the Governor under whom these County and City Service Officers serviced. The Chief Executive Officer of the

> State having the power to appoint the Chief Service Officer and the Statute not providing any term for which he should be appointed it necessarily follows that the Governor has the right to fire this officer at his pleasure and that he would have no power to appoint such officer for a term beyond the term of the Chief Executive appointing such officer...[T]he implied power to remove cannot be contracted away so as to bind the appointing authority to retain a minor officer or employee for a fixed, definite term. This is a universally accepted rule where the tenure of office is not prescribed by Statute or the Constitution. Under such circumstances the power to remove is an incident to the power to appoint. [At 7]

Gillespie is cited for the same proposition in Hamblen County v. Reed, 468 F. Supp. 2 (E.D. Tenn.).

The Municipal Electric Plant Law does not provide otherwise. Even though the above cases apply to officers, I can think of no reason they would not apply to employees. It seem clear that it was the intent of the General Assembly in adopting the Municipal Electrical Plant Law to put the superintendent of the electric board in charge of the personnel of the board for hiring, dismissal and intermediate disciplinary actions.

But an interesting wrinkle on the right of the superintendent to fire utility board employees arises from the question of whether the power to appoint employees includes the power to suspend them as well as to remove them. Logic suggests that the answer is yes, but that is not the result reached in Barnes v. Ingram, 397 S.W.2d 821 (Tenn. 1966). In that case, the employee under the Memphis city charter could be suspended by the mayor for misconduct or dereliction of duty, but, according to the Court, could be removed by the board of mayor and commissioners at will. [As I read the charter of the City of Memphis the Court was in error on that point; the employee could be removed only for cause]. The mayor suspended the employee several times, the board reinstating him each time. Enjoining the mayor from further suspensions without cause, the Court stated the rule governing the suspension of at will employees:

> In 43 Am.Jur., Public Officers ' 242, the following rule is set forth: The power to suspend is generally considered as included in the power of removal for cause, since a suspension is merely a less severe disciplinary measure. But where the power to remove at will or at the pleasure exists, it has been observed that the power to suspend is not necessary and does not exist. Moreover, the indefinite suspensions of a public officer without pay is not considered within the general power of removal....[At 824]

In Barnes, the appointive power over the employee was in the mayor, but the board had to concur in the appointment. In electrical systems operating under Tennessee Code Annotated,

' 7-51-101 et seq., the appointive power over electric system employees is in the superintendent. In Barnes, the city charter provided for how an employee was removed: the mayor could suspend for cause, the board could remove at will. Tennessee Code Annotated, ' 7-52-117 is silent on the power of suspension. But because under Tennessee law the power to appoint includes the power to remove, and because there is nothing in the Municipal Electric Plant Law that gives electric system employees a property or contract right in their jobs and apparently the utility board has not done so, those employees serve at the will of the superintendent. If that is so, under Barnes, the superintendent's power to appoint and remove employees does not include the power to suspend them. His option is to terminate them. But I frankly do not know how the Tennessee courts would handle such a question. Barnes appears to me to defy logic.

Analysis of Questions 1 and 2

Utility board approval of positions and associated budgets

There is no doubt that Tennessee Code Annotated, 7-52-117(b) gives the superintendent some significant personnel powers: "The superintendent shall appoint all employees and fix their duties and compensation, excepting that the appointment of all technical consultants and advisers and legal assistants shall be subject to the approval of the supervisory body." Indeed, the exception in that statute giving the utility board the authority to approve technical consultants, advisors and legal assistants, appears to reinforce the authority of the superintendent over the hiring (and by extension, the firing) of other utility board employees. Mr. Powers concedes that statute "gives hiring, firing, etc. authority to the General Manager," but thinks that the utility board has the authority to "approve positions and associated budgets," and to "determine their compensation within the approved range."

I can find no Tennessee case which helps resolve the question of whether the utility board has the authority to approve positions and associated budgets, and to determine the compensation of those positions in the face of Tennessee Code Annotated, ' 7-52-117(b). However, cases on this question arise in similar contexts in other jurisdictions. In Judges of the 74th Judicial District v. County of Bay, 190 N.W.2d 219 (Mich. 1971), the question was whether the county had the authority to regulate the salary of the employees appointed by the judges of the judicial district by making line item appropriations in the county's budget. A state statute provided that, "Except as otherwise provided, the judges of the district court shall appoint the employees thereof and fix their compensation within appropriations provided by the governing body of each district control unit." The county argued that the language "within appropriations provided by the governing body of each district control unit," allowed the county to fix the salaries of the judge's employees through line item appropriations for each employee. The Court rejected the county's argument, declaring that:

> If, however, the statute means what it says, i.e., that the judges are to fix the compensation of their employees, then it follows that the language 'within appropriations' simply means that the judges' statutory power to employ personnel and fix their compensation must be exercised within the overall limits of funds appropriated

> by the district control unit or units, for the operation and maintenance of the district court. [At 225]

In Employees and Judges of the Second Judicial District Court, Second Division v. Hillsdale County, 378 N.W.2d 744 (Mich. 1985), the Court, citing with approval Judges of the 74th Judicial District, above, subsequently emphasized that "The court has the authority to fix salaries, *which if reasonable and within appropriations*, must be paid by the funding unit...." [At 748] [Emphasis is mine]

In another case involving the employees of judges, Morgan County Commission v. Powell, 293 So.2d 830 (Ala. 1974), an Alabama statute provided that: "Each judge of the Eighth Judicial Circuit is hereby authorized to employ such clerical or stenographic assistance as may be necessary to carry out the duties of his office. The salary of each clerk or stenographer employed hereunder by a circuit judge shall be fixed by such judge, subject to the approval of the county governing body of the county in which such judge resides...." That provision, held the Alabama Supreme Court declared that notwithstanding the so called "Independence of the JudiciaryBInherent Powers' theories," the county court was not obligated to rubber stamp the salaries granted by the judges to their employees. [At 835-36]

Hunter v. County of Morgan, 12 S.W.3d 749 (Mo. App. 2000) involves the question of who had the Authority to establish the compensation of deputies and assistants of the county [tax] collector. Tracing the evolution of statutory changes on that question, the Court pointed out that the current applicable statute read this way:

1. The county collector in each county of the third class is entitled to employ deputies and assistants and for the deputies and assistants is allowed until December 31, 1944, not less than the amount allowed in 1988.

2. Beginning January 1, 1995, the deputies and assistants, including the chief deputy county collector, shall receive compensation in an amount set by the governing body of the county. [At 757]

Applying the rules of statutory construction, the Court held that until 1995, the county collector had the authority to set compensation for his deputies and staff, reasoning that:

> In interpreting statutes, our purpose is to ascertain the intent of the legislature. [Citations omitted by me.] In doing so, we look to the language used, giving it plain and ordinary meaning. Id. When a word used in a statute is not defined therein, it is appropriate to derive its ordinary meaning from a dictionary. Id In interpreting a statute, we are required to give meaning to each word, clause and section of the statute whenever possible. [Citations omitted by me.] The courts are without authority to read into a statute legislative intent that is contrary to the intent made evident by giving the language employed in the statute its plain and ordinary meaning.

> [Citations omitted by me.] When the legislative intent cannot be ascertained from the language of the statute by giving it its plain and ordinary meaning, the statute is ambiguous and only then can the rules of statutory construction be applied. [Citations omitted by me.] [At 757]

Under those rules, concluded the Court, Awe find that the legislature intended that the collector would have the authority to set compensation for his deputies and clerical staff until January 1, 1995, at which time the commissioner's authority in this regard would be ... restored. [At 758]

Those cases stand for the proposition that the Legislature can provide for who has the authority to appoint personnel and compensate them. They all turn on the reading of the statutes at issue in those cases. But Hunter v. Morgan, above, in particular points to specific rules of statutory construction for resolving the question of whether the county or the tax collector had the authority to select and compensate the collector's employees. The Tennessee Rules of Statutory Construction appear identical to the Missouri Rules of Statutory Construction. [See 23 Tennessee Jurisprudence, *Statutes*, in particular *IV. Construction*, '' 23-45. Those cases also stand for the proposition that salaries given to the employees must be reasonable, and that the salaries must stay within the total appropriations for the offices in question.

Utility board's authority over other personnel policies

The utility board derives the authority to adopt personnel policies governing utility board employees from at least two sources:

First, the Municipal Electric Plant Law gives the supervisory body various powers. In Tennessee Code Annotated, ' 7-52-114 it is expressly given "*supervision and control*" over:

- improvement,

- operation, and

- maintenance.

In addition, under Tennessee Code Annotated, ' 7-52-114(c) the supervisory body has within the limits of the funds available, all powers to:

- "acquire,"

-"improve,"

- "operate," and

-“maintain,” and to

-“furnish electric service,” and

-“all powers necessary or convenient to furnishing electric service, conferred by this part...”

Those powers appear to be very broad, even in the personnel context, especially the power of general supervision and control over “operation[s],” and power to “operate” and the language “all powers necessary or convenient to furnishing electric service, conferred by this part.” In theory, that position is supported by other authority the supervisory body has under the Municipal Electric Plant Law. One of those is that under Tennessee Code Annotated, ' 7-52-117(a), it undoubtedly has the power to adopt:

- “rules,”

- “ regulations,”

-“ programs,”

- “plans” and

- “decisions...”,

which the superintendent has the duty of “enforcement and execution.”

Indeed, the utility board has adopted some personnel policies, some of which I have a copy, although those in my possession include only those up to Section 3.09, which appear to reflect only a small part of them. I have no idea to what extent any of those personnel policies might conflict with the superintendent’s personnel authority.

Second, as pointed out above, the supervisory body has the power of “general supervision and control” of those functions listed in Tennessee Code Annotated, ' 7-52-114(a)(1): “acquisition, improvement, operation and maintenance.” As far as I can determine, the courts in Tennessee have not defined the meaning of the term “general supervision” in any context. However, the courts in other jurisdictions have taken on that task.

In Great Northern Ry. Co. v. Snohomish County, 93 P. 924 (Wash. 1908), the Court asked and answered the question of what powers were contemplated in the state board of tax commissioner’s powers of “general supervision” over assessors and county boards of equalization:

> What is meant by “general supervision?” Counsel for respondents contend that it means to confer with, to advise, and that the board

> acts in an advisory capacity only. We cannot believe that the Legislature went through the idle formality of creating a board thus impotent. Defining the term "general supervision" in Vantongeren v. Hefferman, 5 Dak. 180, 38 N.W. 52, the Court said: "The Secretary of the Interior, and under his direction, the Commissioner of the General Land Office, has a general supervision" over all public business relating to the public lands.' What is meant by "supervision'? Webster says supervision means "to oversee for direction; to superintend; to inspect; as to supervise the press for correction." And, used in its general and accepted meaning, the Secretary has the power to oversee all the acts of the local officers for their direction, or, as illustrated by Mr. Webster, he has the power to supervise their acts for the purpose of correcting the same; and the same power is exercised by the Commissioner under the Secretary of the Interior. It is clear, then, that a fair construction of the statute gives the Secretary of the Interior, and, under his direction, the Commissioner of the General Land Office, the power to review all the acts of the local officers, and to correct, or direct a correction of, any errors committed by them. Any less power than this would make the 'supervision' an idle actBa mere overlooking without power of correction or suggestion. Defining the like term in State v. F.E. & M. V.R.R. Co., 22 Neb. 313, 35 N.W. 118, the court said: "Webster defines the word 'supervision' to be the 'act of overseeing; inspection, superintending.' The board therefore is clothed with the power of overseeing, inspecting, and superintending the railways within the state, for the purpose of carrying into effect the provisions of this act, and they are clothed with the power to prevent unjust discrimination against either persons or places." It seems to us that the term "general supervision" is correctly defined in these cases. Certainly a person or officer who can only advise or suggest to another has no general supervision over him, his acts or his conduct....[At 927.]

The Kansas Supreme Court in State ex rel. Miller v. Board of Ed. of U Sch. D. No. 398, 511 P.2d 705 (Kan 1973) puzzled over the meaning of a Kansas statute that gave the state board of education the power of "general supervision" over local school boards. First, it declared:

> We find little legal authority to assist us in determining what is comprised within the term "supervision." In common parlance we suppose the term would mean to oversee, to direct, to inspect the performance of, and to superintend. (See Webster's International Dictionary, Third Edition; American Heritage Dictionary.) It is difficult to be exact as to the legal meaning of the term, for much depends on the context in which it is set out.

> In Continental Casualty Company v. Borthwick, 177 So.2d 687, 689 (Fla. App.), the court stated: "A reference to recognized lexicographies reveals that the word 'supervision' is capable of definitionBthat is, by the use of general comprehensive words. For example, in Webster's Collegiate Dictionary, the definition of supervision is two-fold: namely, as 'Act of supervising' and as 'The direction and critical evaluation of instruction, esp. in public schools.'"
>
> In Commonwealth of Pennsylvania v. Brown, 260 F. Supp. 323, 348, the federal court speaks of supervision as importing regulation. [At 712-13.]

Here the Court turns to, and cites in full, the definition of "general supervision" in Great Northern, above, declaring that case "Perhaps the most helpful in getting at the problem." [At 713.] Applying those definitions, the Court makes an important conclusion about the relative authority of the state board of education and local boards of education:

> Considering the fame of reference in which the term [general supervision] appears both in the constitution and the statutes, we believe "supervision" means something more than to advise but something less than to control. The board of regents has such control over institutions of higher learning as the legislature shall ordain, but not so the board of education over public schools; its authority is to supervise. *While the line of demarcation lies somewhere between advise and control*, we cannot draw the line with fine precision at this point; we merely conclude that the regulation which is the one of contention between the state and district boards in this case falls within the supervisory power of the state board of education. [At 713] [Emphasis is mine.]

In Bailey v. Board of Education of County of Kanawah, 321 S.E.2d 302 (W.Va. 1984), the Supreme Court of Appeals of West Virginia interpreted a provision of the West Virginia Constitution which provided that, "The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law." Consistent with that provision, a West Virginia statute provided that the state board of education "shall determine the educational policies of the state and shall make such rules for carrying into effect the laws and policies of the state relating to education..." [At 307] The question in that case was whether the power of general supervision gave the West Virginia Board of Education the authority to promulgate rules governing academic standards required for student participation in athletic competition. The Court adopted as "persuasive" the Kansas Supreme Court's interpretation in Miller of the meaning of "general supervision":

> As used in article 6, '2(a) of the Kansas Constitution, general

> supervision means the power to inspect, to superintend, to evaluate, to oversee for direction. Despite this relatively broad interpretation of the term "general supervision" the Kansas Supreme Court did recognize that the term does not imply unlimited authority. In Syllabub Point 10 of *Miller*, the Kansas Supreme Court stated that "as found and employed both in the constitution and in the statutes of this state, the term 'general supervision' means something more than to advise and confer with but something less than to control." [At 310]

Finally, State ex rel. Iowa Board of Assessment and Review v. Local Board of Review of City of Des Moines, 283 N.W.87 (1938) involved the interpretation of a statute that gave the plaintiff the power:

> To have and exercise general supervision over the administration of the assessment and tax law of the state, over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties, in all matters related to assessments and taxation, to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law. [At 91]

The Court declared that the language of that statute itself made the term "general supervision" quite clear and also pointed with approval the broad definition of that term.

The cases involving the interpretation of the phrase "general supervision" all relate to the relative authority of state and local entities where the former have the power of "general supervision" over the latter, but they appear instructive as to the relative authority of the utility board and the superintendent of the board. Virtually all of them cite Great Northern or Miller for support, although the definition in Great Northern appears to contemplate some control as well as advice, while the definition in Miller "means something more than to advise and confer with but something less than to control."

But both Miller and Iowa Board of Assessment and Review, above declare that what the power of "general supervision" means is at least partly based on the language of the statute. In Iowa Board, it is doubtful that anyone would have difficulty reaching the conclusion from only the language of the "general supervision" statute in that case, that the Iowa Board of Assessment and Review had broad power to look over the shoulder of everyone involved in assessments, and to intervene in tax assessment disputes.

However, while we are left to guess what "general supervision" and control in Tennessee Code Annotated, ' 7-52-114 means due to the absence of any accompanying statutory language, there is a major difference between the language of the "general supervision" statutes in all the above cases and the "general supervision" language in Tennessee Code Annotated, ' 7-52-114. That statute gives the supervisory body the authority of "general supervision and *control*," not

merely the authority of general supervision. That difference appears significant; the word "control" logically imparts some degree of authority in addition to general oversight. Surely, it means that the utility board can adopt personnel policies and procedures in any area in which it had authority over the utility system, as long as those policies and procedures did not collide with the superintendent's personnel under Tennessee Code Annotated, ' 7-52-117(b). Presumably, the utility board can also give the superintendent advice, warnings, and Tennessee Code Annotated, ' 7-52-114(b) independently allows the utility board to remove him. But unlike the other cases above which support the proposition that the right of general supervision includes the authority to take "corrective action," it is not clear what "corrective action" the utility board could take with respect to individual and particular personnel actions. Presumably, it may mean that the utility board can overturn the superintendent's individual and particular personnel actions, except where his actions are within his authority under Tennessee Code Annotated, ' 7-52-117(b). As I pointed out above, I do not have a copy of the utility board's personnel policies and procedures.

Possible contracts governing personnel

There is another problem associated with trying to delineate the relative powers of the superintendent and the utility board: Under Tennessee Code Annotated, ' 7-52-117(d), "The superintendent shall let all contracts, subject to the approval of the supervisory body." I gather from Question 3 and the superintendent's letter to the utility board on August 6, 2008, that some contracts that have been approved by the utility board govern overtime compensation. I do not know what other contracts between some utility board employees, if any, may govern other personnel issues. We will take up the utility board's and the superintendent's power to contract in addressing Question 3.

Analysis of Question 3

Right of utility board or superintendent to waiver exempt employment status

According to the superintendent's letter to the utility board on August 6, 2008, overtime compensation in the form of compensatory time off is paid to some exempt employees, which compensatory time off is supported by contracts let by the superintendent and approved by the utility board. In addition, the superintendent apparently has an employment contract with the utility board under which he receives compensatory time off for overtime. I do not have a copy of such contracts; for that reason I cannot speak to them with any degree of certainty. I will simply make some pertinent comments about the right of municipalities to pay overtime compensation under the Fair Labor Standards Act (FLSA), the right of the superintendent and the utility board to enter into employment contracts of that kind with utility board employees, and the right of the utility board to enter into employment contracts with the superintendent.

It appears that a government can wavier its claim that its exempt employees are such employees under the FLSA. [See Renfo v City of Emporia, 948 F.2d 1529 (10th Cir. 1991).] A strong argument can be made that if the superintendent entered into a contract, approved by the

utility board, that otherwise exempt employees were entitled to compensatory time off for overtime, the utility board in effect waived its right to claim that they are exempt employees under the FLSA. In addition, the utility board might be estopped under state law from claiming that those employees are exempt employees. I do to wish to get into a discussion on the doctrine of estoppel, except to say that in this case, under that doctrine, the utility board might be equitably prevented from raising the legal defense that the employees in question are exempt employees under the FLSA because of its conduct. However, I note that in Smith v. Harriman Utility Board, above, that Smith made an estoppel argument that had no traction. The Court declared that "Plaintiff's at-will employment created no detrimental reliance on employment with Defendants for any period of time..." [At 887]

I do not know whether the utility board could abrogate those contracts under some legal doctrine. Again, I point out that I do not have those contracts. However, in my opinion, the utility board would be within its right to adopt a policy that the superintendent could not in the future treat exempt employees as non-exempt employees. It appears to me that the same thing could easily be accomplished by the utility board simply not approving contracts in which exempt employees are paid compensatory time off for overtime. I have mulled the question of whether either approach by the utility board would conflict with the superintendent's authority to set the compensation of utility board employees under Tennessee Code Annotated, ' 7-52-117(b), and have determined that the answer is no. It does not appear to me that the superintendent has the right on his own to waive the FSLA's distinction between exempt and non-exempt employees. But if the superintendent is right, the utility board itself agreed to the contracts in question.

Right of utility board to enter into employment contracts with employees of utility board

That brings us to the question of whether the utility board can even enter an employment contract with the superintendent for overtime compensation, or approve employment contract for other utility board employees.

In theory, that question is answered by Smith v. Harriman Utility Board, above. At the risk of excessive repetition, I will point out that in that case Jack Howard, the general manager of Harriman Utility Board (who himself had a five year employment contract with the HUB) entered into an employment contract with Smith, for the latter to be the superintendent of the gas, water and sewer department. The utility board did not approve the contract. Jack Howard died two days after the contract between he and Smith had been executed. Smith was subsequently terminated by the new general manager of HUB. But the Court held that the contract between Jack Howard and Smith was no good, reasoning that Tennessee Code Annotated, ' 7-52-117 "does not confer authority for a general manager of a utility to enter into a fixed-term employment contract with an employee *without approval of the utility board*." [Emphasis is mine.]

Under that case, apparently the contract between the superintendent and Smith would have been upheld had it been approved by the utility board. But it may be noteworthy that the Court said about the contract,"A[I]t is an agreement between a superintendent, Jack Howard, and a lower level employee..." [At 884]

That case did not consider the question of whether the five year contract between the board and the general manager was legal. The reason is that the governing body of a utility system organized under Tennessee Code Annotated, ' 7-52-101 et seq. clearly has the statutory authority to terminate the superintendent of the utility system. Tennessee Code Annotated, ' 7-52-114 (b) provides that, "The superintendent shall serve at the pleasure of the supervisory body and may be removed by such body at any time."

As far as I can determine, there is no law in Tennessee directly on the question of whether a local government can enter into an employment contract with a high-ranking at will employee. But in the unreported case of Walker v. City of Cookeville, 2003 WL 21918625 (Tenn. Ct. App.), an at will employee of a city hospital successfully sued the hospital under the terms of her employment contract that provided her certain benefits if she were terminated. The Court resolved the case by reference to the terms of the contract, and did not take up the question of the city's authority to enter into such a contract. The contract in that case was for one year, and automatically renewed for a like period unless either party gave 60 days notice prior to the end of the current term to the other of an intent not to renew.

However, our "parent" state of North Carolina has directly addressed that question. In Myers v. Town of Plymouth, 522 S.E.2d 122 (N.C. App. 1999), North Carolina city managers by statute serve at the will of their cities' governing bodies. But the Court upheld the severance payment provision of a city's contract with its city manager, reasoning that it did not interfere with his at will status. I think the Tennessee courts would pay close attention to that case. [Also see the unreported case of Iberis v. Mahoning Valley Sanitary District, 2001 WL 1647184 (Ohio App. 11 Dist.).]

But even if a case can be made that under Tennessee Code Annotated, ' 7-52-101 et seq., a utility board can enter into a contract with the superintendent, such a contract may not survive the term of the existing utility board. It did not bother the Court in Myers v. Town of Plymouth, above, that when the city council terminated the city manager and refused to pay him severance pay under the contract, only one council member who was on the board when the contract was executed was a current member of the board, but I am not sure the Tennessee Courts would go that direction. Washington County Board of Education v. Marketmedia, Inc., 693 S.W.2d 344 (Tenn. 1985), makes it clear that municipalities can generally enter into contracts that extend past the term of the sitting board, but the Court in that case was expressly careful not to overrule State ex rel. Brown v. Polk County, 54 S.W.2d 714 (Tenn. 1932).

In State ex rel. Brown v. Polk County the county board of education entered into a five year written contract with Brown to be the principal of a high school and elementary school, and another contract under which he would be entitled to liquidated damages upon breach of the contract. Upon a change in boards of education, the new board refused to recognize the contract. The Court held that the contract was not enforceable because AThe limitation upon the spending power of the county board of education, coupled with the requirement of an annual budget to be made upon approval of the county court, imports a limitation upon the power of the board to a

binding contract or employment or other contract for expenditures of money beyond the annual budget prescribed by the act, a requirement essential to reasonable management of county revenues and expenditures to avoid bankruptcy. [At 715]

But both Marketmedia and Brown v. Polk County leave more questions than they answer about the legality of employment contracts. In Polk, the Court also said that:

> In the absence of any express or implied statutory limitation, a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract, if made in good faith and without fraudulent collusion, binds the succeeding board. [Citation omitted.] [At 715]

Marketmedia said essentially the same thing about the right of governments to enter into contracts extending past the budget year and the term of the sitting board, pointing to several cases in which such contracts had been upheld, including one that involved a low-ranking school employee, the funds for whom were contained in the budget: Cox v. Greene County, 175 S.W.2d 150 (1943). But two footnotes in Marketmedia indicate that Brown v. Polk County is alive and well *with respect to high ranking employees of a board*:

Footnote 1:

> It [Cox, cited above] also said that "the general rule is that contracts for employment for a period beyond the term of the employing board are not valid. The principle is of particular importance where the nature and character of an employment are such as to require a board or officer to exercise supervisory control over the employee." 63 Am. Jr. 2d Public Officers and Employees, sec. 334, at 911 (1984) *Brown* is of course consistent with this general rule. [At 347.]

Footnote 2:

> *Brown* is in agreement with the general rule that employees under the personal supervision of a particular board should serve concurrently with that board. Nothing in this opinion should be construed as disapproving of this rule. See 63A Am.Jur.2d Public Officers and Employees ' 333, at 911 (1984). [At 349, footnote 2]

Other cases have held that the terms of municipal officers and employees do not extend past the term of the sitting board. [Gay v. City of Somerville, 878 S.W.2d 124 (Tenn. App. 1994);Gambling v. Town of Bruceton, 803 S.W.2d 690 (Tenn. App. 1990); Dingman v. Harwell, 814 S.W.2d 362 (Tenn. App. 1991).] However, none of those cases involved contracts of employment; rather, holdovers in office.

In Tennessee, a municipal utility is operated in the municipality's proprietary capacity.

[See Bybees Branch Water Association v. Town of McMinnville, 333 S.W.2d 815 (Tenn. 1960); City of Shelbyville v. State ex rel. Bedford County, 415 S.W.2d 139 (Tenn. 1967); Baston v. Pleasant View Utility District, 592 S.W.2d 578 (Tenn. App. 1980); Maury County Board of Public Utilities v. City of Columbia, 854 S.W.2d 8909 (Tenn. App. 1993).] The significance of that fact is that, with some exceptions that generally relate to the obligation to provide service and to set rates, municipal utilities are governed by the same rules that govern private or corporate businesses. But the Marketmedia Court refused to apply the governmental/proprietary distinction for the purposes of analyzing the contracts that extend past the term of sitting boards, declaring that, "Attempts to distinguish between contacts entered into in 'governmental' as opposed to 'proprietary' capacities contributes only ambiguity and confusion." [At 349]

I frankly do not know what the courts would do with an employment contract between a utility board and a superintendent, that extends beyond the term of the utility board, under Tennessee Code Annotated, ' 7-52-117. They could point to footnotes 2 and 3 of Marketmedia, on the ground that unlike the low-ranking employee in Cox, the position of superintendent of the utility is a high-ranking one directly supervised by the board. At the same time, the utility board does not come to the city's governing body for approval of its budget, requiring the separate budgetary and appropriation coordination about which the Brown v. Polk County Court was concerned.

If the contract in question is not good past the term of the sitting board, what is the sitting board with respect to a utility system under Tennessee Code Annotated, ' 7-52-101 et seq? The answer to that question is also woefully unclear.

In Gillespie v. Rhea County, 235 S.W.2d 4, (Tenn. 1970), it is said that:

> Under our system of government when a new executive comes into office or a new County Court comes into office or a *new governing body of a municipality* comes into office they have a right to hire new employees for positions under them. [At 7]

There, in the words of the Court, "the personnel of the County Court changed" when the term of the "old Court expired" on September 1, 1948, and created a new county court. Because the County Court was a county body, presumably, the terms of all the members of the county court expired on the same date. It is strongly implied in State ex rel. Brown v. Polk County, above, that a partial change in a governing body also produces a new board. In that case a board of education entered into a contract. Apparently only the chairman and secretary of a board of education changed and the board repudiated the contract. In upholding the validity of the contract, the Court declared that, "In the absence of any express or implied statutory limitation, a school board may enter into a contract to employ a teacher or any proper officer for a *term extending beyond that of the board itself....*"

It has been held that "A municipal governing body is generally considered to be a continuous body, regardless of changes in its personnel, *even though the terms of all of the members expire at the same time*." [4 McQuillin, Municipal Corporations, section 13.40.] That is

also the law in Tennessee. [Washington County Board of Education v. Marketmedia, above.] In fact, in Cox v. Greene County, above, seven members of a county school board were elected to staggered one year terms of office. The board entered into contract with Cox to serve as its clerk and stenographer, following which one of the seven members of the board was replaced in a regular election. The question was whether the contract was binding on the board after the election. In holding that it was, the Court reasoned that:

> While provision is made in the statutes for a change in the personnel of the membership of the board of directors by the vote of the qualified electors of the school district at each annual meeting of the school district, yet the intention of the Legislature is clearly reflected in the statutes that the board of directors of a common school district is a continuous body or entity, and that transactions had, and contracts made, with the board, are the transactions and contracts of the board, as a continuous legal entity, and not of its individual members. [At 151]

Similar language appears in Marketmedia, above, with respect to a service contract entered into by a county board of education.

Roti v. Washington, 450 N.E.2d 465 (App. 1 Dis. 1983), puts the doctrine of the continuous governing body into perspective. There the Court considered the question of whether the rules of the Chicago City Council were binding on a future city council under the doctrine of the continuing body. No, held the Court, reasoning that:

> The parties agree that the City Council is a continuing body, the existence of which never ceases by reason of a change of membership. The continuing body concept serves as the useful legal fiction needed to accomplish such desirable public policy considerations as protecting the contract rights of persons who had contracted with the previous municipal body, sustaining the existence of a body that can act during periods of transition and affirming the ability of one City Council to act upon the uncompleted business of a previous Council. [Citations omitted.]....We take issue, however, with the defendant's argument that because the City Council is a continuing body, the Rules of Order adopted by the 1979-83 Council are therefore binding upon the 1983-87 Council. An entirely new City Council is selected by a majority vote of the citizens of Chicago every four years. While the Council as an entity is certainly a continuing body that never ceases to function, we cannot ignore the fact that an entirely new City Council is elected every four years to represent the public's interest in conducting the City's business.... [At 473]

Although the entire council changed each four years in that case, the obvious policy

reasons cited by the Court make it clear that the result would have been the same had the council been elected to staggered terms.

Most cases from other jurisdictions dealing with the length of terms of governing bodies also involve the questions of whether such bodies can enter into contracts, or appoint or hire officers and employees, beyond their terms. [See 70 A.L.R. 794; 149 A.L.R. 336; 75 A.L.R.2d 1277.] The cases are split on those questions, and often depend upon the type of contract, appointment or employment at issue. However, the overwhelming number of cases on both sides of the split expressly or impliedly treat governing bodies that have undergone either a complete or partial elective or appointive change in personnel as new bodies. With respect to appointment of officers and employees made by governing bodies that have staggered terms, it is said in 75 A.L.R.2d 1277, 1280, that:

> It is in the cases wherein the appointing board's members had staggered terms that clarity is lacking. This is due, in part, to the fact that there are but few cases and, in part, to the fact that the courts have not engaged in extensive discussions. Although in one instance a board's prospective appointment for a term commencing after the expiration of the term of a minority of its members was upheld on the ground that the board functioned as a continuing body and that a majority of the board were in office both prior and subsequently to the change in personnel, *in practically in all other cases, the courts have, at least impliedly, deemed a board as constituted after the expiration of a staggered term or terms as being a new board, distinct from and a successor to the board as it was constituted prior to that event, without regard to the fact that the terms of a majority of the board had not expired*.

Thus, in Connelly v. Commissioners of Alms House of City of Kingston, 66 N.Y.S. 194, 197 (Sup. Ct. 1900), a nine member board had staggered terms, three members being elected each year. Shortly after three new members took office following their election, the board repudiated a contract under which an earlier board employed a doctor to perform surgical and medical services. In upholding the board's power to repudiate the contract, the Court declared that, "The good of the public service would seem to demand that, apart from legislative provision, *incoming boards* should not be bound against their will by contracts made by *outgoing boards* extending far into or through the *term of the new board*."

The board of mayor and aldermen were elected as follows in Rogers v. City of Concord, 178 A.2d 590 (N.H. 1962):

> The governing body of the city consists of a principal officer called the mayor and a board of fifteen aldermen. The mayor shall be elected from the city at large for a term of two years. At each election three aldermen shall be elected from the city at large for

> terms of four years and one shall be elected from each ward for a term of two years.'

Obviously, the electoral system provided for staggered terms of office. Five new members of the board were elected and took office. The question was whether a petition that had been heard by the "former Board" could be acted upon by the board with the five newly elected members.

The Court pointed to "The rule that the board of aldermen is a continuing body regardless of changes in its personnel and those proceedings duly begun before one board may be completed by its *successor*, is firmly established." However, the incoming board was still a new board, implied the Court, declaring that, "we hold that the *new board* had jurisdiction to render a decision upon the petition...."

In the recent case of City of Hazel Park v. Potter, 426 N.W.2d 789 (Mich. App. 1988), the Court considered the question of whether the city manager's contract was binding on a new board. It is not clear whether the city council was elected to staggered terms; however, the Court observed that, "On November 5, 1985, a majority of the city council was either defeated at the polls or retired," and "that on January 1, 1986, the *newly elected city council* took office." [Emphasis is mine.] The new council voted to terminate the contract. Citing several cases for other jurisdictions, the Court held the contract made by the "*outgoing city council"* void, "since it deprives the *incoming council* of its power to select and appoint a city manager as provided in the city charter." The Court also said that, "It is therefore clear that the council has no authority to make such contract *extending beyond its term of office*."

In our sister state of Alabama, two members of a three member city commission were elected, although it is not clear whether they were elected under a system of staggered terms of office. The commission as constituted before the election was the "preceding" commission, and the commission as constituted after the election was the "successor" commission. "[T]he *preceding* city commission had no power to bind its *successors* to permit signs to be maintained on the sidewalks of the city," concluded the court in City of Birmingham v. Holt, 194 So. 538 (Ala. 1940).

Analysis of Question 4

I have reviewed the TVA-Utility Board contract and find what appears might be parts of two contracts, one of which includes pages 2, 4, 6, and 8. An attached rate schedule, which is apparently referred to in Paragraph 4 of the contract, about which I will say more below, is attached. What appears to be part of a second contract appears following the rate schedule, and includes pages2, 4, 6, 8, and 10, none of which match the pages 2, 4, 6, and 8 above. I do not know what contract (assuming there are two of them) applies.

However, the first one contains what might be called a pass-through provision. Paragraph 9 provides that:

> 9. Rules and regulations. Municipality hereby adopts the "Schedule of Rules and Regulations" attached hereto, in which Municipality is referred to as "Distributor." Such Rules and Regulations may be amended, supplemented, or repealed by Municipality at any time upon 30 days written notice to TVA setting the nature and reason for the proposed change. No change shall be made in said schedule, however, which is in violation or inconsistent with any of the provisions of this contract.

The attached Residential Rate Schedule RS-7 contains a short paragraph titled "Adjustment," which reads: "The customer's bill for each month shall be increased or decreased in accordance with the current Adjusted Addendum published by TVA."

Tennessee Code Annotated, ' 7-52-202 provides that:

Nothing contained in this part shall be construed as a restriction or limitation upon any authority, power or right that any municipality may have in the absence of this part. These sections shall be construed as cumulative and shall be in addition and supplemental to any power, authority or right conferred by any other law.

That statute appears to authorize the "pass-through" provision of the TVA contract and the rate schedule referred to in that contract.

In addition, both statutory and case law appear to require all utilities to charge their customers what it costs to provide them services. A fundamental principle governing the provision of all utilities in Tennessee is that they must be provided without discrimination to all applicants in the same class, and that class distinctions must generally be reasonable, generally based on the cost of providing service. [See J.W. Farmer v. Mayor and City Council of Nashville, 127 Tenn. 509 (1912); Watauga Water Co. v. Wolfe, 99 Tenn. 429 (1897); Crumley v. Watauga Water Co., 99 Tenn. 419 (1897); City of Parsons v. Perryville Utility District, 594 S.W.2d 401 (Tenn. App. 1979)] In fact, the courts have said that such is the law even where it is not stated in the utility's enabling or governing legislation.

Tennessee Code Annotated, ' 7-34-115(a), a part of the Revenue Bond Law, but which apparently applies to all utilities under whatever statute they are established and operated, requires that:

> Notwithstanding any other law to the contrary, as a matter of public policy, municipal utility systems shall be operated on sound business principles as self-sufficient entities. *User charges, rates and fees shall reflect the actual cost of providing the services rendered.* [Emphasis is mine.]

The overwhelming weight of authority in the U.S. is that utilities can charge differential rates, provided the difference is reasonable. [4 ALR2d 595] Under Parsons v. Perryville Utility

District, 594 S.W.2d 401 (1980), that weight of authority includes Tennessee. That case points the statutory rate-making powers of municipal water and sewer systems: Tennessee Code Annotated, '' 6-604 [now 7-51-401], 6-1408 through 6-1439 [now 7-35-401 et seq.], especially 6-1421 [now 7-35-414], and cites with approval 945 C.J.S. Waters, ' 297, which says, among other things, that:

> Where water furnished is all supplied from the same sources, and is supplied to several contiguous communities embraced in one general district, with no unreasonable extensions to serve lean territory or other elements creating material differences in cost, a uniform rate for the entire territory is indicated and ordinarily justified; but it is not essential that all rates throughout a large territory served from a single water system be the same, and rates in each part of such territory may be fixed at a level which is fair and reasonable in view of the existing conditions....
>
> A classification must, however, in order to be valid, comport with the rule or principle of sound legislative classification, in that there must be some actual difference of situation and condition, bearing a reasonable and just relation to the matter of rates; and an arbitrary or unreasonable classification amounts to unjust discrimination. *Likewise, it is unjust discrimination to differentiate between different services by charging rates for one which are out of all proportion as compared with the rates charged for another, or to impose on one consumer, or class of consumer, losses caused by charging inadequate rates to another consumer or class.* [At 406] [Court's emphasis]

The Court's emphasized language supports the proposition that where it costs more to serve a certain class of customers it is rate discrimination *not* to charge them that cost.

Sincerely,

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SDH/