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Opinion No. 08-63

Legislator Nominated As Candidate For Sheriff

QUESTION

May a member of the General Assembly who has been nominated to be a political party's candidate for the office of Sheriff remain in office until the general election for Sheriff has occurred?

OPINION

Tenn. Code Ann. § 8-8-101 states: "No member of the general assembly shall be nominated or commissioned, nor shall any practicing attorney be obligated to act as sheriff." However, there is some ambiguity as to the original meaning of the term "nominated" contained in that statute. The phrase "nominated and commissioned" was first adopted in 1777 and has not been revised since that time, notwithstanding significant changes in the method of selection of sheriffs and the manner of conducting elections. Accordingly, while the question is certainly not without doubt, we think that the term "nominated and commissioned" as used in Tenn. Code Ann. § 8-8-101 is best read as referring to the final selection of a sheriff by qualified voters and not the nomination of a candidate for sheriff by a political party.

ANALYSIS

A vacancy has arisen in the office of Sheriff of Hamilton County, Tennessee. Both political parties have determined not to hold a primary election, but instead to select their nominees for the general election through caucusing. You have asked whether a member of the General Assembly, if chosen by a party to be its candidate, may remain in office until the general election for the office of Sheriff occurs in August 2008.

Tenn. Code Ann. § 8-8-101 states: "No member of the general assembly shall be nominated or commissioned, nor shall any practicing attorney be obligated to act as sheriff." The term "nominate" is ordinarily defined as "to propose as a candidate for election to office" or "to appoint or propose for appointment to an office or place." Webster's Ninth New Collegiate Dictionary, p. 801 (1988). At first glance, it would appear that Tenn. Code Ann. § 8-8-101 would prohibit a

member of the General Assembly from even being nominated for the office of sheriff. However, there is some ambiguity as to the original meaning of the term "nominated" contained in the statute. The origin of this statute can be traced back to the Acts of 1777 of the North Carolina General Assembly. Public Chapter 8 of the Acts of 1777 provides in part as follows:

> 1. Be it enacted by the general assembly of the state of North Carolina, and it is hereby enacted by the authority of the same, That *every county court shall annually, at the first court after the first day of May, elect and nominate a freeholder of sufficient circumstances to execute the office of sheriff, who shall thereupon be commissioned by the governor* or commander in chief to execute that office for one year; and if any sheriff so nominated shall happen to die, in the time of his sheriffalty, the court shall at the next term elect and nominate another as aforesaid. . . .
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> 3. That . . . if any person who shall hereafter be *appointed sheriff by virtue of this act*, shall refuse to accept and execute the office of sheriff, he shall forfeit and pay the sum of fifty pounds lawful money of this state to the use of the public; . . . Provided always, That if any person who shall hereafter be *nominated or appointed to execute the office of sheriff* of any county in this state, shall be willing to execute the same, but cannot give security as by this act is required, . . . shall not incur the penalty aforesaid, any thing herein contained to the contrary notwithstanding.
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> 4. Provided further, And it be enacted by the authority aforesaid, That *no member of the General Assembly, or council of state, shall be nominated or commissioned*, nor shall any practising attorney be obliged to act as sheriff of any county within this state. (Emphasis added).

Pursuant to this statute, a sheriff was originally "elected and nominated" by the county court. Although not clear, it would appear from the language of Public Chapter 8 that the terms "elected" and "nominated" had essentially the same meaning, as the action of the county court resulted in the selection or appointment of a person to execute the office of sheriff who was then commissioned by the governor.

When the Tennessee Constitution was adopted in 1796, certain laws of North Carolina, including Public Chapter 8 of the Acts of 1777, became the laws of the newly created State of Tennessee. *See* Tennessee Constitution of 1796, Art. X, § 11. Art. VI, § 1 of the new Tennessee Constitution provided that the sheriff was to be "appointed" by the county court and commissioned by the governor. Thus, although the Tennessee Constitution used the term "appointed" rather than "elect and nominate," the Constitution did adopt a process that was consistent in practice to that used in North Carolina, and Public Chapter 8 could be enforced in a manner consistent with its terms.

The method of selecting sheriffs was significantly changed when the Tennessee Constitution

of 1834 was adopted to provide that the sheriff was to be elected by the qualified voters. *See* Art. VII, § 1, Tennessee Constitution of 1834. In addition, the requirement that the sheriff be commissioned by the governor was removed from the 1834 Constitution. With that action, the provisions of Public Chapter 8 were no longer consistent with the constitutionally specified method of selecting sheriffs, as it still referred to election and nomination by the county court and commissioning by the governor. Moreover, Public Chapter 8 still prohibited members of the General Assembly from being "nominated or commissioned." In light of the provisions of Art. VII, § 1, of the 1835 Constitution, however, this prohibition would either have to be deemed unenforceable, or would have to be construed in light of the new selection process. As discussed, *supra*, at the time Public Chapter 8 was passed in 1777, the terms "nominate" and "elect" operated to have the same meaning, *i.e.*, the final selection of an officeholder. Accordingly, the analogous act under Art. VII, § 1, of the 1834 Constitution would be election by the qualified voters. Thus, the prohibition in Public Chapter 8 arguably could be construed as forbidding members of the General Assembly only from being elected as sheriff by the qualified voters.

This analysis of the meaning of "nominated" in Tenn. Code Ann. § 8-8-101 is further complicated by the General Assembly's adoption of the Code of 1858. In adopting the Code of 1858, the Legislature deleted the provisions of Public Chapter 8 providing for the election and nomination of sheriffs by the county court and commissioning by the governor, and instead adopted a provision requiring that the sheriff be elected by the qualified voters, thereby making the statutes consistent with the Constitution. The legislature did not, however, delete the prohibition on members of the General Assembly being "nominated or commissioned" to act as sheriff (as well as the prohibition on practicing attorneys being "obliged" to act as sheriff). This provision of Public Chapter 8 was carried forward essentially unchanged, even though the selection process (the nomination and commissioning of sheriffs) no longer existed either in the statutes or the Constitution. *See* Code of 1858, Ch. 357.

At the time the Legislature adopted Chapter 357 of the Code of 1858, it was presumed to have known that the existing law required sheriffs to be elected by the qualified voters. *See Lavin v. Jordan*, 16 S.W.3d 362, 368 (Tenn. 2000); *Riggs v. Burson*, 941 S.W.2d 44, 54 (Tenn. 1997) (citing *Wilson v. Johnson County*, 879 S.W.2d 807 810 Tenn. 1994)). However, the Legislature is also presumed to have known that the existing law did not require the sheriff to be commissioned by the governor. Thus, we are left with an ambiguity in construing Chapter 357 of the Code of 1858. Unfortunately, there are no records of legislative debates from 1858 that might help clarify the drafters' intent.

In light of this ambiguity, we are hesitant to impose a more modern definition on a term that was introduced into Tennessee law in 1796 and has been carried forward unchanged since that day, particularly as the modern concept of "nominated" by political parties did not appear in Tennessee law until 1890. *See* Acts of 1890, Ch. 24. Thus, the fact that the phrase "nominated and commissioned" was adopted in 1777 and has not been revised since that time, notwithstanding the significant changes in the method of selection of sheriffs and the manner of conducting elections, is, we think, determinative. Accordingly, while the question is certainly not without doubt, we think that the term "nominated and commissioned" as used in Tenn. Code Ann. § 8-8-101 is best read as

referring to the final selection of a sheriff by qualified voters and not the nomination of a candidate for sheriff by a political party.[1]

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[1]We take some comfort that the State of North Carolina, which is the source of the language at issue, now provides in its statutes that "[n]o person shall engage in the practice of law or serve as a member of the General Assembly while serving as sheriff." N.C.Gen.Stat. § 162-2. Thus, North Carolina law does not prohibit a legislator from being a party nominee for sheriff, but does prohibit holding dual offices.