

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
POST OFFICE BOX 20207
NASHVILLE, TENNESSEE 37202

May 10, 2005

Opinion No. 05-077

Proposed Amendment to House Bill 476 (Senate Bill 853) Relative to Engine Compression Brakes
on Trucks or Truck Tractors

QUESTION

Does the proposed amendment to House Bill 476 (Senate Bill 853) permitting local or municipal governments to proscribe the use in their jurisdictions of engine compression brakes without mufflers on trucks or truck tractors violate the Federal or State Constitutions?

OPINION

While the proposed amendment does not unconstitutionally delegate the power of the General Assembly to create laws, the proposed amendment does violate Article VI, Section 14, of the Constitution of Tennessee. The amendment attempts to institute a fine not assessed by a jury in excess of the amount allowed by the Tennessee Constitution.

ANALYSIS

This office has previously opined that another version of the proposed amendment to House Bill 476 (Senate Bill 853) was unconstitutional. Op. Tenn. Atty. Gen. 05-048 (April 19, 2005). However, the General Assembly is now considering a revised amendment to House Bill 476 (the Bill) that would allow any local or municipal government in Tennessee to proscribe the use in its jurisdiction of engine compression brakes on trucks or truck tractors, or similar vehicles, without a muffler in accordance with Tenn. Code Ann. § 55-9-202, so long as the local or municipal government provides notice of the regulation by posting information on street signs in compliance with this action. The revised amendment further provides a standard for the appropriate muffler type and authorizes the commissioner of the Tennessee Department of Transportation to promulgate rules and regulations to effectuate the purposes of this act.

Additionally, the revised amendment to this Bill authorizes a local government that chooses to regulate the use of such brakes to impose a civil penalty punishable as follows:

(1) For a first violation, a fine of fifty dollars (\$50.00). A person charged with a first violation of this section may submit a fine of fifty dollars (\$50.00) to the clerk of the court which has jurisdiction over such offense within the county in which the offense charged is alleged to have been committed; and

(2) For a second or subsequent violation, a fine of five hundred dollars (\$500).

The legislative authority of the State is vested in the General Assembly, and that power may not be delegated indiscriminately to other bodies. Article II, Section 3, of the Constitution of Tennessee. However, Tennessee courts have held that, while the Constitution

prohibits the general assembly from delegating its power to make the law, it does not preclude the general assembly from delegating certain of its powers to governmental agencies and local governing bodies if it establishes basic standards to guide their actions.

Profill Development, Inc. v. Dills, 960 S.W. 2d 17, 31 (Tenn. Ct. App. 1997). Thus, while the General Assembly cannot delegate its power to make laws in general, it can delegate the authority to implement the laws that it makes. The *Profill* court followed criteria established by the Tennessee Supreme Court in *Lobelville Special School Dist. v. McCanless*, 214 Tenn. 460, 381 S.W. 2d 273 (1964). In *Lobelville*, the Supreme Court stated:

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law;. . . it is only necessary that the statute establish a sufficient basic standard, a definite and certain policy and rule of action for the guidance of the instrumentality that is to administer the law.

Profill, supra at 31.

Currently, the Commissioner of the Tennessee Department of Transportation is authorized to promulgate rules not inconsistent with federal law regulating the equipment required for trucks or truck tractors and establishing particular highways upon which they may operate. Tenn. Code Ann. § 55-7-112. As amended, House Bill 476 (Senate Bill 853) is a constitutionally permissible delegation of the Commissioner's authority to local and municipal governments in this regard. In the Bill, the General Assembly has set out guidelines for compliance, posting of notices, funding, and the penalty for a violation. Thus, basic standards and a definite policy have been laid out to

guide the local governments. The only choice for local governments is whether they want to implement this law in their jurisdiction. Tennessee courts have addressed this legislative delegation issue multiple times in relation to various subjects including: the sale of liquor, horse racing, wheel taxes, metropolitan forms of government, and sales taxes. In all of these instances, the local option laws were upheld as a proper delegation of the legislative power to implement laws and were deemed not violative of Article II, Section 3, of the Tennessee Constitution. Likewise, it is the opinion of this Office that the proposed Bill does not violate this constitutional provision.

However, the Bill authorizes a local or municipal government to impose a civil penalty greater than fifty dollars for non-compliance with the muffler standard, and that provision of the bill is unconstitutional. Article VI, Section 14, of the Tennessee Constitution 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 should be more than fifty dollars.

Tennessee Courts have held that no fine above fifty dollars may be assessed if that fine is punitive, as opposed to remedial, in nature.

A remedial fine is one which is intended to reimburse or compensate for loss and expenses. Article VI, Section 14, does not apply to the assessment of fines if the purpose of the fine is remedial. *Dickson v. State of Tennessee, Department of Environment and Conservation*, 116 S.W. 3d 738, 742-44 (Tenn. Ct. App. 2003).

If the predominant 'remedial' purpose served by a monetary sanction is ensuring deterrence against future wrongdoing, then the sanction more properly appears to be punitive in its actual purpose or effect. A fine that is fixed and determinant is predominantly punitive in nature. . .the only way a fixed, determinate fine can be considered remedial is when it bears some relationship to the harm caused by the violation, compensates the state for the costs of enforcement, or requires the wrongdoer to disgorge ill-gotten gains.

Id. at 744, quoting *City of Chattanooga v. Davis*, 54 S.W. 3d 248 (2001).

In our view, the mandatory fine in House Bill 476 serves no purpose other than to deter violations and ensure future compliance. The reason that the fine escalates for a subsequent offense is to provide a motivation for compliance. There is no basis to suggest that the proposed fine is intended to compensate for loss or reimburse for expenses. The fine is therefore punitive and, as such, is restricted by Article VI, Section 14, of the Tennessee Constitution. *See Davis*, 54 S.W.3d at 256-70. Since the proposed Bill would authorize the assessment of a punitive fine which exceeds fifty dollars without the intervention of a jury, it is in violation of Article VI, Section 14, of the Constitution of Tennessee in that respect.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

AMANDA GOVAN WILLS
Assistant Attorney General

Requested by:

The Honorable Gary Odom
State Representative
22 Legislative Plaza
Nashville, Tennessee 37243-0155