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

July 18, 2008

Opinion No. 08-125

Filling a Vacancy in the Office of County Mayor

QUESTION

When the office of county mayor becomes vacant, how should the vacancy be filled?

OPINION

Under Tenn. Code Ann. § 5-1-104, as amended by Chapter 871 of the Public Acts of 2008, vacancies in the office of county mayor are filled by appointment by the county legislative body, and the successor is elected at the next general election. In all but Davidson and Shelby counties, the appointment by the county legislative body is now governed by the procedures set forth in Tenn. Code Ann. § 5-5-111, as rewritten by Section 3 of Chapter 871, which is summarized below.

ANALYSIS

This opinion addresses the statutes that govern filling a vacancy in the office of county mayor or county executive. The request indicates that the question refers to a vacancy in the office of Sumner County Executive[1] that occurred when the incumbent died on July 6. Tenn. Code Ann. § 8-48-101(1)(death of incumbent vacates an office). The request indicates that the Sumner County Commission intends to meet to select a successor on July 21. Article VII, Section 2, of the Tennessee Constitution provides:

> Vacancies in county offices shall be filled by the county legislative body, and any person so appointed shall serve until a successor is elected at the next election occurring after the vacancy and is qualified.

The county legislative body, therefore, fills a vacancy in the office of county mayor. The individual so appointed serves until a successor is elected at the next election occurring after the vacancy and is qualified.

[1] Under Tenn. Code Ann. § 5-6-101, the chief executive officer of each county is a county mayor; but private acts passed before March 28, 2007, may designate the title of the chief executive officer of the county as the "county executive." The Sumner County Mayor is designated as the "county executive" under 2004 Tenn. Priv. Acts Ch. 137. References in this opinion to the county mayor include those officials designated "county executive" by private act.

The General Assembly recently amended the statutes governing vacancies in county offices. 2008 Tenn. Pub. Acts Ch. 871 ("Chapter 871"). Under Section 5, the changes became effective when the act became law on May 6, 2008. The amendments to the statutes have not yet been codified. Tenn. Code Ann. § 5-1-104(b)(1), as amended, will provide:

> Vacancies in county offices required by the Constitution of Tennessee or by any statutory provision to be filled by the people shall be filled by the county legislative body, and any person so appointed shall serve until a successor is elected at the next general election, as defined in § 2-1-104, in the county and is qualified; provided, that the candidates have sufficient time to qualify for the office, as provided for in § 2-14-106. *The county legislative body shall be required to make an appointment to fill a vacancy within one hundred and twenty (120) days of receiving notice of the vacancy unless during that time period there is a general election scheduled in the county and there is sufficient time for the vacancy to be placed on the ballot in accordance with this section. Any appointment to fill a vacancy by the county legislative body shall be made in accordance with title 5, chapter 5, part 1. The provisions of this subdivision shall not apply to any county which has a metropolitan form of government and a population in excess of five hundred thousand (500,000), according to the 2000 federal census or any subsequent federal census. The provisions of this subdivision shall not apply in any county having a population of not less than 897,400 nor more than 897,500 according to the 2000 federal census or any subsequent federal census.*

(Italicized language added by Chapter 871). Tenn. Code Ann. § 5-1-104(b)(2), which Chapter 871 did not amend, provides:

> If the vacancy occurs after the time for filing nominating petitions for the party primary election and more than sixty (60) days before the party primary election, then nominees of political parties shall be selected in such primary election and a successor elected in the August general election. *If the vacancy occurs less than sixty (60) days before the party primary election but sixty (60) days or more before the August election, then nominees of political parties shall be selected by party convention and a successor elected in the August election. If the vacancy occurs less than sixty (60) days before the August election but sixty (60) days or more before the November election, then nominees of political parties shall be selected by party convention and a successor elected in the November election.*

(Emphasis added). Under this statute, the successor Sumner County Executive will be elected in the November general election.

The question then becomes what statutes govern appointment of an interim county mayor by the county commission. Sections 3 and 4 of Chapter 871 completely rewrote Tenn. Code Ann. § 5-5-111 and deleted Tenn. Code Ann. §§ 5-5-112 — 5-5-117. The new Tenn. Code Ann. § 5-5-111 now governs the county commission's appointment of an interim county mayor in every

Tennessee county except for Davidson and Shelby. Tenn. Code Ann. § 5-5-111(h) and (i) (as amended by 2008 Tenn. Pub. Acts Ch. 871). Section 2 of Chapter 871 also deleted subsection (c)(3) from Tenn. Code Ann. § 5-5-102. That subsection, now deleted, provided:

> If any member of the county legislative body accepts the nomination as a candidate for the office of county mayor, sheriff, trustee, register, county clerk, superintendent of roads, director of schools, circuit court clerk, assessor of property, judge of a court of general sessions or seat in the general assembly, when such office is being filled by the county legislative body, such member shall automatically become disqualified to continue in office as a member of the county legislative body, and a vacancy on the body shall exist.

Section 3 of Chapter 871 sets forth Tenn. Code Ann. § 5-5-111 governing appointment of an interim county executive by the county commission. Under subsection (a), the county clerk shall provide notice to county commissioners of the need to fill the vacancy. Formal notice to members is directory and may be waived by the members of the county commission if all members have constructive notice of the vacancy or opening through other sources of information. Tenn. Code Ann. § 5-5-111(a)(1) (as amended). The presiding officer of the county commission must also cause public notice to be given in a newspaper of general circulation in the county at least seven days before the commission meeting at which the vacancy will be filled, notifying the public of the vacancy and specifying the office to be filled at the meeting. Tenn. Code Ann. § 5-5-111(a)(2) (as amended).

Under subsection (b), as amended, registered voters of the county are allowed to submit names to the county commission for consideration. These names may be submitted in writing to the chair before the meeting or may be submitted in person at the meeting. In order for a name to be considered, a member of the commission must nominate the person. Members of the county commission may also nominate a candidate or candidates to fill the vacancy without the name being submitted by a voter. Nominations do not require a second. If the person nominated is not present at the meeting, the person making the nomination must submit a signed statement from the nominee that the nominee is willing to serve in the position if appointed.

Under subsection (c), as amended, if a county commissioner accepts a nomination to fill the vacancy, the member is prohibited from voting on the appointment and on motions and resolutions relative to making the appointment. For the purposes of determining a majority, the membership of the commission is reduced to reflect members prohibited from voting on the motion. If a commissioner is elected to fill the vacancy, that member must immediately resign from the commission.

Under subsection (d), the commission may discuss the nominations after they have been submitted. The commission may, at the discretion of the chair, interview nominees or allow nominees to address the legislative body. The vote to make the appointment may be postponed to a subsequent meeting upon a motion passed by a majority of the members. Adequate public notice of the later meeting must be given in accordance with the Open Meetings Act, Tenn. Code Ann. §§

8-44-101, *et seq.*

Under subsection (e), to receive an appointment, a nominee must receive the votes of a majority of the members of the commission eligible to vote on the appointment. The commission must adopt rules of procedure for eliminating nominees in cases where there are multiple nominees for an appointment and no nominee receives a majority of the votes after the initial vote. Secret balloting is prohibited. Each member's vote regarding the appointment process must be recorded by the clerk and entered on the commission's minutes. A tie vote of the commission regarding an appointment may be broken in the same manner that other tie votes of the body may be broken.

Under subsection (f), any complaint challenging the legality of an appointment must be filed with the Chancery Court for that county within ten days of the date of the appointment. Under subsection (g), when filling a vacancy in offices required to be filled by the county commission, the commission must fill the vacancy in accordance with the deadline in Tenn. Code Ann. § 5-1-104(b)(1), as amended.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Debra Young Maggart
State Representative
203 War Memorial Building
Nashville, TN 37243-0183