

STATE OF TENNESSEE

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

August 15, 2006

Opinion 06-132

County commissioners voting under Tenn. Code Ann. § 2-8-111

QUESTION

Tenn. Code Ann. § 2-8-111 concerns deciding a tie vote between two or more persons having the highest number of votes for an office. Under Tenn. Code Ann. § 2-8-111(1), the county commission casts the deciding vote for offices filled by the votes of a single county or civil district. In this case, an incumbent member of a county commission and a challenger received the same number of votes in the popular election. In the county commission vote to decide the election, may the incumbent county commissioner vote for herself?

OPINION

Yes.

ANALYSIS

This opinion addresses a county commission vote to decide a popular election in which two candidates received the same number of votes. Tenn. Code Ann § 2-8-111 provides in relevant part:

If there is a tie vote between the two (2) or more persons having the highest number of votes for an office, the state election commission shall cast the deciding vote except that:

(1) *The county legislative body* shall cast the deciding vote for offices filled by the votes of a single county or civil district[.]

(Emphasis added).

In this case, county commissioners are elected by district, with three commissioners elected from each district. Two commissioners were elected from the district in question, but two candidates for the third position received an equal number of popular votes. One of the candidates in the tied vote is an incumbent member of the county commission. The term of office for members of the county legislative body begins on September 1 next succeeding their election. Tenn. Code

Ann. § 5-5-102(g). This Office has concluded that Tenn. Code Ann. § 2-8-111(1) refers to the county legislative body as an office. Thus, either the county legislative body in existence at the time of the election that results in a tie vote, or the newly elected body, would be authorized to cast the deciding vote. *Op. Tenn. Att’y Gen. 86-173* (October 8, 1986). In this case, the legislative body in existence at the time of the August election plans to cast the deciding vote. The question is whether the incumbent commissioner who tied with the other candidate may vote for herself.

We have found no clear authority in this State or other states addressing this issue.¹ By its terms, the statute authorizes “[t]he county legislative body” to cast the deciding vote where two candidates for a county office receive the same number of popular votes. We think a court would conclude that this statute authorizes all the members to vote on breaking the tie, including an incumbent member who is one of the two tied candidates. We also think a court would conclude that, under the statute, an incumbent member may vote for himself to break the tie. By entrusting the tie-breaking vote to the local legislative body, we think the General Assembly recognized that the decision would be essentially political. Further, we think the General Assembly could have easily foreseen that, under the statute, incumbent members could be called upon to vote on an election involving themselves. But the statute does not prohibit such members from participating in the decision or from voting for themselves.

We note that the Municipal Technical Advisory Service has reached the opposite conclusion in interpreting this statute. *MTAS Legal Opinion* (January 9, 1997). This conclusion was based on the reasoning that the decision under this statute is analogous to the resolution of an election contest. The opinion notes that, where a local legislative body is given the right to determine the qualifications and election of its members in contested elections, members who are parties to the contest cannot participate or vote in determining the validity or result of the election. *McQuillin Municipal Corporations* § 12.93 (3d ed. 2001). The case *McQuillin* cites in support of this rule, however, illustrates the distinction between a decision under Tenn. Code Ann. § 2-8-111 and the review of an election contest. *Robinson v. Hays*, 62 S.W.2d 1007 (Tex. Ct. App. 1933). In that case, the Court noted that the city council, in reviewing the contest, was being asked to determine the validity of the election. The council would be holding hearings and reviewing evidence regarding the election. By contrast, a decision under Tenn. Code Ann. § 2-8-111 is a tie-breaking vote, not a judgment on the validity of the election. As discussed above, we think the General Assembly intended a vote to break a tie under Tenn. Code Ann. § 2-8-111 to be political. For this reason, we do not think the decision can be analogized to an election contest.

It can be argued that, by voting for herself under Tenn. Code Ann. § 2-8-111, a county commissioner violates state conflict of interest rules. We do not think those rules were intended to apply to a decision under this statute. Under Tenn. Code Ann. § 12-4-101(a)(1), a county commissioner may not be “directly interested” in a contract he or she is authorized to vote for, let

¹Ordinarily, a local governing body may not appoint one of its own members to an office over which it exercises direct power of appointment. *State ex rel. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). Of course, that principle is not applicable to this case. The county commission is not called on to exercise a power of appointment, but to carry out its statutory duty to cast the deciding vote in the case of a tie election.

out, overlook, or superintend. Of course, the commissioner in this case would have a pecuniary interest in continuing to receive her compensation as a county commissioner. We do not think, however, that the General Assembly intended this statute to apply to a decision made under Tenn. Code Ann. § 2-8-111. Our Office has concluded that Tenn. Code Ann. § 12-4-101(a)(1) prohibits an officer from being directly interested in a contract, whether or not he or she abstains from voting on it. *Op. Tenn. Att’y Gen. 04-016* (February 5, 2004). Here, however, Tenn. Code Ann. § 2-8-111 itself creates any potential conflict that might exist under Tenn. Code Ann. § 12-4-101(a)(1). Where there is a general statute and an inconsistent special statute, the special statute is deemed an exception to the general statute. *See Op. Tenn. Att’y Gen. 88-122* (July 13, 1988) (Tenn. Code Ann. §5-5-107(a) authorizing a county legislative body to fix its compensation is an exception to Tenn. Code Ann. § 12-4-101(a)). For this reason, we do not think Tenn. Code Ann. § 12-4-101(a)(1) would prohibit an incumbent commissioner from voting for herself in a decision under Tenn. Code Ann. § 2-8-111.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Bill Ketron
State Senator
311 War Memorial Building
Nashville, TN 37243-0213