**STATE OF TENNESSEE**
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October 5, 2006

Opinion No. 06-153

Vacancy in State Senate

## QUESTIONS

1. Under Art. II, § 15 of the Tennessee Constitution, is the Shelby County Commission required to elect an interim successor to fill the vacancies in Senate Districts 31 and 33 prior to the November 7, 2006, general election?

2. Earlier this year, the Tennessee Senate voted to void the September 15, 2005, Special Election for Senate District 29. Is there a vacancy in that office?

## OPINIONS

1. Art. II, § 15 of the Tennessee Constitution specifies no time within which the Shelby County Commission must fill the vacancy.

2. Yes, however, the United Stated District Court for the Western District of Tennessee has issued an order in the case of *Senator Ophelia Ford, et al, v. John Wilder, et al.*, No. 06-CV-2241, enjoining the Shelby County Commission from electing a successor to fill the vacancy in that office during the pendency of that case.

## ANALYSIS

1. Your first question concerns the time within which the Shelby County Commission must fill vacancies in Senate Districts 31 and 33. Art. II, § 15 of the Tennessee Constitution provides:

> 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 or 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.
>
> (c) Only a qualified voter of the district represented shall be eligible to succeed to the vacant seat.

The vacancies in the two Senate districts occurred less than twelve months prior to the next general election for legislators, which is November 7, 2006. Thus, subsection (b) of Art. II, § 15 is applicable and it states that "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." However, this subsection specifies no time within which the legislative body, in this instance, the Shelby County Commission, must fill the vacancies. It is a general rule of law that the word "shall" is ordinarily construed as being mandatory when used in constitutions or statutes. *West Tenn. Motor Express, Inc. v. Public Service Comm'n*, 514 S.W.2d 742, 746 (Tenn. 1974). But this constitutional provision includes no sanction if the Commission does not fill the vacancy before the next general election. A writ of mandamus may be issued against a public official to require performance of a ministerial, non-discretionary act of the official. *State ex rel. Cole v. Francisco*, 643 S.W.2d 105 Tenn. 1982). The decision by the Shelby County Commission to fill the vacancies in Senate Districts 31 and 33, however, is not ministerial and non-discretionary. Thus, the Constitution imposes no penalty if the Commission leaves these two offices vacant until they are filled at the November 7, 2006, general election.

Your second question concerns the status of Senate District 29 and whether or not a vacancy in this office exists as a result of the Tennessee Senate's declaring the election of Ophelia Ford void. This Office has previously opined that, if the Senate declared 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* Tenn. Atty. Gen. Op. 06-005 (January 9, 2005) (copy attached). However, we would note that the United States District Court for the Western District of Tennessee has entered an order in the case of *Senator Ophelia Ford, et al. v. John Wilder, et al*, No. 06-CV-2241, enjoining the Shelby County Commission from electing a successor to fill the vacancy in that office during the pendency of that case.

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