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Opinion No. 08-144

Resignation under 2008 Tenn. Pub. Acts Ch. 871

QUESTION

Chapter 871 of the Public Acts of 2008 (“Chapter 871”) rewrote Tenn. Code Ann. § 5-5-111 regarding the election of county officers. Under subsection (c), a member of a county commission must resign if he or she is appointed to a position or vacant office required to be filled by the county commission. Does this statute require a county commissioner to resign from the commission if he or she accepts appointment to any office over which the commission has appointment authority?

OPINION

Under Tenn. Code Ann. § 5-5-111(c), as amended, we think a court would conclude that a county commissioner must resign once appointed to an office over which the commission has appointive authority, unless the requirement irreconcilably conflicts with the statute creating the particular office. For example, where a specific statute requires the county commission to appoint one of its members to fill the office, we think a court would conclude that the new law requiring resignation irreconcilably conflicts with the specific statute. Thus, a county commissioner appointed to be a county finance committee member under Tenn. Code Ann. § 5-8-201 is not required to resign immediately under Tenn. Code Ann. § 5-5-111(c). Whether the requirement of resignation under the new statute applies to other county offices over which the county commission has the power of appointment would depend on the particular statute creating the office.

ANALYSIS

This opinion concerns the scope of Tenn. Code Ann. § 5-5-111(c), as amended by Section 3 of Chapter 871. That act does not apply to Shelby and Davidson Counties. 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[.]*

Tenn. Code Ann. § 5-1-104(b)(1), as amended by 2008 Tenn. Pub. Acts Ch. 871, § 1 (emphasis added). Section 2 of the act deleted Tenn. Code Ann. § 5-5-102(c)(3). 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 deleted Tenn. Code Ann. § 5-5-111 and substituted a new provision. Under subsection (a)(1), as amended, “Whenever an office *is required to be filled, or a vacancy occurs in any office required to be filled,* by the county legislative body,” county officials must provide notice as specified in the subsection. (Emphasis added).

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 he or she is willing to serve in the position if appointed.

Subsection (c) provides:

Should a member of the county legislative body accept a nomination for a position or vacancy to be filled by the county legislative body, the member shall be prohibited from voting on the appointment or any motions or resolutions relative to making the appointment until the position is filled. For the purposes of determining a majority, the membership of the county legislative body shall be reduced to reflect any member or members prohibited from voting on the appointment. If a member of the county legislative body is subsequently appointed to the position such member shall immediately resign from the county legislative body upon accepting the appointment. If the member

does not receive the appointment, the member shall not be required to resign and may continue the member's duties on the county legislative body upon the conclusion of the vote on the appointment.

Tenn. Code Ann. § 5-5-111(c), as amended by 2008 Tenn. Pub. Acts Ch. 871, § 3 (emphasis added). Subsection (g) of the statute provides:

When filling a vacancy in offices required to be filled by the county legislative body, the county legislative body shall fill such vacancy *in accordance with the deadline provided in § 5-1-104*.

Tenn. Code Ann. § 5-5-111(g), as amended by 2008 Tenn. Pub. Acts Ch. 871, § 3 (emphasis added). The request asks whether, under § 5-5-111(c), a county commissioner appointed by the county commission to any county position must immediately resign from the commission. When the legislation was being considered by the General Assembly, the County Officials' Association explained subsection (c) to the Senate State and Local Government Committee as follows:

Marie Murphy with the County Officials' Association, and there's one provision here I want to make sure you know of, because it is kind of a change, it's not just a procedure or existing—I have not had an objection from my membership about this and I've sent it out to them a number of times, but, under the existing law, when a county commissioner is accepting a nomination for a vacancy on a court clerk, or a county clerk or trustee, or other role, they have to resign upon accepting the nomination. This does not make them do that. They will recuse themselves from voting, but they will automatically have their seat back if they are not elected, and that is just a policy change that in full disclosure I wanted to make sure to you that you are aware of[.]

Senate State and Local Government Committee, April 1, 2008, Tape 2 (remarks of Marie Murphy). Senator Haynes and Ms. Murphy later had the following exchange:

Senator Haynes: In the event that a person runs and is elected to the legislature or to the county clerk position, in that event, or they are not elected by the body that they're a member of, do they still have to resign?

Ms. Murphy: No, sir, that's the change. Under today's statute [Tenn. Code Ann. § 5-5-102(c)(3), deleted under section 2 of the act], let's say we had a vacancy in the office of county clerk, or a county commissioner wanted to be the county clerk and they accepted or placed their name in nomination for that position – under today's law, and that's based on a case and codified, they have to resign. Under this proposal they will simply recuse themselves from voting for cause. If they don't receive the vote to be the county clerk, then they will still be a county commissioner. And you know, if a county commissioner got that position then we've created another vacancy and even if they didn't get the position you've created another vacancy, so I think that this is an effort to not have another vacancy if they don't get the position.

Id. (remarks of Senator Haynes and Marie Murphy).

Discussion of the act in the legislature focused on filling a vacancy in a popularly elected office and did not address other offices such as board memberships. But the new statute is not limited to the vacancies that were discussed. Instead, Tenn. Code Ann. § 5-5-111(c) applies, “[s]hould a member of the county legislative body accept a nomination for a *position* or vacancy to be filled by the county legislative body[.]” (Emphasis added). By its terms, therefore, this provision applies to any position the county legislative body is authorized to fill. We think a court would conclude that, under subsection (c), a member of the county commission must resign once appointed to an office over which the commission has appointive authority, unless the requirement irreconcilably conflicts with the statute creating the particular office.

The request includes material citing several statutes authorizing a county commission to appoint members to various boards. Some of these statutes require a county commission to appoint a member of the commission to the office. For example, Tenn. Code Ann. § 5-8-201(a)(1) provides:

The county legislative body in regular session assembled, a quorum being present, is authorized to adopt a resolution to contract with a bank or banks making the highest and best bid or bids to pay interest on daily balances of the county’s funds; *and to appoint three (3) of its members, who, in conjunction with the county trustee and county mayor, shall constitute the county finance committee, with the county mayor as chair of the committee.*

(Emphasis added). Under this statute, a county commission may appoint three of its members to serve on a county finance committee with the county trustee and the county mayor. Thus, the county commission is authorized to fill the office of county finance committee member; but, under the statute, it must appoint three commissioners. Membership on the county commission, therefore, is a qualification for the office of county finance committee member appointed by the county commission. If Tenn. Code Ann. § 5-5-111(c) is applied to this position, a county commissioner appointed to the position must immediately resign from the commission, forfeiting the qualification. The requirement that a commissioner resign under subsection (c), therefore, irreconcilably conflicts with the requirement that a commission-appointed member of the finance committee must be a county commissioner. Further, if Tenn. Code Ann. § 5-5-111(c) is applied to appointments to the county finance committee, then the commission must create three vacancies on the commission every time it fills the offices.

Statutes that are related to the same subject matter should be read *in pari materia*. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). At the same time, a statute should not be construed to produce an absurd or incongruous result. *Barnett v. Barnett*, 27 S.W.3d 904, 908 (Tenn. 2000). When two statutes appear to address the matter in question, and one is special and particular and the other is general, then the general statute will be construed so as to operate on all the subjects introduced therein except the particular one which is the subject of the special provision. *Smallwood v. Mann*, 205 S.W.3d 358, 365 (Tenn. 2006). For all these reasons, we think a court would conclude that a county commissioner appointed to be a county finance committee member under Tenn. Code Ann. § 5-8-201 is not required to resign immediately under Tenn. Code Ann. § 5-5-111(c), as amended. This reasoning would apply to any office

that, under the statute creating it, the county commission must fill by appointing a member of the commission. Whether the requirement of resignation under the new statute applies to other county offices over which the county commission has the power of appointment would depend on the particular statute creating the office.

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