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MEMORANDUM

**TO: KAREN CARSON
KNOX COUNTY BOARD OF EDUCATION**

FROM: RICHARD B. ARMSTRONG, JR. 
KNOX COUNTY LAW DIRECTOR

DATE: OCTOBER 7, 2014

RE: BOARD OF EDUCATION HIRING ITS OWN ATTORNEY

QUERY: Can the Knox County Board of Education (BOE) defray monies from pupil education to hire its own attorney?

ANSWER: No, except under the provisions set out in the previously adjudicated case.

SUMMARY OF OPINION: This issue has been litigated and decided by the Honorable Sharon Bell, Knox County Chancellor in a lawsuit brought by the Knox County Board of Education in 2001 in a case which cost the taxpayers \$267,000 in attorneys' fees. The Chancellor held that the Board could not hire its own attorney in contravention of the Charter. On appeal, the parties to the lawsuit agreed that, as to this issue, they would abide by the conflict of interest provisions of Supreme Court Rule 8, DR 5-105.

[It is here noted that Chuck Cagle also answered this query at the September 19, 2014 retreat of the BOE, at which time he stated that the issue had been litigated and the Compromise Agreement governed the issue of the hiring of an attorney. Ed.]

At the September 2, 2014 BOE Workshop, you queried the undersigned regarding this issue. At that time, the law and facts were fully set forth to the Board and the public regarding this issue. Notwithstanding, you requested a written response.

This question has been submitted to the Law Director on several occasions. First, via correspondence dated March 22, 2013. This office responded on March 27, 2013 in which I opined that this office would not commit taxpayer monies to pay for an attorney to give the BOE a second opinion on a resolution that had been passed by the Knox County Commission. In that memorandum, I referenced that under a prior administration, it had cost the taxpayers \$35,000 to hire an outside attorney to render a second opinion on whether Knox County could build Carter Elementary School. The second opinion was the same opinion that the Law Director had delivered.

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Previously, on June 18, 2014, Chairperson Lynne Fugate asked the same question in a letter to this Office. Chairperson Fugate queried:

The Knox County Law Director's Office recently appointed an attorney to represent the Board in a termination appeal where the Law Department had a professional conflict of interest. In taking this action the Law Department declined to appoint an attorney of the Board's choosing. What is the rationale for these actions and what is the propriety with respect to both state law and the 2003 Compromise Agreement?

The question assumes that the Law Director was required to hire, at taxpayer's expense, an additional outside attorney chosen by the School Board for a teacher termination hearing. Neither under law, nor under Chancellor Sharon Bell's opinion, nor under the Compromise Agreement, was the Law Director required to hire, at taxpayer's expense, an additional attorney of the Board's choice, for a teacher termination hearing.

Second, contrary to the premise of the query, there was no professional conflict of interest. The Board, acting as the appellate review board, was hearing an appeal of the independent hearing officer who had upheld the previous action of the Board and the Director of Schools in terminating a tenured teacher. The interests of the School Board were in conflict only with the dismissed teacher. There could be no conflict with itself. The concession was made so that David Sanders could concentrate on countering the teacher's arguments.

Further at the inter-office request of David Sanders, the Law Director's Office, in its own discretion retained former Knox County Law Director, John Owings as additional counsel for the Board. Mr. Owings has 22 years of respected service to the County and its agencies, including the Board of Education. No one is more qualified than he. At the most recent hearing, the Law Director engaged the services of Melanie Davis, a Maryville attorney who represents the Blount County School Board and the Maryville School Board and has argued those boards' positions in numerous tenure hearings. It should be noted that Ms. Davis does not hire outside counsel to sit with her boards during termination hearings.

Evidently, the Superintendent and the Chair wanted to hire Michael Kelley. In a prior tenure hearing, the Law Director had acceded to the wishes of the Superintendent and hired Mr. Kelley. Mr. Kelley, who has no experience as a school board attorney, charged the taxpayers three thousand one hundred dollars (\$3,100.00) for his services for one meeting. On the other hand, the highly qualified and experienced, Ms. Davis charged the taxpayers eight hundred ninety-eight Dollars (\$898.00) for her services for two separate appearances before the BOE.

Even prior to this, in September of 2001, the question was asked of then-Law Director Michael Moyers (now, Chancellor Moyers). Law Director Moyers answered the question the same as has this Law Director. The Board of Education and Superintendent Lindsey (fired in 2008) did not like the Law Director's opinion and filed suit in October of 2001, against the Knox County Commission, the Commissioners individually, the County Executive, the Knox County Trustee and the Knox County Law Director. The BOE sought a judicial declaration on several issues

including the Board's perceived right to hire its own attorney under T.C.A. § 49-2-203(b)(5). The Board argued that state law took precedence over the charter. Chancellor Bell did not agree with the Board on that issue, and four (4) months and \$267,000 later, Chancellor Bell dismissed the Board's lawsuit.

Chancellor Bell looked to the legislative history of this section and noted that the floor debate made it eminently clear that it was understood by the members of the general assembly that counties of a certain size which had elected law directors (as opposed to most counties which have appointed law directors) could opt out of the provision that school boards could hire their own attorneys. She held that the charter of Knox County [passed by vote of its citizens and which adopted and incorporated the private act creating an elected law director. Ed.] constituted an opt out of T.C.A. § 49-2-203(b)(5).

The School Board took issue with the Chancellor and filed an appeal. The Tennessee School Board Association joined with the BOE in prosecuting the appeal. Prior to the conclusion of the appellate proceedings, the BOE approached the Knox County defendants about avoiding the necessity for an appellate court decision. Thus was born the "Order of Compromise." The appeal was thereby dismissed and an order entered to that effect.

As to the issue of the BOE expending additional taxpayer monies to hire an outside attorney, the compromise did not in any way negate the holding of Chancellor Bell. It simply overlays the Chancellor's holding by stating the law as it existed as to conflicts of interest. That law was, at that time, set forth in Supreme Court Rule 8, DR 5-105 (since rescinded). The BOE dropped the appeal after the Compromise Agreement was finalized. Absent the specific prerequisites set out in the Compromise Agreement, Chancellor Bell's holding that Knox County had opted out of the provisions of the statute is still in force and effect. Therefore, the issue as to the blanket right of the BOE to defray taxpayer funds from the education of students, in order to hire an additional attorney, is *res judicata*--the principle that a matter, once adjudicated, is final and may not be re-litigated. The TSBA, being a party to the appeal impliedly acquiesced to the dismissal of the appeal.

RBA:kfc

cc: Knox County Board of Education Members