

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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January 9, 2006

Opinion No. 06-005

Filling of Vacancy in Senate if Election is Declared Void

QUESTIONS

1. This Office has concluded that either House of the General Assembly may allow a member-elect with respect to whose election a contest is pending to participate in legislative activities pending the outcome of the election contest. If the Senate allows Senator Ophelia Ford to participate in legislative activities, will the election contest have the effect of removing her from office if the Senate declares the election void by a majority vote, or is a two-thirds vote required?

2. If the Senate declares the election of Senator Ford to be void, then is a successor appointed by the legislative body of Shelby County to fill the vacancy created by the action of the Senate, pursuant to Article II, Section 15(b), of the Tennessee Constitution?

OPINIONS

1. The election contest will have the effect of removing Senator Ford from office if the Senate declares the election void by a constitutional majority vote, that is, a majority vote of the entire membership of the Senate. A two-thirds vote is not constitutionally required.

2. Yes.

ANALYSIS

On September 15, 2005, a special election was held to fill the vacancy created by the resignation of Senator John Ford for the office of State Senator in District 29. The Democratic nominee, Ophelia Ford, received 4,333 votes, and the Republican nominee, Terry Rowland, received 4,320 votes in that election — a difference of only 13 votes. Mr. Rowland filed a petition contesting the election of Senator Ford¹ with the Senate in accordance with Article II, Section 11, of the Tennessee Constitution. That provision, which vests each House of the Tennessee General Assembly with the authority to judge the qualifications and election of its members, provides in pertinent part, as follows:

¹Senator Ford took the oath of office and has been acting as a legislator pending the outcome of the election contest.

The Senate and House of Representatives, when assembled, shall each choose a speaker and its other officers; be judges of the qualifications and election of its members, and sit upon its own adjournments from day to day.

This section of the Constitution has been construed as vesting sole and exclusive authority in the House and Senate to judge the qualifications and election of their respective members after each legislative body is constituted as of the day of the November general election. *State ex rel. Ezzell v. Shumate*, 172 Tenn. 451, 113 S.W.2d 381 (1938); *Gates v. Long*, 172 Tenn. 471, 113 S.W.2d 388 (1938); *Comer v. Ashe*, 514 S.W.2d 730 (Tenn. 1974).

1. Effect of Majority Vote Declaring Election Void

This Office has concluded in the past that either House of the General Assembly may allow a member-elect with respect to whose election a contest is pending to participate in legislative activities as a member, pending the outcome of the contest. *Op. Tenn. Att’y Gen. 81-297* (May 7, 1981). The opinion concludes that an election contest should be treated as neither an exclusion or expulsion issue but, rather, as a matter of determining the final results of an election. Thus, while the determination of an election contest may have the result of removing a member-elect from office, this determination is not tantamount to an expulsion, and may be accomplished by a constitutional majority of the House in question. *Id.* For this reason, the election contest will have the effect of removing Senator Ford from office if the Senate declares her election void by a constitutional majority vote, that is, a majority vote of the entire membership of the Senate. A two-thirds vote is not constitutionally required.

2. Filling the Vacancy

The second question concerns filling the vacancy in Senate District 29 if Senator Ford’s election is declared void by the Senate. If an election is declared void by either House of the General Assembly, this Office has previously opined that the vacancy in such office should be filled pursuant to Tenn. Code Ann. §§ 2-14-201, *et seq.*, and Tenn. Code Ann. § 8-48-101. *Op. Tenn. Att’y Gen. 81-297* (May 7, 1981).

Tenn. Code Ann. § 2-14-201 specifies when an election by the qualified voters of a district is required to fill a vacancy in either House of the General Assembly. It provides that if the vacancy occurs twelve (12) months or more prior to the next general election for members of the General Assembly, or if the vacancy occurs less than twelve (12) months prior to the next general election, but with more than two (2) years remaining in a term in the State Senate, then a successor “shall be elected . . . by the qualified voters of the district in which the vacancy occurred.” Tenn. Code Ann. § 2-14-201(a) and (b). Tenn. Code Ann. § 2-14-201 was enacted by the General Assembly pursuant to Article II, Section 15, of the Tennessee Constitution, which provides, in pertinent part, as follows:

When the seat of any member of either House becomes vacant, the vacancy shall be filled as follows:

(a) When twelve months or more remain prior to the next general election for legislators, a successor shall be elected by the qualified voters of the district represented, and such successor shall serve the remainder of the original term. The election shall be held within such time as provided by law. The legislative body of the replaced legislator's county of residence at the time of his or her election may elect an interim successor to serve until the election.

(b) When less than twelve months remain prior to the next general election for legislators, a successor shall be elected by the legislative body of the replaced legislator's county of residence at the time of his or her election. The term of any Senator so elected shall expire at the next general election for legislators, at which election a successor shall be elected.

If the Senate declares the election of Senator Ford void, the manner in which the Senate District 29 seat is to be filled depends upon when the vacancy in that seat occurred. Tenn. Code Ann. § 8-48-101 provides that any office in this State is vacated by:

- (1) The death of the incumbent;
- (2) The incumbent's resignation, when permitted by law;
- (3) Ceasing to be a resident of the state, or of the district, circuit, or county for which the incumbent was elected or appointed;
- (4) ***The decision of a competent tribunal, declaring the election or appointment void or the office vacant;***
- (5) An act of the general assembly abridging the term of office, where it is not fixed by the constitution;
- (6) The sentence of the incumbent, by any competent tribunal in this or any other state, to the penitentiary, subject to restoration if the judgment is reversed, but not if the incumbent is pardoned; or
- (7) Due adjudication of the incumbent's insanity.

(Emphasis added).

As previously discussed, Article II, Section 11, of the Tennessee Constitution vests each House of the Tennessee General Assembly with the sole and exclusive authority to judge the qualifications and ***election*** of its members. *See also* Tenn. Code Ann. § 2-17-102 ("Contests for the office of senator in the general assembly are decided by the senate, . . ."). Thus, if the Senate declares the election of Senator Ford to be void, then pursuant to Tenn. Code Ann. § 8-48-101(4), a vacancy would occur at that time. *See Stambaugh v. Price*, 532 S.W.2d 929 (Tenn. 1976) and *Shumate v. Claiborne County*, 183 Tenn. 182, 191 S.W.2d 441 (1946). Furthermore, the vacancy would occur less than twelve (12) months prior to the next general election for legislators and, therefore, the provisions of Article II, Section 15(b), would apply. Accordingly, if the Senate declares the election of Senator Ford void, it is our opinion that the resulting vacancy in Senate

District 29 is to be filled by the Shelby County Commission, and the term of any such successor would expire at the next general election for legislators.²

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²The next general election for legislators is set for November 7, 2006.