

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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September 8, 2006

Opinion No. 06-138

Retroactive Application of Public Chapter 965

QUESTION

If a write-in candidate in the August 3, 2006, Primary Election, has filed the notice required by Tenn. Code Ann. § 2-8-113(c), as well as campaign finance reports, prior to the effective date of Public Chapter 965, can the provisions of this Act be applied to such candidate?

OPINION

Yes.

ANALYSIS

Public Chapter 965 of the Acts of 2006, among other things, amends Tenn. Code Ann. § 2-8-113(a) to change the requirements for a write-in candidate to receive a party nomination by write-in ballot from five percent (5%) of the votes cast in the election to five percent (5%) of the registered voters in the district. That statute now reads as follows:

On the third Thursday after a primary election the state coordinator of elections shall publicly calculate and compare the votes received by each person and declare who has been nominated for office in the primary or elected to the state executive committee. The candidates who receive the highest number of votes shall be declared elected or nominated; provided, that in order for any person to receive a party nomination by write-in ballots, such person must receive a number of write-in votes equal to or greater than five percent (5%) of the total number of registered voters of the district. However, this section shall not apply where there are candidates for the office involved listed on the official ballot.

Pursuant to Section 5 of Public Chapter 965, this provision took effect when it was signed into law on June 27, 2006.

You have asked whether this change in the requirement of the number of votes that write-in candidates must receive in order to receive a party nomination by write-in ballot can be applied to a candidate who filed the notice required by Tenn. Code Ann. § 2-8-113(c) and campaign financial disclosure reports prior to the effective date of the Act. This Office has previously opined that the election process for write-in candidates has not and cannot commence until the primary election itself commences. *See* Op. Tenn. Atty. Gen. 02-076 (June 27, 2002). Pursuant to Tenn. Code Ann. § 2-6-102(a)(1), early voting may begin not more than twenty (20) days before the day of the election. Thus, with respect to the August 3 election, early voting began on July 14, 2006. Because the election process did not begin for write-in candidates until after the effective date of the Act, its application to write-in candidates in the August 3 election was not retroactive.

Furthermore, the filing of the notice required by Tenn. Code Ann. § 2-8-113(c) does not change this determination. Tenn. Code Ann. § 2-8-113(c) provides that:

Any person trying to receive a party nomination by write-in ballots shall complete a notice requesting such person's ballot be counted in each county of the district no later than twenty (20) days before the primary election. Such person shall only have votes counted in counties where such notice was completed and timely filed. Write-in candidates for the offices of governor, United States senator and representative in the United States congress shall file their notice with the state coordinator of elections. The notice shall be on a form prescribed by the coordinator of elections and shall not require signatures of any person other than the write-in candidates requesting ballots be counted. The coordinator of elections shall distribute such form to the county election commissions. Upon timely receiving the notice required by this subsection (c), the county election commission shall promptly inform the state coordinator of elections, the registry of election finance, as well as all other candidates participating in the affected election.

In our prior opinion, we noted that while the requirement to file such a notice was not a qualifying deadline *per se*, it had the practical effect of acting as a qualifying deadline in that it provided that no write-in ballots for a candidate would be counted unless the required notice had been timely filed. *See* Op. Tenn. Atty. Gen. 02-076. Subsection (c) establishes that deadline, however, at twenty (20) days prior to the election. With respect to the August 3 election, that deadline is again after the effective date of the Act.

We would note that Section 2 of Public Chapter 965 amends this subsection (c) to change the requirement that the notice be filed by the write-in candidate from twenty (20) days before the primary election to fifty (50) days before the primary election. However, Section 5 specifically provides that this Section does not take effect until January 1, 2007, and, therefore, is not applicable as your request specifically concerns a write-in candidate in the August 3, 2006, Primary Election.

Finally, we do not think that the filing of reports or other documents pursuant to the Campaign Financial Disclosure Act, Tenn. Code Ann. §§ 2-10-101, *et seq.* (the “Campaign Disclosure Act”), constitutes the commencement of the election process, and in particular, with respect to write-in candidates. For example, that Act itself provides that it does not apply to candidates for public office for which the service is part-time and the compensation is less than \$500 per month, unless the candidate’s expenditures exceed \$1,000. *See* Tenn. Code Ann. § 2-10-101. Obviously, if the filing of a report under the Campaign Disclosure Act is the triggering event that commences the election process for a candidates, then the election process conceivably will never commence for candidates falling within this exception. Additionally, the Campaign Disclosure Act requires that each candidate for state or local public office shall certify the name and address of the candidate’s political treasurer to the Registry of Election Finance and/or the county election commission, where appropriate, “before the candidate . . . may receive a contribution or make an expenditure in a state or local election.” It is certainly conceivable that a write-in candidate will have received no contributions and/or made any expenditures prior to a primary election and, therefore, would not be required to file such information.

Accordingly, it is our opinion that application of Public Chapter 965 to a write-in candidate in the August 3, 2006, Primary Election would not be retroactive, despite the fact that such candidate may have filed the notice required by Tenn. Code Ann. § 2-8-113(a) and/or campaign financial disclosure reports prior to the effective date of that Act.

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