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August 19, 2008

Opinion No. 08-138

Vacancy on Knox County Commission

QUESTION

If a seat on the Knox County Commission becomes vacant after August 13, 2008, but before September 1, 2008, with an unexpired portion remaining on the current term of office, how is the vacancy to be filled.

OPINION

Pursuant to Tenn. Code Ann. § 5-1-105(b)(2), the vacancy on the Knox County Commission should be filled pursuant to a special election on the November 4, 2008, state and federal general election ballot. Political parties will choose their nominees by way of countywide nomination convention.

ANALYSIS

Your question concerns the filling of a vacancy on the Knox County Commission. It assumes that the vacancy will occur after August 13, 2008, but before September 1, 2008. You have asked how that vacancy should be filled. Specifically, you have asked whether the vacancy should be filled pursuant to a special election on the November 4, 2008, state and federal general election ballot with political parties choosing their nominees accordingly by way of countywide nomination convention, or whether the vacancy should be filled by an appointee of the Knox County Commission who shall serve until a successor is elected at the next county general election in August 2010.

Article VII, Section 2, of the Tennessee Constitution provides that "[v]acancies 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." In *McPherson v. Everett*, 594 S.W.2d 677 (Tenn. 1980), the Tennessee Supreme Court held that Article VII, Section 2, "is somewhat ambiguous and is not self-executing" and, therefore, "until

such time as the Legislature speaks affirmatively and with specificity upon the subject, the phrase 'next election,' . . . must be held to mean the regular August general election." 594 S.W.2d at 680-81.

In *McPherson*, the Tennessee Supreme Court recognized that the legislature has the authority to pass a general law defining the phrase "next election" for purposes of filling vacancies in county offices. Pursuant to the provisions of Article VII, Section 2, the Legislature has enacted Tenn. Code Ann. § 5-1-104(b)(1), which provides as follows:

> 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 all the candidates have sufficient time to qualify for the office, as provided for in § 2-14-106. (Emphasis added).[1]

Tenn. Code Ann. § 5-5-102(i), which governs the filling of vacancies in the county legislative body, provides:

> If a vacancy shall occur in the office of a member of the county legislative body, the vacancy shall be filled as provided for in § 5-1-104(b).

Thus, the issue is what constitutes the "next general election" for purposes of Tenn. Code Ann. § 5-1-104(b)(1) – the November 2008 general election or the August 2010 general election. The Tennessee Supreme Court in *McPherson* also recognized that pursuant to Article VII, Sections 2, 4 and 5 of the Tennessee Constitution, the legislature has the authority to provide for special elections to fill vacancies in county offices, but that the provisions were not self-executing and required affirmative legislative action. *McPherson*, 594 S.W.2d at 680. Accordingly, the legislature has enacted Tenn. Code Ann. § 5-1-104(b)(2), which provides:

> (2) 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 (6) 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

[1]Tenn. Code Ann. § 2-1-104 defines "election" as a "general election for which membership in a political party in order to participate therein is not required."

> 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.

Here, you have indicated that the vacancy on the Knox County Commission will occur after August 13, 2008, but before September 1, 2008, in other words, after the August election but more than sixty (60) days before the November election. Accordingly, pursuant to Tenn. Code Ann. § 5-1-105(b)(2), the vacancy on the Knox County Commission should be filled pursuant to a special election on the November 4, 2008, state and federal general election ballot with political parties choosing their nominees accordingly by way of countywide nomination convention.[2]

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[2] Pursuant to Tenn. Code Ann. § 5-1-104(b)(1), the Knox County Commission has the authority to appoint an individual to fill the vacancy on the Commission until a successor is elected at the November 4 election, however it is not required to make such appointment.