

STATE OF TENNESSEE

OFFICE OF THE
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May 20, 2009

Opinion No. 09-92

Effect of Expiration of State Election Commission

QUESTIONS

Under the Tennessee Governmental Entity Review Law, Tenn. Code Ann. §§ 4-29-101 to 4-29-236 (2005 & Supp. 2008), the State Election Commission terminated on June 30, 2008. *Id.* §4-29-229(67) (Supp. 2008). On that date, the commission entered a one-year wind-up period. *See* Tenn. Code Ann. § 4-29-112. At the end of that period, on June 30, 2009, the commission will automatically expire and must “cease all activities” unless legislation providing for the commission’s continued existence is enacted before that date. In the event that the General Assembly does not act and the commission automatically expires on June 30, 2009:

1. How will county election commissioners be appointed in 2011?
2. How will vacancies occurring in the county election commissions on or after July 1, 2009, be filled?

OPINIONS

1. Because there would be no statutory mechanism in place for the appointment of county election commissioners upon the expiration of the State Election Commission, no appointments could be made in 2011. By virtue of Article VII, §5, of the Tennessee Constitution and Tenn. Code Ann. § 2-12-101(a), incumbent county election commissioners would hold over pending further action of the General Assembly to determine the manner of the appointment of such commissioners.

2. Vacancies occurring in the county election commissions on or after July 1, 2009, could not be filled because there would be no operative statutory procedure for the filling of vacancies after June 30, 2009.

ANALYSIS

1. Tenn. Code Ann. § 2-12-101 establishes county election commissions and provides that the “state election commission shall appoint, on the first Monday in April of each odd-numbered year, five (5) election commissioners for each county, for terms of two (2) years and

until their successors are appointed and qualified.” Subsection (b) of this statute authorizes the state election commission to remove a county election commissioner “who becomes unqualified” or “may remove or otherwise discipline a commissioner for cause.” Tenn. Code Ann. § 2-12-103 provides that three (3) members of the county election commission shall be members of the majority party and shall be appointed by the members of the majority party on the state election commission. The remaining two (2) members shall be members of the minority party and appointed by the members of the minority party on the state election commission. Furthermore, before making any appointments, the members of the state election commission are required to consult with the members of the general assembly serving each of the counties as to the persons to be appointed to the county election commissions. *See* Tenn. Code Ann. § 2-12-103(d). Finally, Tenn. Code Ann. § 2-12-106 provides that the “county election commission shall give prompt notice of all vacancies to the state election commission, which shall appoint a new commissioner of the same political party as the vacating commissioner to fill the unexpired term.” These statutes clearly establish that the existence of the State Election Commission is essential to the appointment of county election commissioners.

If the General Assembly takes no action to continue, restructure, or reestablish the State Election Commission prior to June 30, 2009, the commission will statutorily expire under the provisions of the Governmental Entity Review Law. In similar situations in which a “sunset” provision has terminated an agency or commission, but the legislation did not expressly repeal or effect an implied repeal of the existing statutory scheme, this Office has opined that the statutory scheme is temporarily suspended. In *Op. Tenn. Att’y Gen. 82-1* (Jan. 5, 1982), this Office addressed the effect of the termination of the Public Service Commission under the Tennessee Governmental Entity Review Law and concluded that, in the event the Commission was terminated without any legislation transferring the jurisdiction of the Commission to another entity, “those industries which are presently regulated by the Public Service Commission would no longer be regulated with regard to purely intrastate commerce.” *Id.* at 2.

In *Op. Tenn. Att’y Gen. 91-38* (Apr. 26, 1991), this Office addressed the effect of the termination of the Health Facilities Commission under the “sunset law” and concluded:

It would be unrealistic and incorrect to conclude that in terminating the Health Facilities Commission, the legislature did not intend to also terminate or suspend the regulatory process provided in the Tennessee Health Planning and Resource Development Act, i.e., the certificate of need program. . . . The Commission was created for the express purpose of administering the certificate of need program. The Commission and the certificate of need program are legally and factually inseparable, and it seems unlikely that by terminating the Commission, the legislature did not also intend to terminate, at least temporarily, the certificate of need program. In fact, the Governmental Entity Review law expressly requires the evaluation committee, in considering whether to terminate an entity, to consider the impact

the termination would have on the regulatory functions of the particular entity. . . .

We are aware of the well established rule that repeals and/or amendments of existing legislation by implication are disfavored by the law. We do not opine that the regulatory process and requirements of the Tennessee Health Planning and Resource Development Act have been impliedly repealed by the “sunset” termination of the Commission. We are of the opinion, however, that such regulatory provisions must necessarily be suspended and not enforced until such time as legislation is enacted either abolishing or transferring such regulatory functions.

Id. at 4-6 (internal citations and footnote omitted).

In Op. Tenn. Att’y Gen. 95-045 (Feb. 17, 1998), this Office opined on the effect of the “sunsetting” of the Tennessee State Racing Commission and concluded:

With respect to the Racing Commission, we also conclude that its regulatory functions will be suspended and unenforceable if it goes out of existence under the Sunset Law on June 30, 1998, without further legislation. . . . If the Racing Commission simply goes out of existence under the Sunset Law because the General Assembly takes no further legislative action, an outright repeal of the Racing Control Act will not be effected. Nevertheless, the Racing Commission and its intended regulation of pari-mutuel wagering on horse racing are legally and factually inseparable. If the General Assembly does not enact legislation to continue the Racing Commission beyond June 30, 1998, or to transfer its regulatory functions, then it is our opinion that the Legislature also intend to terminate its legalization of pari-mutuel betting under the Racing Control Act.

Id. at 5, 7.

Most recently, in Op. Tenn. Att’y Gen. 09-43 (March 26, 2009), this Office opined on the effect of the “sunsetting” of the Judicial Selection Commission and the Judicial Evaluation Commission and concluded that the Tennessee Plan, which provides for the election and evaluation of appellate court judges and for the selection of persons to fill vacancies on the trial and appellate courts, would be not repealed; however, because those entities and the scheme embodied by the Tennessee Plan are legally and factually inseparable, the Tennessee Plan would be suspended and unenforceable without further legislation. *Id.* at 8. We further concluded that, with the Tennessee Plan suspended, there would be no statutory scheme in place for the election of appellate judges after June 30, 2009. Furthermore, because Article VII, §5, of the Tennessee Constitution requires that “[e]very officer shall hold his office until his successor is elected or appointed and qualified,” incumbent appellate court judges would hold over pending further

action of the General Assembly to determine the manner of the election of judges, or until such judge chose to resign from office. *Id.* at 9.

Likewise, with respect to the termination of the State Election Commission, the statutes providing for the appointment of county election commissioners would not be repealed. However, because the commission and the appointment scheme embodied by those statutes are legally and factually inseparable, such appointment scheme would be suspended and unenforceable without further legislation. With the suspension of these statutes, there would be no statutory scheme in place for the appointment of county election commissioners after June 30, 2009. As noted, however, Article VII, §5, of the Tennessee Constitution requires that “[e]very officer shall hold his office until his successor is elected or appointed, and qualified.” Tenn. Code Ann. § 2-12-101(a) also requires that county election commissioners are appointed “for terms of two (2) years and *until their successors are appointed and qualified.*” (Emphasis added). Thus, by virtue of these two provisions, an incumbent county election commissioner would hold over pending further action of the General Assembly to determine the manner of the appointment of commissioners, or until such commissioner chose to resign from office.

2. The ability to fill vacancies on county election commissions after June 30, 2009, would also be significantly affected by the suspension of the appointment scheme in Tenn. Code Ann. §§ 2-12-101 to 2-12-107. Tenn. Code Ann. § 2-12-106 provides that a vacancy is to be filled by the State Election Commission, which shall appoint a new commissioner of the same political party as the vacating commissioner. Thus, as in the case of the appointment of commissioners for new terms, with the appointment scheme suspended, there would be no statutory procedure in place for filling county election commission vacancies after June 30, 2009. Although the Constitution provides for the filling of vacancies in general, it does not contain any executory details. Article VII, § 4, merely provides that “the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct.” Thus, absent action by the General Assembly, there would be no statutory procedure for filling vacancies on county election commissions after June 30, 2009.

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