S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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January 18, 2002

Opinion No. 02-012

Same Individual Running for Office of Sheriff and Constable

QUESTIONS

1. Are the offices of sheriff and constable incompatible under the common law?

2. a. The Sheriff's Office in Bradley County maintains a civil process division. As part of the duties of office, a constable is required to serve process, for which he or she receives a fee. Where the same person serves as sheriff and constable, would the sheriff supervise a contract with himself or herself within the meaning of Tenn. Code Ann. § 12-4-101?

b. If so, could a person seek election to both offices?

3. Under Tenn. Code Ann. § 2-5-101(f)(5), no candidate may qualify for and run for election to more than one constitutional county office or any other county-wide office voted on by voters during any primary or general election. Would this provision prohibit the same individual from running for sheriff and constable?

OPINIONS

1. Statutes governing the office of sheriff indicate that a sheriff is expected to devote his or her entire working time to his or her duties. On this basis alone, a court could conclude that a sheriff may not hold any other public office. In addition, a court could conclude that holding the offices of sheriff and constable is illegal because they are incompatible under the common law doctrine of incompatible offices. A definitive ruling on this issue could only be made by a court of competent jurisdiction after considering all the relevant facts and circumstances regarding the functions of the two positions.

2. a. A court is unlikely to conclude that the duty of a sheriff or a constable to serve civil process is "work" or a "contract" within the meaning of Tenn. Code Ann. § 12-4-101(a). Further, the statutes do not indicate that either officer controls the other's duty to serve civil process. Therefore, although both the sheriff and a constable within Bradley County are required to serve civil process, an individual holding both offices would not violate Tenn. Code Ann. § 12-4-101(a) for that reason alone.

This Office is unaware of any other statutory responsibilities of sheriff and constable that would cause an individual who held both offices to violate Tenn. Code Ann. § 12-4-101(a).

b. Because of the answer to Question a., Question b. is moot.

3. It is our opinion that the prohibition in Tenn. Code Ann. § 2-5-101(f)(5) includes an office like that of constable, the jurisdiction of which is county-wide, even though it is not filled by a county-wide vote. Therefore, under that statute, the same individual may not run for the office of sheriff and constable in the same election. To the extent it is inconsistent with this conclusion, Op. Tenn. Atty. Gen. 80-238 (May 14, 1980) is overruled.

ANALYSIS

1. Incompatible Offices

The request states that the same individual has obtained petitions to qualify to appear on the ballot as a candidate for the office of sheriff and the office of constable. The request includes an opinion from the Division of Elections in the Tennessee Department of State. That opinion concludes that a person may run for both offices at the same time, but may not serve in both offices if the two are incompatible. As further discussed below, for a number of reasons we think the same individual is probably prohibited under Tenn. Code Ann. § 2-5-101(f)(5) from running for both offices in the same election. As an initial matter, however, you have asked this Office to examine the issue of incompatibility of the offices of sheriff and constable.

Our Office has noted that an individual might be prohibited from holding two offices if they are incompatible under the common law doctrine prohibiting an individual from holding incompatible offices. Op. Tenn. Atty. Gen. 00-159 (October 17, 2000); *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). The question of incompatibility depends on the circumstances of each individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. Officers § 27 at 279-80 (1978). For example, an inherent inconsistency exists where one office is subject to the supervision or control of the other. *State ex rel v. Thompson, supra.* In *Thompson*, the Tennessee Supreme Court concluded that the offices of city manager and member of the city council were incompatible because the council had the authority to appoint, remove, and supervise the city manager, and no statute then in effect permitted the same individual to hold these offices.

No statute specifically prohibits a sheriff from holding another public office. But Tennessee statutes indicate that the office of sheriff is intended to be a full-time position. The sheriff is the principal conservator of the peace in the sheriff's county. Tenn. Code Ann. § 38-3-102. Section § 8-8-201 of the Code contains an extensive list of other duties of the sheriff. Sheriffs receive an annual salary under Tenn. Code Ann. § 8-24-101. *See* Tenn. Code Ann. § 8-22-101 (county officers deprived of fees). Under Tenn.

Code Ann. § 8-20-101(a), a sheriff, among other local officers, may employ deputies and assistants as may be "actually necessary" to conducting the sheriff's office where the sheriff cannot properly and efficiently conduct the affairs and transact the business of the sheriff's office "by devoting such person's *entire working time thereto* . . .." On this basis alone, we think a court could well conclude that a sheriff may not hold any other public office, even though no statute specifies the hours required of a constable.

In addition, your request notes that the constable in Bradley County has law enforcement powers while the sheriff is the chief law enforcement officer in the county. We have found no Tennessee statute that places a constable with law enforcement powers under the supervision or control of the sheriff in his or her exercise of those powers. But a court could conclude that occupancy of both offices by the same person is detrimental to the public interest or that performing the duties of constable, a part-time office, interferes with the ability of that individual to perform his or her duties as sheriff. For example, many statutes provide that a duty may be performed by the sheriff or the constable. *See, e.g.*, Tenn. Code Ann. § 29-21-111 (serving writ of habeas corpus); Tenn. Code Ann. § 38-5-110 (serving summons for jurors and subpoenas for witnesses to coroner's inquest); Tenn. Code Ann. § 40-6-101 (execution of search warrant); Tenn. Code Ann. § 47-13-104 (citation for trustee's failure to settle conveyance in trust for the benefit of creditors); Tenn. Code Ann. § 49-6-3007 (enforcement of truancy laws); Tenn. Code Ann. § 53-11-451 (seizure of drug trafficking property); Tenn. Code Ann. § 57-9-115 (liquor confiscation); Tenn. Code Ann. § 66-23-111 (execution of subpoena on witness); Tenn. Code Ann. § 67-1-1202 (execution of warrant for nonpayment of taxes); Tenn. Code Ann. § 67-1-1203 (execution of garnishment). If the same individual holds both offices, fewer personnel are available to carry out these responsibilities. Further, specific facts and circumstances concerning the individual, the performance of the respective duties, and law enforcement within Bradley County could support the conclusion that the two offices are incompatible under the common law.

As the request notes, a sheriff does exercise some statutory authority over a constable. Under Tenn. Code Ann. § 8-10-111(a), "[i]t is the duty of a constable to execute all process lawfully directed to the constable, and to wait upon the court, when *appointed by the county legislative body or by the sheriff, as the case may be*." (Emphasis added). In addition, both the sheriff's office and the constable are authorized to serve process. This overlap in responsibilities could interfere with efficient service of process within the county, especially since constables are authorized to retain fees for service of process, while sheriffs have been placed on salary. Op. Tenn. Atty. Gen. 97-043 (April 7, 1997). We have found no Tennessee case law, however, addressing this issue. A definitive ruling could only be made by a court of competent jurisdiction after considering all the relevant facts and circumstances. Further, we know of no authority that would prevent an individual from running for election to both offices merely because they are incompatible under common law or because a sheriff may not hold any other public office. Op. Tenn. Atty. Gen. U97-013 (March 5, 1997).

2. Conflict of Interest

Your request also asks whether Tenn. Code Ann. § 12-4-101(a) would be violated if a sheriff also served as constable. You state that the Bradley County Sheriff maintains a civil process division. Further, you state that a constable is paid for serving civil process. Tenn. Code Ann. § 12-4-101(a) provides in relevant part:

> It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.

Whether this statute prohibits any particular arrangement depends on the facts and circumstances. This Office has noted that these restrictions could apply where the same individual serves as a constable and a deputy sheriff. Op. Tenn. Atty. Gen. 99-160 (August 19, 1999). But, on their face, applicable statutes do not reflect that, as a general matter, a sheriff controls a contract in which a constable has a direct personal interest, or that a constable controls a contract in which a sheriff has a direct personal interest. The fact that each officer is charged with the duty of providing service of process does not appear to constitute a conflict of interest under Tenn. Code Ann. § 12-4-101. The duty to serve process is a statutory responsibility that does not appear to be "work" or a "contract" within the meaning of this statute. Of course, the fact that a sheriff receives a salary, while a constable retains a fee for service of process, could interfere with the ability of an individual holding both offices to perform the duties of each. We think, however, that this conflict is pertinent to whether the two offices are incompatible under common law, as discussed above.

3. Running for Sheriff and Constable under Tenn. Code Ann. § 2-5-101(f)(5)

Finally, you ask whether the office of constable is still a constitutional county office within the meaning of Tenn. Code Ann. § 2-5-101(f)(5). That statute provides as follows:

> (5) No candidate, whether independent or represented by a political party, may be permitted to submit and have accepted by any election commission, more than one (1) qualifying petition, or otherwise qualify and be nominated, or have such candidate's name anywhere appear on any ballot for any election or primary, wherein such candidate is attempting to be qualified for and nominated or elected to more than one (1) state office

> as described in either § 2-13-202(1), (2) or(3) or in article VI of the Constitution of Tennessee *or more than one (1) constitutional county office described in article VII, § 1 of the Constitution of Tennessee or any other county-wide office, voted on by voters during any primary or general election.*

(Emphasis added). Article VII, Section 1 of the Tennessee Constitution provides in relevant part:

> The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property.

The question is whether, under Tenn. Code Ann. § 2-5-101(f)(5), the same person would be prohibited from running for the office of sheriff and the office of constable.[1] This Office concluded in 1980 that, under this statute, the same individual may qualify to run as a candidate for both the office of sheriff and constable. Op. Tenn. Atty. Gen. 80-238 (May 14, 1980).[2] As that opinion points out, the office of constable is no longer listed in Article VII, Section 1 of the Tennessee Constitution. Therefore, that office is not a constitutional county office within the meaning of the statute.

The question remains, however, whether the office of constable falls within the category of "any other county-wide office, voted on by voters during any primary or general election." The 1980 opinion concluded that the office of constable is not a "county-wide office" within the meaning of this statute because constables are not elected by a county-wide vote. On review, we think this interpretation of the statute is incorrect.

The 1980 opinion noted that the term "county-wide" is defined as "extending over the whole county," citing *Webster's Third New International Dictionary* 521 (1971). This Office has continued to cite that definition. Op. Tenn. Atty. Gen. 01-084 (May 23, 2001); Op. Tenn. Atty. Gen. 86-42 (February 24, 1986). Courts of other states have concluded that an office is county-wide when it covers the entire area within a county. *See Application of O'Hara*, 42 Misc.2d 716, 248 N.Y.S.2d 535, 538

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[1] The opinion from the Division of Elections does not specifically discuss this statute. This omission appears to be because the Division concluded that, while the office of sheriff is a county office, the office of constable is a state office. In support of this conclusion, the Division cites *Glasgow v. Fox,* 214 Tenn. 613, 383 S.W.2d 9 (1964). This Office, however, has concluded that, in light of legal developments after that case was decided, a court would probably conclude that the office of constable is a county office. *See, e.g.,* Op. Tenn. Atty. Gen. 91- 70 (August 1, 1991). The 1980 opinion also reflects this assumption. *See also Spurlock v. Sumner County,* 42 S.W.3d 75 (Tenn. 2001) (a sheriff acts as a county official under Tennessee law).

[2] The version of Op. Tenn. Atty. Gen. 80-238 (May 14, 1980) on Michie's Law on Disc does not include page two of the same opinion in our files. That page includes a discussion of Tenn. Code Ann. § 2-5-101(f)(5). Attached to this opinion is a copy of the version in our files.

(1964). This Office has concluded that the jurisdiction of a constable is county-wide. Op. Tenn. Atty. Gen. 94-95 (August 30, 1994). But, as the 1980 opinion noted, the office of constable is not filled by a county-wide vote. Tenn. Code Ann. § 8-10-101. Thus, the 1980 opinion concluded that the office of constable does not fall within the category of "any other county-wide office, voted on by voters during any primary or general election" within the meaning of Tenn. Code Ann. § 2-5-101(f)(5).

On review, we think this interpretation is incorrect. We think the statute includes an office the jurisdiction of which is county-wide, even if the office is not filled by a county-wide vote. This conclusion is based on the specific language of the statute. Under Tenn. Code Ann. § 2-5-101(f)(5), the same individual may not run for election "for more than one (1) constitutional county office described in article VII, § 1 of the Constitution of Tennessee or *any other* county-wide office, voted on by voters during any primary or general election." (Emphasis added). Article VII, Section 1 of the Tennessee Constitution describes, among other offices, membership in the county legislative body. The constitutional provision also expressly states that members of the county legislative body may be elected by districts within the county. The prohibition in Tenn. Code Ann. § 2-5-101(f)(5), therefore, includes officers who are the members of a body with county-wide jurisdiction, but who are not elected by a county-wide vote. For this reason, we think a court would conclude that the prohibition in that statute includes an office like that of constable, the jurisdiction of which is county-wide, even though it is not filled by a county-wide vote. Therefore, under Tenn. Code Ann. § 2-5-101(f)(5) the same individual may not run for the office of sheriff and constable in the same election. To the extent Op. Tenn. Atty. Gen. 80-238 (May 14, 1980) is inconsistent with this conclusion, it is overruled.

We note that this Office recently reached a different conclusion when interpreting Tenn. Code Ann. § 5-5-102(c). Op. Tenn. Atty. Gen. 01-084 (May 23, 2001). That statute prohibits the same individual from holding the office of county legislator and of "county executive, sheriff, trustee, register, county clerk, assessor of property, or any other county-wide office filled by vote of the people or the county legislative body." We concluded, however, that Tenn. Code Ann. § 5-5-102 did not prohibit the same individual serving as a county commissioner and as a member of the county highway commission because the latter office is not filled by a county-wide vote. This conclusion was based on the specific language of the statute, which listed only officials elected by county-wide vote as examples of offices that a county commissioner may not hold. By contrast, Tenn. Code Ann. § 2-5-101(f)(5), by implication, includes officers whose jurisdiction is county-wide even if they are not elected by a county-wide vote. The different language supports the different result.

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