S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

August 28, 2006

Opinion No. 06-137

Application of Public Chapter 965

QUESTIONS

1. Whether the provisions of Section 3 of Chapter 965 of the Public Acts of 2006 are mandatory and require a candidate to have his or her name removed from the ballot as a candidate for election to the general assembly?

2. If these provisions are not mandatory, what would happen if such candidate were elected to the general assembly and thereafter resigned?

OPINIONS

1. No.

2. It is our opinion that if a candidate is elected to the General Assembly under the circumstances set forth herein, and immediately resigns from that office thereby creating a vacancy, a successor would be elected by the qualified voters of the district in which the vacancy occurred in accordance with the provisions of Tenn. Code Ann. § 2-14-202(a) - (c).

ANALYSIS

1. You have asked whether the provisions of Section 3 of Chapter 965 of the Public Acts of 2006 are mandatory in a their application. This Act amends Tenn. Code Ann. § 2-13-204 to add the following new provision:

> (d) If a candidate for general assembly is elected to a local public office where the charter or law governing such local election prohibits such person from holding a state office and a local office simultaneously, then such candidate shall have such candidate's name removed from the ballot as a candidate for election to the general assembly, if such candidate files a written request with the county election commission requesting such candidate's name be removed at least fifty (50) calendar days prior to such election for the

> general assembly. Nomination for a new candidate may be made by the former candidate's party by any method of nomination authorized by § 2-13-203.

The plain language of this statute makes it clear that its provision are not mandatory, but rather, permissive. Under this new subsection, if a candidate for the general assembly is elected to a local public office and there is a charter provision or other law that prohibits the holding of both offices simultaneously, then such candidate may seek to have his or her name removed from the ballot as a candidate for the general assembly by submitting a written request to the county election commission at least fifty (50) days prior to the election. If such request is timely made, then this statute does mandate that such candidate's name shall be removed from the ballot as a candidate for the general assembly. The statute does not mandate, however, that such candidate must submit a request to have his or her name removed from the ballot as a candidate for the general assembly.

2. If the provisions of Section 3 are not mandatory, you have asked what would occur in the event such candidate is elected to the general assembly and then resigns from that office . 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.

Thus, pursuant to this statute, a vacancy would occur in the event such candidate is elected to the General Assembly and thereafter resigns. 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.

Accordingly, it is our opinion that if a candidate is elected to the General Assembly under the circumstances set forth above, and immediately resigns from that office thereby creating a vacancy, a successor would be elected by the qualified voters of the district in which the vacancy occurred in accordance with the provisions of Tenn. Code Ann. § 2-14-202(a) - (c).

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

Requested by:

Honorable Henri E. Brooks
State Representative
38 Legislative Plaza
Nashville, TN 37243-0192