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December 21, 2007

Opinion No. 07-169

Resignation of city council member

QUESTIONS

1. A Chattanooga City Council member recently resigned from office after a determination by the Chattanooga City Attorney that such individual did not meet the legal requirements to qualify and hold the Council District Seat. Is the City of Chattanooga or any other entity of state or local government legally authorized to seek reimbursement from this individual for salary, expenses or any other compensation paid by or through the City to this individual in her capacity as a member of the City Council?

2. Is the City of Chattanooga or any other entity of state or local government legally authorized to seek reimbursement from this individual for reasonable expenses incurred by the City related to the investigation of this individual's qualifications for holding office?

3. Is the City of Chattanooga or any other entity of state or local government legally authorized to seek reimbursement from this individual for reasonable costs associated with the upcoming special election necessary to fill the Council District seat?

4. May the City of Chattanooga or any other entity of state or local government revoke or otherwise deny this individual retirement service credit for the period in which he or she held office?

5. What, if any, other sanctions or criminal penalties may be imposed upon persons who violate the provisions of Tenn. Code Ann. §§ 2-19-109, 2-19-107 and 8-47-101?

6. Under the facts and circumstances outlined above, are there any other state laws that may have been violated?

7. Is this individual disqualified from employment by the Mayor or any other city official of Chattanooga?

OPINIONS

1. Assuming that the City Attorney's determination that the council member did not meet the legal requirements to qualify for and hold the Chattanooga City Council District Six Seat is correct, then her election to such office was illegal and void. Accordingly, any compensation paid to that individual as a council member would have been without authority of law, and the City of Chattanooga would be entitled to seek recovery of such compensation from the individual.

2. We are not aware of any statute or provision of the common law that would allow a municipality to recover expenses of any investigation related to the qualifications and/or conduct of a city official.

3. It is our opinion that the City of Chattanooga is solely responsible for the costs of the special election to fill the vacancy in the District Six Council seat and cannot seek to recover those costs from the former council member.

4. Assuming that the City Attorney's determination that the council member did not meet the legal requirements to qualify for and hold the Chattanooga City Council District Six Seat is correct, then her election to such office was illegal and void. Consequently, that council member would not be considered an "employee" of the City as that term is defined under the city's General Pension Plan, and, consequently, that individual would not be entitled to participate in the Plan, nor would that individual be entitled to credited service for the length of time in which she was in office.

5. Both Tenn. Code Ann. § 2-19-107 and 2-19-109 provide that a person who knowingly violates either of these statutes commits a Class D felony. Tenn. Code Ann. § 40-20-112 provides that upon conviction for any felony, "it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage." Furthermore, Tenn. Code Ann. §§ 40-29-105(a)(2)(D) and 40-29-204(1) provide that any person convicted of voter fraud, once convicted, shall never again be eligible to register and vote in this state. The only remedy or sanction provided for violations of Tenn. Code Ann. § 8-47-101 is ouster or removal of the official in question.

6. Because we do not know facts upon which the City Attorney based his determination that the council member had violated the provisions of Tenn. Code Ann. §§ 2-19-107, 2-19-109 and 8-47-101, this Office is not in a position to opine as to whether any other state laws may have been violated by that council member's actions.

7. We are not aware of any provision of the Chattanooga City Charter or any state law that would disqualify a former council member from employment by the Mayor or other Chattanooga city officials as a result of the circumstances leading to his or her resignation from the City Council.

ANALYSIS

On April 18, 2005, Ms. Martha Rutherford was installed in the District Six Seat of the Chattanooga City Council. The Chattanooga City Attorney subsequently determined that Ms. Rutherford did not meet the legal requirements to qualify for and hold that office. The City Attorney further concluded that Ms. Rutherford had intentionally and knowingly filed false information with respect to her nominating petition in violation of Tenn. Code Ann. § 2-19-109; that Ms. Rutherford had intentionally and knowingly registered to vote in a manner in which she was not entitled in violation of Tenn. Code Ann. § 2-19-107; and that Ms. Rutherford had committed official misconduct in office by assuming the office of City Council member when she was not qualified to do so and, prior to assuming office, proceeding to swear an oath or affirmation that she possessed the required qualifications and was free of any disqualifying prerequisites, all in violation of Tenn. Code Ann. § 8-47-101. As a result of these determinations, Ms. Rutherford sought to resign her seat and on October 8, 2007, the Chattanooga City Council voted formally to accept Ms. Rutherford's resignation.

1. You have asked a number of questions with respect to the City Attorney's determinations and Ms. Rutherford's subsequent resignation from the Chattanooga City Council. Your first question asks whether the City of Chattanooga may seek reimbursement from Ms. Rutherford for salary, expenses or any other compensation paid by or through the City to Ms. Rutherford during the time she held office as a member of the Chattanooga City Council. This issue was addressed by the Tennessee Supreme Court in *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). In that case, Mr. Thompson, who was a member of the Board of Commissioners of the City of Paris, was elected by his fellow board members to the office of City Manager, while retaining his position as a commissioner. A suit in the nature of a quo warranto was brought asserting that, by accepting the office of City Manager, Mr. Thompson had forfeited his office as a member of the city Board of Commissioners, and that because the Board lacked the authority to appoint one of its own as City Manager, Mr. Thompson was unlawfully holding the office of City Manager. The suit further sought to recover from Mr. Thompson all of the funds of the City paid to him as City Manager.

The Supreme Court found that the Board of Commissioners was without any authority to elect one of its own members to the office of City Manager and, therefore, that Mr. Thompson's election was illegal and void. With respect to recovery of the funds paid to Mr. Thompson as City Manager, the Court stated:

> The quo warranto statute . . . provides that the action also lies to "restrain improper alienations" of the funds of a corporation, " and to secure them for the benefit of those interested; and generally to compel faithful performance of duty." The word "corporation" as used in this code section is construed as referring to only a public corporation, and refers to funds only that are "given or appropriated to a 'public or charitable purpose.'"

246 S.W.2d at 63 (internal citations omitted).

The Court found that the city of Paris was a public corporation and that the funds which are procured for it by taxes are funds procured for a public purpose and, therefore, that the city was authorized under the quo warranto statutes to obtain a judgment against Mr. Thompson for the funds paid to him as City Manager. In finding that the City was entitled to recovery of these funds, the Court noted:

> [I]t is generally held that the public funds of a municipality paid out under appointment to office that is void, it being an appointment that offends public policy, may be recovered back from the person to whom it was paid, and that this rule is of general application, and "is so inflexible that no inquiry into the good or bad intention of the officer . . . is permitted." The principle upon which recovery is allowed is one of prevention, rather than remedial justice. Its purpose is to remove from a public official the temptation to so violate his office of trust for personal benefit.

Id. (internal citations omitted). *See also Roberts v. Roane County*, 160 Tenn. 109, 23 S.W. 239, 243 (1929) (general rule is that compensation paid to officers in excess of, or without authority of, law may be recovered).

Here, assuming that the City Attorney correctly determined that Ms. Rutherford did not meet the legal requirements to qualify for and hold the Chattanooga City Council District Six Seat, then her election to such office was illegal and void. Accordingly, any compensation paid to Ms. Rutherford as a council member would have been without authority of law, and the City of Chattanooga would be entitled to seek recovery of such compensation from Ms. Rutherford.

2. & 3. Your next two questions concern the ability of the City of Chattanooga to recover certain expenses incurred as a result of Ms. Rutherford's actions. First you inquire as to whether the City of Chattanooga may recover from Ms. Rutherford the reasonable expenses incurred by the City related to the investigation of Ms. Rutherford's qualifications to hold the Council District Six seat. We are not aware of any statute or provision of the common law that would allow a municipality to recover expenses of any investigation related to the qualifications and/or conduct of a city official. Further, we would note that Tenn. Code Ann. § 8-47-103 requires city attorneys, within their respective jurisdictions, to investigate any complaint alleging that a municipal officer is guilty of any of the acts constituting official misconduct as set forth in § 8-47-101, and upon determination of reasonable cause, to institute a proceeding in the appropriate court to oust such official. Tenn. Code Ann. § 8-47-122 provides that the costs of any such proceeding against a municipal officer brought by the city attorney or the District Attorney are to be paid by the municipality. We believe that these statutes demonstrate an intent on the part of the legislature that the expense of any investigations and subsequent court proceedings to remove a municipal officer is to be borne by the municipality and not by the ousted official.

You also ask whether the City of Chattanooga may seek reimbursement from Ms. Rutherford for the reasonable costs associated with the special election necessary to fill the vacancy in the District Six Council seat. Again, we are not aware of any statute or provision in common law that would authorize a municipality to seek reimbursement from a city official who has resigned for the costs of a special election to fill the vacancy resulting from such resignation. While Tenn. Code Ann. § 2-14-101 authorizes special elections to be held to fill a vacancy in an office that is required to be filled by election at other times than those fixed for general elections, this statute makes no provision for the costs of holding a special election. However, the Tennessee Supreme Court has recognized that "the expense of holding special municipal elections is in every sense a governmental function carried on for the exclusive benefit of the municipality." *See City of Red Bank-White Oak v. Abercrombie*, 202 Tenn. 700, 308 S.W.2d 469 703-04 (1957). That Court has further held that since the Legislature left with municipalities the power to provide for municipal elections, "[b]y implication, it conferred the authority upon municipalities to assume and agree to pay the expenses incident to holding special or municipal elections. *Id*. at 704. *See also Abercrombie v. City of Chattanooga*, 203 Tenn. 357, 313 S.W.2d 256. 259 (1958). Accordingly, it is our opinion that the City of Chattanooga is solely responsible for the costs of the special election to fill the vacancy in the District Six Council seat and cannot seek to recover those costs from Ms. Rutherford.

4. Your next question asks whether the City of Chattanooga may revoke or otherwise deny Ms. Rutherford retirement service credit for the period of April 18, 2005, to October 8, 2007. In 1965, the City of Chattanooga created by private act a General Pension system for certain officials and employees of the City of Chattanooga. *See* Chattanooga City Charter, Ch. III, Art. 2 (Priv. Acts 1965, Ch. 254, § 2) (hereinafter referred to as "the Plan"). Section 3.38 of the Plan provides that "[e]ach employee hired after February 1, 1979, shall be a participant of this plan as a condition of the employment" and that once an employee becomes a participant, he or she shall continue to be a participant as long as he or she continues to be an employee. An "employee" is defined under the plan as including "any person who is an official of the city elected by popular vote." *Id*. at § 3.37(6). A "participant" is defined as "any employee who is a participant as provided in Article 2 [3.38 hereof], or a former employee who completed five (5) years of credited service, and thereby has a vested interest in the general pension plan." *Id*. at § 3.37(7). The Plan is financed through employee and city contributions. Each participant in the employment of the City, upon retirement on his or her normal retirement date, is eligible to receive payment of a monthly benefit from the plan. *Id*. at § 3.40(2). The amount of the benefit is calculated in part based upon a participant's years of credited service. *Id*. at § 3.41. "Credited service" is defined under the Plan as "the length of time a person participated in this plan or any former plan prior to the date as of which credited service is being determined." *Id*. at § 3.37(10).

Under the terms of the City of Chattanooga's General Pension Plan, participation in the plan and the accumulation of years of credited service is all based upon an individual's being an "employee" of the City of Chattanooga, and the definition of "employee" includes elected officials. Thus, as an elected member of the Chattanooga City Council, Ms. Rutherford would otherwise be an "employee" and "participant" for purposes of the Plan for the length of time she held that office. That period of time would be considered credited service. However, assuming that the City Attorney correctly determined that Ms. Rutherford did not meet the legal requirements to qualify

for and hold the Chattanooga City Council District Six Seat, then her election to such office was illegal and void. Consequently, Ms. Rutherford would not be considered an "employee" of the City as that term is defined under the Plan and would not be entitled to participate in the Plan, nor would she be entitled to credited service for the length of time during which she purported to occupy the office (April 18, 2005, through October 8, 2007).

5. Your fifth question asks what, if any, other sanctions or criminal penalties may be imposed upon persons who violate the provisions of Tenn. Code Ann. §§ 2-19-109, 2-19-107 and 8-47-101. Tenn. Code Ann. § 2-19-107 and 2-19-109 provide that a person who knowingly violates the statute commits a Class D felony. Tenn. Code Ann. § 40-20-112 provides that upon conviction for any felony, "it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage." Furthermore, Tenn. Code Ann. §§ 40-29-105(a)(2)(D) and 40-29-204(1) provide that any person convicted of voter fraud, once convicted, shall never again be eligible to register and vote in this state.

With respect to violations of Tenn. Code Ann. § 8-47-101, the only remedy or sanction provided under this statute is ouster or removal of the official; however, Tenn. Code Ann. § 8-47-125 does provide that proceedings under this section shall not be a bar to proceedings under any criminal statute now in force or which may be in force.

6. Question number six asks whether this Office is aware of any other provisions of state law that may have been violated. Because we do not know facts upon which the City Attorney made his determination that Ms. Rutherford had violated the provisions of Tenn. Code Ann. §§ 2-19-107, 2-91-109 and 8-47-101, this Office is not in a position to opine as to whether any other state laws may have been violated by Ms. Rutherford's actions.

7. Your last question asks whether Ms. Rutherford is disqualified from employment by the Mayor or any other city official of Chattanooga. Section 3.1 of Chapter 1 of the Chattanooga City Charter provides, in part, that "[n]o person, while holding any office or employment under the federal, state or county government, except the office of notary public, shall be eligible to any popularly elected office under said city government." Had Ms. Rutherford not resigned from the Chattanooga City Council, she would have been prohibited during her term of office from accepting employment by the Mayor or any other city official of Chattanooga pursuant to this provision. However, since Ms. Rutherford has resigned and such resignation has been formally accepted by the Chattanooga City Council, this prohibition on employment by city officials is no longer applicable. Furthermore, we are not aware of any other provision of the Chattanooga City Charter or any state law that would disqualify Ms. Rutherford from employment by the Mayor or other Chattanooga city officials as a result of the circumstances leading to her resignation from the City Council.

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