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THE ATTORNEY GENERAL OF MARYLAND OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin O’Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 247 / House Bill 492

Dear Governor O’Malley:

We have reviewed for constitutionality and legal sufficiency Senate Bill 247 and HB 492, identical bills relating to the compensation of the attorney for the Prince George’s County Board of License Commissioners. While the bills may be signed into law, we note that a severable portion of the legislation may be in conflict with Article III, §35 of the Maryland Constitution, which provides in relevant part that “[e]xtra compensation may not be granted or allowed by the General Assembly to any public officer, agent, servant or contractor, after the service has been rendered, or the contract entered into...”.

Background

Section 15-109(r)(5)(ii) of Article 2B of the Maryland Code provides that the attorney for the Prince George’s Board “shall receive an annual salary of \$15,500 and the County Council shall pay all court costs and expenses incurred thereon by the attorney to

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the Board.”¹ Senate Bill 247 / House Bill 492 would amend this law to provide that the council pay the Board’s attorney legal fees approved by the Board for representing it in court. This amount would include “fees approved by the Board and not paid in prior fiscal years.” In addition, the legislation contains provisions of prospective operation, requiring the Board to establish the fee rate for the attorney’s representation in court and the Council to budget for this compensation. These latter provisions raise no constitutional issue. However, the additional payment for prior year’s representation raises a question under Article III, §35.

The Fiscal and Policy Note for the legislation states that:

In addition to the salary of \$15,500, the board attorney has been receiving a contractual income of \$26,500 annually. Current law does not provide that the board attorney be compensated for legal fees...

The Prince George’s County Board of License Commissioners advises that the \$26,500 annual contractual compensation for the board’s attorney was approved by the county council for fiscal 2006 and 2007. The board has budgeted an amount of \$26,500 for fiscal 2006.

Analysis

There is surprisingly little construction of Maryland’s “extra compensation” prohibition.² However, similar prohibitions appear in the constitutions of more than 20

¹ Previously, this office advised that certain payments to the attorney above the statutory salary would constitute compensation and would not be permissible. *See* Letters of Advice to the Hon. Nathaniel Exum, dated October 17, 2005 and the Hon. Gwendolyn Britt, dated March 1, 2007, copies of which are attached. This office was not asked for, nor did it render advice on the constitutionality of legislatively mandating payment for prior years’ service.

² In *State v. Dashiell*, 195 Md. 677, 693 (1950), the Court of Appeals said that Article III, §35 should be construed broadly, but concluded that the extra compensation prohibition did not apply to damages for breach of contract. In 78 *Opinions of the Attorney General* 296 (1993), Attorney General Curran said that the constitutional restriction did not apply to a benefit change in a pension plan.

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states and caselaw and State Attorney General opinions in these jurisdictions offer more guidance. Particularly relevant are two State Attorney General opinions.

In a 2003 opinion the Attorney General of Florida concluded that state “extra compensation”prohibition would be violated by a school board’s ratification of previous payments for legal services not authorized under the original contract between the board and its lawyer. 2003 WL 22513550 (Fla. AG). Attorney General Crist also noted that “[e]xtra compensation generally refers to an additional payment of retroactive compensation, lump sum allowances or other forms of compensation not provided for by law or contract is general prohibited...”. Similarly, in a 1952 opinion the Attorney General of New York concluded that extra compensation could not be paid for litigation to be undertaken by a City Attorney above the salary fixed by law for services rendered. 1952 WL 81860 (N.Y.A.G.). The opinion also noted that: “[a]s a practical matter ... you might consider requesting an increase in your salary for a particular year or years because of the additional labor.”

In accordance with these authorities, we believe SB 247 / HB 452 authorizes extra compensation for services that have already been rendered when pay was limited to \$15,500. Thus this portion of the legislation - - which we view as severable - - should not be given effect. As the Attorney General of New York has suggested in the above cited opinion, it would be possible for the Legislature next session to increase the salary of the Board’s attorney even for a brief period to resolve this problem and remedy any inequity.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/RAZ/as
Attachments
cc: Joseph Bryce
Secretary of State
Karl Aro