June 24, 2009

Dear City Attorney:

Several questions have arisen with respect to the establishment of a city environmental court, and the election or appointment of a city court clerk. MTAS is trying to put together material from Tennessee and other states on environmental courts; Your municipal management consultant has sent to you some information on such courts in Tennessee. This letter will concentrate on the legal issues surrounding the establishment of an environmental court in the City under existing state law and the city's charter.

General

The City adopted home rule on January 12, 1954, under Article XI, Section 9 of the Tennessee Constitution. Before then, it operated under Private Acts 1921, Chapter 569. Even though Public Acts 1972, Chapter 778, created a statutory scheme for home rule city municipal courts, which is now contained in Tennessee Code Annotated, ' 16-17-101 et seq., the City has provisions in its charter pertaining to its city court, which apparently stem from an amendment to its home rule charter in 1988.

Article XI, Section 9 of the Tennessee Constitution authorizes municipalities to adopt home rule, and speaks of a significant limitation on such charters:

> Any municipality adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, *provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly.*

In 1978, the former director of MTAS, Victor Hobday, wrote what is probably still the definitive publication on home rule in Tennessee. In that publication he spoke of the meaning of the italicized portion of the above provision of Article XI, Section 9:

> The reference is to "any general act" and not simply to general acts passed with respect to home rule municipalities. Nor is it limited to

> general acts passed after adoption of the amendment. Accordingly, it appears that the charter of a home rule municipality cannot be "inconsistent" with any provision of a general act adopted before or after the amendment became effective, except as to "compensation of municipal personnel." Said Mr. Miller [a member of the 1953 Tennessee Constitutional Convention] to the Convention: "I want to make it clear that no municipality can act in regard to any matter either of local or of state-wide concern if the state itself has already entered the field by general law, and preempted that field by an inconsistent provision or regulation." [Citing *Debates*, p. 1045]

Mr. Hobday declares that "The word 'inconsistent' is subject to interpretation," and citing cases from Tennessee (none of which involved home rule municipalities) and other jurisdictions, concludes that, "Direct conflicts with a general law would seem to be prohibited....," but that absent a direct contradiction, between the home rule charter and the general law, the two may not be "inconsistent." But as far as I can determine there has never been a Tennessee case interpreting that provision before nor after 1978. For that reason, there is little law to enlighten us about the difficult distinction between inconsistent and conflicting statutes where the distinction involves home rule municipalities. But an analysis of the provisions Tennessee Code Annotated, ' 16-17-101 et seq., and the provisions in the City Charter governing the city's home rule courts appear to disclose inconsistencies between the statute and the charter.

The General Assembly clearly has the authority to legislate generally as to home rule municipalities, and as to home rule municipal courts in particular. In City of Knoxville ex rel. Roach v. Dossett, 672 S.W.2d 193 (1984), the City of Knoxville argued that because it was a home rule municipality, under Tennessee Code Annotated, '' 16-17-101 and 16-17-103, it had both ordinance violation and concurrent criminal jurisdiction. But the Tennessee Supreme Court held that the General Assembly could remove the concurrent criminal jurisdiction of the city courts in Knox and other counties, and had done so by amending the 1970 act that had removed that jurisdiction, in 1972 and 1980:

> It thus appears that when Tennessee Public Acts 1972, Chapter 778, was adopted, conferring state criminal jurisdiction on municipal courts in "all" Home Rule municipalities, there was already in existence a statute removing such jurisdiction from counties in a specified population bracket, and the latter statute has since been reaffirmed by the General Assembly. [At 194]

The Court reasoned further that:

> The Home Rule provisions contained in Article XI, ' 9 of the state constitution do impose limitations upon the power of the General

> Assembly with respect to municipalities electing to come within them. Nevertheless these limitations do not apply to the authority of the legislature over the general statute judicial system....Since 1970 the General Assembly has not intended for the municipal courts in Knox County to have jurisdiction over state criminal offenses. [At 195]

City of Knoxville v. Dossett supports the proposition that the General Assembly, can pass general laws governing home rule city courts, but also the accompanying proposition that in some confrontations with other laws governing the court system, the general law governing home rule city courts loses.

But even the Tennessee Supreme Court can be "wrong," in cases dealing with home rule and other courts. Dossett and other cases declared that the judges of corporation courts need not be elected, but Town of South Carthage v. Barrett, 840 S.W.2d 895 (1992) did an about face on that issue, reasoning that on that point, Dossett and the other cases were either dicta or that the court in question had not been exercising concurrent jurisdiction. [At 897-98]. But as we will see below, the City anticipated Barrett by several years.

The provisions of the City Charter pertinent to the city court provide as follows:

Section 6-A:

> The City Court...shall have all powers and authority enumerated in Section 40-1-109(a) in the Tennessee Code Annotated, which is incorporated in this Charter by reference. Said City Court shall also be vested with concurrent jurisdiction...relating to matters arising within the corporate limits of said City exclusive of civil jurisdiction.
>
> Amendment of the aforesaid Section of the Code shall in no way change such powers as applied to the City Court, but such powers shall be increased, decreased, or changed only by amendment to this Home Rule Charter in the manner provided in Article XI, Sec. 9 of the Constitution.

Section 6-B:

The city judge is required to be at least 30 years old, licensed to practice law in Tennessee, and before his election must have been a resident of the state for 5 years and of the city for 1 year. He can't have been convicted of a crime involving moral turpitude, and cannot hold any other office, federal, state, county or municipal. He is popularly elected at the same time and in the same manner as council members, for a term of 8 years.

The city clerk and deputy clerk "as designated by said Judge" have the authority to issue

all legal process.

Section 6-C:

This provision of the charter provides that: "The judge of said court shall have exclusive jurisdiction in and over all cases for the violation of City Ordinances and all cases arising under the laws of the State of Tennessee."

The statutory scheme for home rule city municipal courts found in Tennessee Code Annotated, Title 16, Chapter 17, is the product of Public Acts 1972, Chapter 778. That statutory scheme has been amended several times since then, the last in 2009 by Public Acts 2009, Chapter 128, and now contains these three significant statutes (which are also compared to the previous ones):

- Tennessee Code Annotated, ' 16-17-101, provides that:

> (a) In each home rule municipality that does not have a city court ordained and established by the general assembly, a city court is created to try violations of municipal ordinances. The governing body of the municipality may increase the number of divisions of the court created by this section.
> (b) The governing bodies of all home rule municipalities may also decrease the number of divisions of city courts by ordinance, but no such division shall be eliminated except when a term of a city court judge expires or when a vacancy in the office of city court judge exists.
> (c) Notwithstanding the provisions of this section or any other provision of the law to the contrary, no municipality shall create a municipal court with concurrent jurisdiction after May 12, 2003, until such time as the Tennessee judicial council, having heard the report of the committee it created to examine the issue of the proliferation of municipal courts in Tennessee, has made a recommendation to the general assembly and the general assembly as had until the adjournment of the first session of the 103rd General Assembly to consider the issue and determine whether any legislative changes are necessary....

[Tennessee Code Annotated, ' 16-17-101(a) formerly read:

> *In all home rule municipalities, the governing bodies are authorized to establish city courts to try violations of municipal ordinances, and in those municipalities which now have city courts, the governing bodies may increase the number of divisions of same.]*

- Tennessee Code Annotated, ' 16-17-102, provides that:

> The judge of the city court shall be appointed on the nomination of the mayor and concurred in by the city council or other legislative body, but the appointed judge shall serve only until the next general election, at which time a judge or judges will be elected.

[Tennessee Code Annotated, '16-17-102 formerly read:

> *The judges of the city court hereinafter established by the governing body of home rule municipalities shall be appointed on the nomination of the mayor or chief executive officer, concurred in by the city council or other legislative body, but the judges so appointed shall run for election in the next general election.]*

- Tennessee Code Annotated, ' 16-17-104 provides that:

> In home rule municipal courts that have city courts and whose divisions have been increased by the legislative body, the new divisions have the same power as other divisions and are under the same direction and control as provided in this part and the municipality's charter.

[Tennessee Code Annotated, ' 16-17-104 formerly provided that:

> *In those home rule cities which have city courts and in which the legislative body increases the number of divisions thereof, the legislative body shall authorize the same power as other divisions, and the newly created divisions shall be under the same direction and control as presently provided in the municipal charter.]*

Until the passage of the Municipal Court Reform Act in 2004, there was also a Tennessee Code Annotated, ' 16-17-103, which provided that:

> *The judges so appointed or elected shall have full power and authority to try and dispose of violations of municipal ordinances and have all other powers touching upon the arrest and preliminary trial, discharge, binding over, of all persons charged with offenses against the state committed in the city or municipality.*

That section was repealed by Public Acts 2004, Chapter 914, long after the City Court was established.

That statutory scheme reflects Public Acts 1972, Chapter 778, except that as noted above, Tennessee Code Annotated, ' 16-17-103 was repealed by Public Acts 2004, Chapter 914. In

addition, Tennessee Code Annotated, ' 16-17-101 was amended by Public Acts 1994, by its addition of subsection (b), and by Public Acts 2003, Chapter 113, by the addition of subsection (c). Finally, Tennessee Code Annotated, '' 16-17-101, 102 and 104, were amended as indicated above by Public Acts 2009, Chapter 128.

A close reading of that statutory scheme indicates that Tennessee Code Annotated, '' 16-17-101, 16-17-103 (before it was repealed in 2004) and 16-17-104 applied to home rule city courts, including those that had already been established before 1972. But Tennessee Code Annotated, ' 16-17-102 indicates that section applied to the judges of home rule courts "hereinafter established by the governing body..." and required such judges to be elected after initial appointment by the city council. It is well-known that State ex rel. Town of South Carthage v. Barrett, above, held that Article VI, ' 4, of the Tennessee Constitution applies to the judges of courts that exercise concurrent jurisdiction, which requires, inter alia, that such judges be elected for terms of eight years. The City Charter was amended four years earlier, in 1988, to require that the city judge meet those requirements.

Environmental Court

Court with concurrent jurisdiction over environmental cases

The establishment of a city environmental court with concurrent jurisdiction poses at least two problems:

First, under Tennessee Code Annotated, ' 16-17-101(c), which was added by Public Acts 2003, Chapter 113, home rule municipalities were temporarily blocked from creating additional courts with concurrent jurisdiction, and under the Municipal Court Reform Act of 2004, codified in Tennessee Code Annotated, ' 16-18-301, municipal courts could continue to exercise concurrent jurisdiction if they possessed and exercised such jurisdiction continuously on and before May 11, 2003. Municipal courts that did not meet that qualification could be conferred concurrent jurisdiction only if they met the strict requirements contained in Tennessee Code Annotated, ' 16-18-311. [Tennessee Code Annotated, ' 16-18-302(c)] Under Tennessee Code Annotated, ' 16-18-311(a):

> Notwithstanding any provision of law to the contrary, on or after May 11, 2003, concurrent general sessions jurisdiction shall be *newly* conferred upon an existing or newly created municipal court only in compliance with the procedures and requirements set forth in this section.
>
> [There follows a list of procedures and requirements.]

As indicated above, the Municipal Court Reform Act of 2004 also repealed Tennessee Code Annotated, ' 16-17-103, which had bestowed concurrent jurisdiction on home rule city

courts.

Presumably, because the Municipal Court was continuously exercising concurrent jurisdiction on and after May 11, 2003, the establishment of an environmental court with concurrent jurisdiction would not reflect "newly conferred" concurrent jurisdiction on the municipal court. That proposition may run head-on into ' 6-C of the City Charter, which gives the city judge "exclusive jurisdiction" over both ordinance and state law violation cases. I am not sure whether the city judge's exclusive jurisdiction under the City Charter conflicts with the power of home rule cities to create additional divisions of city courts under Tennessee Code Annotated, ' 16-17-101(a). That question is complicated by the fact that Tennessee Code Annotated, ' 16-17-101(a) has always bestowed only ordinance jurisdiction on

home rule city courts. Those courts got concurrent jurisdiction from Tennessee Code Annotated, ' 16-17-103, which was repealed by Public Acts 2004, Chapter 914. But as amended by Public Acts 2009, Chapter 138, Tennessee Code Annotated, ' 16-17-104 provides that:

> In those home rule municipalities that have city courts, and whose divisions have been increased by the legislative body, the new divisions have the same power as other divisions and are under the same direction and control as provided in this part *and the municipality's charter*.

It seems that statute would support the argument that where, as in the City, the home rule city court had been exercising concurrent jurisdiction continuously on May 11, 2003, it could increase its divisions, and that the new divisions could exercise concurrent jurisdiction, even though Section 6-C of the City Charter gives the city court judge "exclusive jurisdiction" over the court's cases. In a contest between the City Charter and the home rule city court scheme found in Tennessee Code Annotated, ' 16-17-101 et seq., the state statutory scheme would probably prevail.

But even if Tennessee Code Annotated, ' 16-17-101 et seq., prevailed over ' 6-C of the City Charter on that point, Tennessee Code Annotated, ' 16-17-104 may mean that if the City established a city court with an "environmental case division," both city judges would have jurisdiction over environmental cases, but I am not clear what organizational impact the language directing that new divisions would be under "the same direction and control as provided in this part and the municipality's charter" would have on the city court. Presumably, the city's charter would need to be consulted on that question, and that consultation does not lead me to any firm conclusions on that question.

Whatever the outcome of that debate, the City Charter clearly contemplates only one city judge, and even a successful argument that under Tennessee Code Annotated, ' 17-16-101 there can be more than one city judge, both Tennessee Code Annotated, ' 16-17-104 and the provisions of the City Charter governing the establishment and operation of the city court, may be fertile ground for incessant arguments about which city judge has the authority to do what in the

operation of the two divisions of the court.

An ominous question about the legal foundation of home rule city courts under Tennessee Code Annotated, ' 16-17-101 et seq., let alone the creation of another city court judge with concurrent jurisdiction to hear only environmental cases, arose in the recent unreported case of Moses v. City of Jellico, 2009 WL 167072 (Tenn. Ct. App.). There a private act gave the City of Jellico the authority, by ordinance, to establish a city court and a city judge that had ordinance and concurrent jurisdiction. The Court of Appeals held that the city court was invalidly established

because city courts were "Corporation" Courts established under Article 6, ' 1 of the Tennessee Constitution, and that the General Assembly itself had to bestow jurisdiction on such courts. The delegation of authority by the General Assembly to the City of Jellico to establish a city court and a city judge with such jurisdiction it thought needful did not satisfy Article VI, ' 1. If that case was correctly decided, it calls into question whether the General Assembly could delegate to home rule municipalities the authority to establish home rule city courts, which is what Tennessee Code Annotated, ' 16-17-101 did.

Concern for the implications of that case with respect to municipal courts and judges, including home rule municipal courts and judges, that may not have been properly established and elected or appointed under Article VI, ' 1, led to the passage of Public Acts 2009, Chapter 144, which amended Tennessee Code Annotated, ' 16-18-302 by providing that:

> "For any municipality that does not have, on the effective date of this act a municipal court that was ordained and established by the general assembly, a municipal court is created to be presided over by a city judge...."

At first glance, that Act applies to all municipalities, including home rule ones, and intercepts any Moses challenge to the validity of home rule municipal courts. But Public Acts 2009, Chapter 128, amended Tennessee Code Annotated, ' 16-17-101(a) to provide that "In each home rule municipality that does not have a city court ordained and established by the general assembly, a city court is created to try violations of municipal ordinances...." Which statute applies to home rule municipal courts? If it is the former, arguably it protects home rule municipal courts from a Moses challenge generally. But it if is the latter, arguably, it protects home rule municipal courts from a Moses challenge only as to their ordinance violation jurisdiction. But until Public Acts 2003, Chapter 914, repealed Tennessee Code Annotated, ' 16-17-104, home rule city courts also had concurrent jurisdiction, assuming the home rule municipal court complied with Article VI, ' 4 of the Tennessee Constitution, and absent a Moses problem, if the home rule municipal court exercised continuous concurrent jurisdiction up to May 11, 2003, it retained that jurisdiction. It seems that Public Acts 2009, Chapter 144, applying as it does to "any municipality," would intercept a general Moses problem even if Public Acts 2009, Chapter 128 would intercept a Moses problem only for the municipal ordinance jurisdictions of home rule city courts.

In all events, Tennessee Code Annotated, ' 16-17-104 may be a legal barrier to establishing

a separate and independent environmental city court judge, and given the City Charter provisions governing the city court, a practical barrier as well.

Court with ordinance jurisdiction over environmental cases

Tennessee Code Annotated, ' 16-17-101, which applies to the city courts in home rule municipalities, gives home rule municipalities the authority to establish a city court to try

"violations of municipal ordinances," and to increase (and decrease) the number of divisions of such courts. In that statute, the General Assembly bestows jurisdiction on home rule municipal courts, all without an amendment to a home rule city's charter.

But as noted above, in light of Tennessee Code Annotated, ' 16-17-104, it is difficult to figure out how that city's governing body would create a division of the municipal court with only ordinance jurisdiction. As also noted above, under that statute, new divisions of the city court would have the same power as existing divisions, and be under the same direction and control "as provided in this part and the municipality's charter." That provision appears to block the establishment of a separate environmental division of the city court with only ordinance jurisdiction, and may create serious practical problems in the administration of the environmental division.

Possible solutions

One solution is to obtain an amendment to the general law governing all municipal courts, or to Tennessee Code Annotated, '' 16-17-101 et seq., that provide the authority for municipalities, or of home rule municipalities, to establish environmental courts. Such courts are being created all over the United States, so I assume that such legislation would be reasonably attractive. The amendment could provide that the judge of the environmental court have either concurrent jurisdiction (if the city court already has such jurisdiction), or ordinance jurisdiction. In either case, the amendment could also provide that because the environmental court would be relatively specialized, it and its staff would operate with considerable independence. Considerable debate and work would probably need to be done to determine exactly how such legislation would look.

A possible objection to a city environmental court whose judge has only ordinance jurisdiction is that such a court may not have sufficient legal power to be an effective environmental court. It is said in the Shelby County's website on the environmental court there that:

> Prior to the establishment of a separate court to handle environment concerns, the Memphis city courts generally were ineffective in taking actions against violations not covered by Federal statutes. General Sessions' Environmental Court, however, gave meaning to the term "expedient justice" by its ability to readily and specifically respond to our community's environmental needs.

That statement needs to be analyzed to determine from the experience of other municipal environmental courts in Tennessee whether it reflects an actual problem, and if it does, whether that problem can be overcome.

Another potential solution to the problem of establishing a separate city environmental court is to seek legislation that authorizes cities to handle such problems through administrative procedures, fines and penalties. ***In my view, this solution is the preferred one***. Where a municipal *court* levies fines of greater than $50 in municipal ordinance violation cases, it runs head on into Article VI, ' 14, of the Tennessee Constitution, which provides that:

> No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine shall be more than fifty dollars.

In City of Chattanooga v. Davis, the Tennessee Supreme Court held that the levy of municipal civil penalties in excess of $50 violated Article VI, ' 14, of the Tennessee Constitution, where their purpose was punitive, rather than remedial. That case also involved the consolidated case of Barrett v. Metropolitan Government of Nashville-Davidson County. The "fine" or "civil penalty" in both Davis and Barrett were punitive rather than remedial because, under a "totality of circumstances" test, the intent of the fine was to punish the defendant rather than to remedy the violations at issue. In Davis, more so than in Barrett, the language of the ordinance was clearly punitive. But there may be a way to avoid the difficult problems of trying to sort out what is and is not a punitive fine, and of what appear to be lengthy and difficult delays in the progress of many municipal code violation charges through municipal courts.

There are no cases dealing with the question of whether Article 6, ' 14 of the Tennessee Constitution applies to administrative penalties imposed by local government officials or boards, although it can be argued that a remedial fine takes on the character of an administrative fine. But in the recent case of Barrett v. Tennessee Occupational and Health Review Commission, ____ S.W.3d. ____, 2009 WL 1211327 (filed May 5, 2009), the Tennessee Supreme Court upheld the Tennessee Court of Appeals decision that the monetary penalties assessed by an administrative agency are not subject to the $50 fine limitation contained in Article VI, ' 14 of the Tennessee Constitution. There a TOSHA employee inspected Barrett's construction site, and cited him for several violations. After a hearing before the Tennessee Occupational Safety and Health Review Commission, Barrett was fined $950. The Court reasoned that Article VI, ' 14 was a limitation on the power of the judiciary, not on the executive branch of the government, of which the Tennessee Occupational and Health Review Commission was a part. Monetary penalties, are subject to judicial review, continued the Court, but "the reviewing court does not assess the penalty; it merely reviews its appropriateness." [At 6]

Earlier, Dickson v. State, 116 S.W.3d 738 (Tenn. Ct. App. 2003), considered the question of whether a $15,000 fine levied by the Petroleum Underground Storage Tank Division of the Department of Environment and Conservation, under the authority of the Underground Petroleum Storage Act, codified at Tennessee Code Annotated, ' 68-215-101 et seq., was subject to the $50

fine limitation contained in Article 6, ' 14.

The answer was no, held the Tennessee Court of Appeals, reasoning that the $50 fine limitation in Article 6, ' 14, applied only to *fines levied by the judiciary and not to the* government as a *whole. For that reason, it did not apply to administrative agencies. (The court did say that had the fine been levied by a court, it would have been punitive rather than remedial. and subject to Article VI, ' 14).*

The Tennessee Attorney General was also asked the question of whether Article VI, ' 14 applies to the civil penalties issued by *municipal beer boards*. Attorney General's Opinion 05-056, relying on Dickson v. State, declared that the answer was no. Presumably, the same logic would apply to municipal administrative penalties.

However, it is probably the law that cases cannot be heard and disposed of with the imposition of an administrative find unless there is a statute that supports such a process. Such statutes exist with respect to some municipal functions, for example stormwater ordinance infractions, pretreatment ordinance infractions, and beer ordinance infractions. Other statutes support the use of an administrative process by a municipality where no fine (but a property lien) can be imposed for a municipal ordinance or state law violation, such as in cases involving dilapidated property, and dirty lot clean-up. No such statutes exist as to most municipal "environmental" code infractions. It may be possible to address that problem legislatively.

Selection, Removal Of The City Court Clerk

Municipal Court Reform Act

Tennessee Code Annotated, ' 16-18-310(a), requires that all municipal courts have a court clerk, and prescribes for the clerk certain duties, but it does not specify how such clerks are to be selected:

> (a) Notwithstanding any provision of the law to the contrary, at all times there shall be a person elected, appointed or otherwise designated to serve as clerk of the municipal court. Immediately upon such election, appointment or designation, the chief administrative officer of the municipality shall promptly certify the results of such election, appointment or designation to the administrative officer of the courts and shall supply such additional information, concerning the clerk as shall be required by the administrative director.

It appears that such clerks of courts that do not exercise concurrent jurisdiction would be selected in the manner prescribed by the city's charter. Clerks of court that exercise concurrent jurisdiction arguably must be elected in accordance with Article VI, ' 13 of the Tennessee Constitution. More will be said about that question later.

City Charter

Under the City Charter it appears that the city judge appoints the city court clerk and the deputy court clerk, although that conclusion is open to question. Section 6-B of the City Charter, provides that, "In addition to the inherent authority of the City Judge to issue all warrants and other legal process coming from said court, the *Clerk and Deputy Clerk as designated by the said Judge* shall likewise have authority to issue all legal process." It can be argued that because the subject of that sentence is the issuance of warrants and other legal process, the phrase "the Clerk and Deputy Clerk as designated by the said Judge" refers to the authority of the city judge to designate the city court clerk and deputy court clerk with the authority to issue all legal process. But that seems like a strained argument. The language, "the Clerk and Deputy Clerk as designated by the said Judge," sounds like it means he appoints them, even though that language is found in a paragraph that speaks about the issuance of warrants and process. That provision of Section 6-B may reflect bad wording, but its intent still seems to put the appointive power of the city clerk and the deputy clerk in the hands of the city judge.

Section 5-I of the charter provides that the city manager is the chief executive officer of the city, and gives him the authority to:

> (1) ... appoint and, when he deems it necessary for the good of the service, suspend or remove all city employees and appointive administrative officers provided for by or under this charter, except as otherwise provided by law, this charter or personnel rules adopted pursuant to this charter.
>
> (2) He shall direct and supervise the administration of all departments of the city, except as otherwise provided by this charter or by law.

But Section 5-N of the charter provides that:

> All departments, offices and agencies under the direction and supervision of the City Manager shall be administered by an officer appointed by and subject to the direction and supervision of the City Manager. The City Manager may serve as the head of one or more of such departments, officers or agencies or may appoint one person as the head of one or more of them.

Until very recently, Title 1, Chapter 4 of the City Code indicated that the city court was *not* a department of the city. Section 1-401 provided that "the following departments are hereby recognized as the official departments of the city":

Police
Fire
Finance

Environment and planning
Parks and recreation
Public works

The City's Organizational Chart, which is also a part of Section 1-401, put those departments under the city manager, and it put the city judge in an entirely separate "box" unconnected in any way to the city manager. I had no idea where "administrative" personnel that perform court functions were placed. The city's personnel policies found in Title 4, Chapter 2, of the Municipal Code do not put court employees in the exempt service, or in any way distinguish them from any other city employees. But I think that is generally true of city court clerks in Tennessee, including the clerks of city court that exercise concurrent jurisdiction. In fact, I think that in most cities the clerks of city courts that exercise concurrent jurisdiction are the recorders or other city employees who have other city functions. Those positions usually do not consume all of a municipal employee's work time. Section 6-B of the City Charter points to city court officers and employees being city employees: "The City Council may authorize any officer or employee of the Court to accept pleas of guilty and accept fines in cases of minor traffic violations when authorized by the City Council," and that "All fines, penalties, forfeitures, and monies collected by the Court by officers and employees thereof shall be promptly turned over to the City Treasury."

But Ordinance No. 863, which is to take effect on July 1, 2009, amended ' 1-401 of the Municipal Code. It created the following city departments:

a) City services
b) Economic and community development
c) Finance
d) Public Safety.

With respect to the city court, that amendment says:

> Any and all City employees who work on the City Court matters shall be in the Department of Finance and shall for the purposes of compliance with the personnel ordinance and policies of the City report to the Director of the Department of Finance and the City Manager as shall be determined by the City Manager and for all matters involving the legal operation of the Court, said employees shall be under the jurisdiction of the City Judge.

Under the new organizational chart, the city court is still an independent "box," which is undoubtedly the only way a court can appear on such a charter, regardless of the position that a court clerk occupies in the city.

But there is nothing expressly said in the City Charter about who has the authority to remove the city court clerk or the deputy court clerk. If those officials are members of departments of the city, it may be that the manager can remove them under Section I-5 of the

charter. But ample case law 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.).

But if the persons appointed by the city judge to the positions of city court clerk and deputy clerk are city employees who simply work for the city court, presumably, if the city judge removed them from those positions, they would still be city employees unless the city manager removed them as city employees under Section I-5 of the charter and under the city's personnel policies.

Needless to say, in theory, the city manager could fire city employees who doubles as city court clerk and deputy court clerk from city employment, but the city judge could refuse to remove those persons from their positions as city court clerk and deputy court clerk, but I assume that the city manager and the city council, through their respective immediate and long-range control of the city's purse strings, could end their employment as court personnel.

Concurrent jurisdiction courts

Tennessee Attorney General's Opinion 08-183 opines that the court clerk where the city judge exercises concurrent jurisdiction must be elected. I held that view long before that opinion was issued. [See attached letter to a Tennessee city dated March 31, 2004.] Article VI, ' 13 of the Tennessee Constitution provides for the election of Inferior court clerks ("Clerks of the Inferior Court holden in the respective Counties or Districts shall be elected by the qualified voters thereon for the term of four years.") A strong argument can be made that clerks of courts that exercise concurrent jurisdiction are not clerks of Inferior Courts. That argument would find support in many cases addressing the question of whether city courts that exercise concurrent jurisdiction are Inferior Courts within the meaning of Article VI, ' 1 of the Tennessee Constitution. It is said in those cases that municipal courts are the "Corporation Courts" of which Article 6, ' 1 speaks, even when the municipal court is vested by the Legislature with concurrent jurisdiction. [See Hill v. State ex rel. Phillips, 392 S.W.2d 950 (1965); State ex rel. Boone v. Torrence, 470 S.W.2d 356 (1971); City of Knoxville ex rel. Roach v. Dossett, 672 S.W.2d 193 (Tenn. 1984); State ex rel. Town of South Carthage v. Barrett, 840 S.W.2d 895 (Tenn. 1992); Newsom v. Biggers, 911 S.W.2d 715 (Tenn. 1995).]

But the fact that municipal courts that exercise concurrent jurisdiction are not Inferior Courts under Article VI, ' 1 of the Tennessee Constitution, did not stop the Tennessee Supreme Court in State ex rel. Town of Carthage v. Barrett, 840 S.W.2d 895 (Tenn. 1992) from holding that city courts that exercise concurrent jurisdiction exercise "state power" and must be elected (and meet the other qualifications) as prescribed by Article VI, ' 4, of the Tennessee Constitution, which applies to the "Judges of the Circuit and Chancery Courts, and of other *Inferior Courts*..." [Emphasis is mine.] It is difficult to escape the conclusion that if the judges of city courts that exercise concurrent jurisdiction must be elected as the judges of Inferior Courts are elected, then the clerks of the city courts that exercise concurrent jurisdiction must be elected as the clerks of the Inferior Courts are elected. Indeed, such clerks exercise "state power" in the respect that they issue state warrants. The statutory counterpart of Article VI, ' 13 is apparently Tennessee Code Annotated, ' 18-4-104 et seq.

The issue of whether such municipal courts clerks must be elected under Article VI, ' 13, arose in State ex rel. Newsom v. Biggers, 911 S.W.2d 715 (Tenn. 1994). There Newsom challenged his shoplifting conviction by the Jackson City Court on a number of grounds, one of which was that the city clerk who issued the warrant had not been elected in accordance with Article VI, ' 13. However, the Court concluded that Newsom had waived that issue by not raising it in the trial court. As far as I can determine, that is the furthest that question has gotten in the Tennessee court system. For that reason I concede that there is still a question mark behind that question.

But a state statute exists under which clerks of city courts that exercise concurrent jurisdiction can be elected in Tennessee. Tennessee Code Annotated, ' 16-18-207 provides that the city governing body may by ordinance:

> require the city court clerk serving the popularly elected city judge be elected by the voters of the city or town for a term of four (4)

> years. The elected clerk may be an alternative or in addition to the court clerk provided for by charter. The initial term may be a transition term established by ordinance to make the clerk's election coincide at every other election with the election of the city judge. The elected clerk shall perform the duties set out in the charter and ordinances of the city or town for the city court clerk.

That provision is optional, but if the proposition that such clerks are required to be elected is correct the optional aspect of that statute does not apply.

The remainder of that statute provides that the city court judge can remove the city court clerk, and the reasons for which the clerk can be removed. It also provides for how vacancies in the office of city court clerk are filled. All of those provisions appear to be consistent with Article VI, ' 13 of the Tennessee Constitution.

Duties and Administrative Control Of City Court Clerks

Municipal Court Reform Act

Tennessee Code Annotated, 16-18-310(b), provides that:

> Notwithstanding any provision of the law to the contrary, the clerk of the municipal court shall maintain an accurate and detailed record and summary report of all financial transactions and affairs of the court. The record and report shall accurately reflect all disposed cases, assessments, collections, suspensions, waivers and transmittals of litigation taxes, court costs, forfeitures, fines, fees and any other receipts and disbursal. An audit of the financial records and transactions of the municipal court shall be made each year as part of any audit performed pursuant to ' 6-56-101 or ' 6-56-105.

Tennessee Code Annotated, ' 6-56-101 requires the governing board of every municipal corporation to have done a biennial audit "of the financial affairs of the corporation, including all receipts from every source...," and Tennessee Code Annotated, ' 6-56-105 requires the governing body of each municipality to have done an annual audit of "all departments, boards and agencies under its jurisdiction that receive and disburse funds," including Amunicipal courts.

Presumably, Tennessee Code Annotated, ' 16-18-310(b) applies to all city courts, including those that exercise concurrent jurisdiction.

City Charter

There is little directly said in the City Charter about who has administrative control over

the court clerk and the deputy court clerk. But that is not uncommon in municipal charters, or even in municipal personnel policies. Some of the provisions in the charter governing the city court clerk have been discussed earlier, but here is what the charter says in total about the city court clerk, and other court employees, much of which deals with their duties:

- Section 6-B, entitled CITY JUDGE, CLERK AND EMPLOYEES OF CITY COURT, says:

- "The City council shall by ordinance provide for the compensation of the City Judge and other employees of the Court...," and that "In addition to the inherent authority of the City Judge to issue all warrants and other legal process.... the *Clerk and Deputy Clerk as designated by the said Judge* shall likewise have authority to issue all legal process."

Section 6-C entitled CITY COURT ADMINISTRATION says only that:

- "The records to be maintained by said Court shall be prescribed by ordinance and it shall be the responsibility of the Clerk to make whatever reports that are required and maintain all required records as directed....."

- "The Court Clerk, Deputy Clerk, or ranking Police Officer on duty shall have the power to set and accept bail bonds or bail, provided, however, that the City Judge shall have the supervisory power in this matter...."

- "The City Council may authorize any officer or employee of the Court to accept pleas of guilty and accept fines in cases of minor traffic violations when authorized by the City Council," and that "All fines, penalties, forfeitures, and monies collected by the Court by officers and employees thereof shall be promptly turned over to the City Treasury."

The provision in Section 6-C that the city judge has the inherent authority to issue warrants and process, and that the clerk and the deputy clerk "as designated by the said Judge" shall "likewise have authority to issue all legal process," strongly implies that the city judge has supervisory authority over that process. Section 6-C expressly gives the city judge the supervisory powers over the city court clerk and the deputy court clerk to the city judge with respect to the setting and accepting of bonds or bail.

6-C expressly declares that the city council can, by ordinance, prescribe the records to be maintained by the Court, and gives the responsibility to the court clerk to make those reports, and Tennessee Code Annotated, ' 16-18-310 expressly provides that the city court clerk is to keep the detailed records contained in that statute, regardless of any provision of the law to the contrary. Those provisions, particularly the latter one, seem to give the city council some ability to see what is going on in the city court, both to its financial and operational aspects, and to control the city court clerk on the administrative and reporting side of the court's operations, without impinging on the authority of the city judge to exercise his judicial powers without interference from the city council.

Elected city court clerk of court with concurrent jurisdiction

There are a raft of duties for all court clerks, elected or appointed, in Tennessee Code Annotated, Title 18, Chapters 1 and 2. Tennessee Code Annotated, ' 18-1-101, says that the duty of the clerks is "to attend the court and perform all the clerical functions thereof." I have been unable to find any statute or case in which it is said that the court clerk is the judge's employee, or that the judge of the clerk's court has the authority to supervise the clerk in the administration of his duties. But under Article VI, ' 13, the judge's of the Supreme Court and the Chancellors appoint their clerks for six years, and the clerks of the Inferior Courts are elected, yet the clerks in both cases are removed by the judges of the courts they serve. It appears logical, therefore, that even the elected clerks of the Inferior courts are subject to the considerable supervision and control of the judges of those courts. But there are surprisingly few statutes and cases that speak directly to the issue of who has the supervision and control of the court clerk.

Tennessee Code Annotated, ' 18-1-108 also provides that the clerks of the court have the authority to "Appoint deputies with full powers to transact all the business of such clerk...." That provision may conflict with Section 6-C of the City Charter, which appears to provide that the clerk and the deputy clerk are appointed by the city judge.

Sincerely,

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