S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

March 23, 2000

Opinion No. 00-054

Service as UT Assistant General Counsel and Member of Judicial Selection Commission

QUESTION

Tenn. Code Ann. § 17-4-104(a) provides that no member of the Judicial Selection Commission shall be a salaried office holder of the State of Tennessee. Is an Assistant General Counsel employed in the Office of General Counsel and Secretary for the University of Tennessee a "salaried office holder" within the meaning of this statute?

OPINION

No.

ANALYSIS

This opinion addresses whether a person may serve as a member of the Judicial Selection Commission while being employed by the University of Tennessee ("UT") in the position of Assistant General Counsel. The answer depends on whether an Assistant General Counsel is an "office holder" under Tenn. Code Ann. § 17-4-104, or is more properly characterized as an employee. We conclude an Assistant General Counsel is an employee, and thus, may serve as a member of the Commission. The relevant statute provides:

> (a) **No member of the judicial selection commission shall be a salaried office holder of the state of Tennessee** or the United States, nor shall any member of the commission hold any office in any political party or political organization; provided, that members of the national guard and/or members of any armed forces reserve organization, any district attorney general or an employee of a district attorney general, or any district public defender or an employee of a district public defender shall not be considered as salaried office holders.
>
> (b) **Any member of the commission becoming a salaried office holder of the state of Tennessee** or the United States or accepting any office in any political party or political organization **ipso facto vacates the member's office as a member of the commission**.

Tenn. Code Ann. § 17-4-104 (emphasis added).

We have found no Tennessee case defining the term "office holder," but our courts have recognized that a "public officer" is "'an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises the functions concerning the public assigned to him by law.'" *Sitton v. Fulton,* 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) quoting 67 C.J.S. *Officers* § 2; *see also Gamblin v. Town of Bruceton,* 803 S.W.2d 690 (Tenn. Ct. App. 1990) (town recorder was officer not employee when city charter provided for position's appointment by Board of Aldermen).

Statutes regarding UT are found at Tenn. Code Ann. §§ 49-9-101, *et seq.* The Trustees of the University "have full power and authority to elect a president, and such professors, tutors **and other officers** in the university as they may judge necessary." Tenn. Code Ann. § 49-9-209(d)(1) (emphasis added). The Board elects a General Counsel and Secretary among the senior administrative officers of the University. UT Bylaws, art. IV, § 1. But according to information obtained in connection with the opinion request, the Board does not elect an Assistant General Counsel as an officer of the University. Rather, these individuals serve at the pleasure of the General Counsel and Secretary. The position is not created by statute, nor are the duties set forth in statute. We conclude, therefore, that a UT Assistant General Counsel is an employee, as opposed to an officer or office holder of the State. *See generally* Op. Tenn. Atty. Gen. 82-515 (November 15, 1982) (employment by a state university is not an "office" within the meaning of Article II, Section 26 of the Tennessee Constitution). Accordingly, a UT Assistant General Counsel may serve as a member of the Judicial Selection Commission under Tenn. Code Ann. § 17-4-104.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

GINA J. BARHAM
Deputy Attorney General

Requested by:

Honorable Cornelia A. Clark
Director, Administrative Office of the Courts
Nashville City Center, Suite 600
Nashville, TN 37243-0607