

STATE OF TENNESSEE

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

June 12, 2007

Opinion No. 07-93

Salary of District Attorney General Pro Tem

QUESTIONS

The District Attorney General for the 15th Judicial District has been prohibited by the Board of Professional Responsibility from performing his duties, although he is still drawing his salary. One of his assistants has been appointed District Attorney General pro tem.

1. Is a District Attorney General pro tem entitled to draw the salary of a District Attorney General while the elected officeholder is still receiving his salary?
2. Does funding for the salary of a District Attorney General pro tem come from the District Attorneys General Conference, although there is no provision for this expense in its budget?

OPINIONS

1. Yes.
2. The funding is clearly an expense of the offices of the District Attorneys General. Logically, therefore, as a part of his duties under Tenn. Code Ann. § 8-7-309, the Executive Director of the District Attorneys General Conference should take measures to ensure that it is paid. The current Appropriations Act appears to authorize this expenditure from the lump sum appropriated for the District Attorneys General or under Section 8, Item 3. Of course, the expenditure must also comply with the applicable budget. The Executive Director should confer with the Department of Finance and Administration to determine whether a budget revision may be necessary to defray this expense. This Office is available to assist the Department of Finance and Administration in making this determination.

ANALYSIS

This opinion addresses the following situation. The District Attorney General for the 15th Judicial District has been prohibited by the Board of Professional Responsibility from acting in his elected capacity. He is still drawing his salary. One of his assistants has been appointed to act as District Attorney General pro tem while the officeholder is prohibited from carrying out his duties.

The first question is whether a District Attorney General pro tem is entitled to draw the salary of a District Attorney General while the elected officeholder is still receiving his salary. Article VI, Section 5, of the Tennessee Constitution provides in relevant part: “In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have power to appoint an Attorney pro tempore.” Tenn. Code Ann. § 8-7-106(a) provides:

If the district attorney general fails to attend the circuit or criminal court, *or is disqualified from acting*, or if there is a vacancy in the office, the court shall appoint some other attorney to supply such district attorney general’s place temporarily. The acts of such district attorney general pro tem shall be as valid as if done by the regular officer, *and the district attorney general pro tem shall be entitled to the same privileges, and emoluments.*

(Emphasis added).

The request indicates that the District Attorney General continues to draw the salary of the office, even though he has been disqualified from acting. The salary for district attorneys general is fixed under Tenn. Code Ann. § 8-7-105. So long as the elected officeholder holds title to the office of District Attorney General, he is entitled to receive the salary. Under Tenn. Code Ann. § 8-7-106(a), the District Attorney General pro tem is entitled to the same “privileges and emoluments” as the District Attorney General. The statute clearly contemplates a situation where both individuals are being paid at the same time.

In 1982, this Office addressed the salary paid a District Attorney General pro tem under Tenn. Code Ann. § 8-7-106(a). Op. Tenn. Att’y Gen. 82-28 (January 26, 1982). That opinion addressed a case where a full-time Assistant District Attorney General had been appointed to serve as District Attorney General pro tem. The opinion notes that the offices of Assistant District Attorney General and District Attorney General pro tem are both “lucrative offices” within the meaning of Article II, Section 26, of the Tennessee Constitution. Therefore, an individual may not hold both offices at the same time. The opinion states:

If one holding the office of assistant district attorney general accepts appointment as district attorney general pro tempore, upon the latter appointment becoming effective, he temporarily ceases to hold the former office and, during that time, is not entitled to the compensation or emoluments of the former office. *See State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 326 (1905).

This conclusion remains valid. The individual serving as District Attorney General pro tem, therefore, is entitled only to receive the salary of that office. The 1982 opinion concludes that this salary should be calculated as follows:

A person holding the office of district attorney general pro tempore is to be compensated at an hourly rate based upon the district attorney general’s salary, as provided by Tenn. Code Ann. §§ 8-7-105 and 8-23-101(d), plus the other

emoluments of his office computed on the basis of a forty-hour week. The emoluments include any county salary supplements, retirement benefits, insurance, annual and sick leave, office equipment, library, supplies, etc., insofar as these can be quantified. If the district attorney general pro tempore spends, for example, forty hours on the cases which he is to prosecute, he should receive 1/52 of the total annual emoluments of the district attorney general's office.

Since the opinion was issued, the applicable authorities have not been materially changed. The State is liable for the expenses of the District Attorney General pro tem. *Goddard v. Sevier County*, 623 S.W.2d 917 (Tenn. 1981). These expenses would include any salary supplements that the county pays the District Attorney General. This conclusion is based on the reasoning that the salary due the District Attorney General pro tem, although its measure includes county salary for the position, is the State's responsibility.

2. Source of the Salary and Benefits

The second question is whether funding for the District Attorney General pro tem's salary and other benefits must come from the District Attorneys General Conference, even though it does not appear in that organization's budget. The District Attorneys General Conference operates under Tenn. Code Ann. §§ 8-7-301, *et seq.* Under Tenn. Code Ann. § 8-7-309(a)(5) and (6), the Executive Director of the Conference shall:

(5) Administer the accounts of the judicial branch of government which relate to the offices of the district attorneys general, and shall prepare, approve and submit budget estimates and appropriations necessary for the maintenance and operation of the offices of the district attorneys general and make recommendations with respect to such offices; and

(6) Draw and approve all requisitions for the payment of public moneys appropriated for the maintenance and operation of the state judicial branch of government which relate to the offices of the district attorneys general, and shall audit claims and prepare vouchers for presentation to the department of finance and administration, including payroll warrants, expense warrants, and warrants covering the necessary costs of supplies, materials and other obligations by the various offices with respect to which the executive director shall exercise fiscal responsibility.

The salary and benefits payable to a District Attorney General pro tem are clearly an expense of the offices of the District Attorneys General. Logically, therefore, the Executive Director of the District Attorneys General Conference should take measures to ensure that they are paid. Section 1 of the Appropriations Act lists lump sum appropriations:

for the purpose of defraying the expense of state government for the fiscal year beginning July 1, 2006, in the *administration, operation and maintenance of the*

legislative, executive and judicial branches of the various departments, institutions, offices and agencies of the state . . . all according to the following schedule:

* * * *

III. EXECUTIVE

1. Constitutional and Quasi-Judicial Offices

* * * *

2. District Attorneys General Conference

2.1 District Attorneys General\$ 55,030,700.00

2.2 District Attorneys General Conference 437,100.00

2.3. Executive Director 1,142,100.00

Total District Attorneys General Conference.....\$ 56,609,900.00

2006 Tenn. Pub. Acts Ch. 963, § 1, Title III. Since the District Attorney General pro tem’s salary and benefits are clearly an expense of the District Attorneys General offices, their payment appears to be authorized under this appropriation. In addition, Section 8, Item 3 of the same act provides:

Section 8: In addition to the appropriations made in Section 1 of this act and subject to the provisions of Tennessee Code Annotated, Title 4, Chapter 3, Part 10 and Title 9, Chapter 4, Part 51, there is hereby appropriated a sum sufficient:

* * * *

Item 3. To pay the salaries and travel expenses of all persons appointed to sit as Special Judges, *Special District Attorneys General* and/or Special Prosecutors under statutes relating to the state judicial system.

(Emphasis added). Of course, the expenditure must also comply with the applicable budget. Whether funding for the salary is already available in the budget, for example, from unexpended funds under some other item of the budget, would depend on the terms of the budget. The Executive Director, thus, should confer with the Department of Finance and Administration to determine whether a budget revision may be necessary to defray this expense. This Office is available to assist the Department of Finance and Administration in making this determination.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable James W. Kirby
Executive Director, Tennessee District Attorneys General Conference
226 Capitol Boulevard, Suite 800
Nashville, TN 37243-0890