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

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Opinion No. 08-177

Same Individual Serving as Constable and County Commissioner

QUESTION

May the same individual simultaneously hold the offices of constable and county commissioner?

OPINION

Under Tenn. Code Ann. § 2-5-101(f)(5), the same individual may not run for the offices of county commissioner and constable in the same election. But neither this statute nor Tenn. Code Ann. § 5-5-102(c)(2) prohibits a constable from being nominated for or elected to membership in the county legislative body at some other time. In counties, however, where the county commission may abolish the office of constable under Tenn. Code Ann. § 8-10-101(a)(3)(A), we think a court would conclude that the offices of county commissioner and constable are incompatible under the common law. Similarly, we think a court would conclude that, in counties where the county commission may remove constables' law enforcement powers under Tenn. Code Ann. § 8-10-109(b)(1), the offices of county commissioner and constable with law enforcement powers are incompatible under the common law.

ANALYSIS

This opinion addresses whether the same individual may simultaneously hold the offices of constable and county commissioner. The Tennessee Constitution, Article II, Section 26, prohibits a person from "hold[ing] more than one lucrative office at the same time." The term "office" has been construed by Tennessee courts to mean "state office." *Phillips v. West*, 187 Tenn. 57, 65-66, 213 S.W.2d 3 (Tenn. 1948); *Boswell v. Powell*, 163 Tenn. 445, 43 S.W.2d 495 (Tenn. 1931). The offices of county commissioner and constable are local offices and, therefore, are not covered by the prohibition of Article II, Section 26. Nor does any other constitutional provision prohibit the same individual from simultaneously holding both offices.

Tenn. Code Ann. § 2-5-101(f)(5) provides:

> No candidate, whether independent or represented by a political party, may be permitted to submit and have accepted by any

> election commission, more than one (1) qualifying petition, or otherwise qualify and be nominated, or have such candidate's name anywhere appear on any ballot for any election or primary, wherein such candidate is attempting to be qualified for and nominated or elected to . . . more than one (1) constitutional county office described in article VII, § 1 of the Constitution of Tennessee or any other county-wide office, voted on by voters during any primary or general election.

Our Office has concluded that the office of constable is a "county-wide office, voted on by voters during any primary or general election" within the meaning of Tenn. Code Ann. § 2-5-101(f)(5). Op. Tenn. Att'y Gen. 02-012 (January 18, 2002). Article VII, Section 1, of the Tennessee Constitution provides in relevant part:

> The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property.

Thus, the office of county commissioner is a constitutional county office described in Article VII, Section 1, of the Tennessee Constitution. The same individual, therefore, may not run for the offices of county commissioner and constable in the same election.

The request cites Tenn. Code Ann. § 5-5-102(c)(2). That statute provides in relevant part:

> No person elected or appointed to fill the office of county mayor, sheriff, trustee, register, county clerk, assessor of property, or any other county-wide office filled by vote of the people or the county legislative body, shall also be nominated for or elected to membership in the county legislative body.

Our Office has concluded that the term "any other county-wide office filled by vote of the people or the county legislative body" does not include county offices that are not filled by a county-wide vote. Op. Tenn. Att'y Gen. 01-084 (May 23, 2001). This conclusion was based on the language of this statute, which specifically lists only offices filled by a county-wide vote. The office of constable is not filled by a county-wide vote. Tenn. Code Ann. § 8-10-101. Tenn. Code Ann. § 5-5-102(c)(2), therefore, does not prohibit a constable from being nominated for or elected to membership in the county legislative body.

In addition to constitutional and statutory provisions regarding dual office-holding, there is a common law prohibition against a public officer's holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 316 (1905). The question of incompatibility depends on the circumstances of each individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether

the performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. *Officers* § 38 (2008). Tennessee courts have recognized that an inherent inconsistency exists where one office is subject to the supervision or control of the other. *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). In *Thompson*, the Tennessee Supreme Court concluded that the offices of city manager and member of the city council were incompatible because the council had the authority to appoint, remove, and supervise the city manager, and no statute then in effect permitted the same individual to hold these offices. The Court found, therefore, that the common law principle of incompatible offices prohibited the same individual from acting as city manager and city council member.

Of course, only a Tennessee court can make a binding determination on whether two offices are incompatible. Op. Tenn. Att'y Gen. 08-129 (August 8, 2008). No Tennessee case addresses whether the offices of county commissioner and constable are incompatible. A constable is an independently elected official. While the county commission does not ordinarily exercise day-to-day control over a constable, the county commission in many counties may abolish or change the term of office for a constable. Tenn. Code Ann. § 8-10-101(a)(3)(A) provides:

> Notwithstanding any other provision of law to the contrary, a county legislative body may, by adopting a resolution by two-thirds (2/3) vote at two (2) consecutive meetings of the county legislative body, abolish the office of constable for that county or set the term of office for the constable at either two (2) or four (4) years. Any change would not be effective until the end of the current term being served by the constable.

Subsection (a)(3)(B) of the statute excludes counties in seven population brackets from the application of this statute. We think a court would conclude that, in counties where the county commission may abolish the office of constable under Tenn. Code Ann. § 8-10-101(a)(3)(A), the offices of county commissioner and constable are incompatible under the common law. Similarly, under Tenn. Code Ann. § 8-10-109(b)(1):

> Notwithstanding any other provision of law to the contrary, a county legislative body may, by adopting a resolution by a two-thirds (2/3) vote at two (2) consecutive meetings of the county legislative body, remove any law enforcement powers exercised by the constables of the county.

Subsection (b)(2) of the statute excludes counties in seven population brackets from the application of this statute. We think a court would conclude that, in counties where the county commission may remove constables' law enforcement powers under Tenn. Code Ann. § 8-10-

109(b)(1), the offices of county commissioner and constable with law enforcement powers are incompatible under the common law.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:
Honorable Ron Ramsey
Lieutenant Governor
One Legislative Plaza
Nashville, Tennessee 37243