

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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June 15, 2009

Opinion No. 09-120

Removal of Water and Wastewater Treatment Authority Commissioner

QUESTIONS

1. Under Tenn. Code Ann. § 68-221-601 *et seq.* or any other applicable statute, what steps must occur to remove a commissioner, once duly appointed by the mayor and city commissioners of a particular municipality, from a Waste Water Treatment Authority Board?
2. May a mayor temporarily appoint or designate a person to be the city's representative in lieu of a properly-appointed commissioner?

OPINIONS

1. Tenn. Code Ann. § 68-221-605(d)(3) provides guidance concerning removal of a commissioner from office. The provision requires service of notice of the cause of removal on the commissioner, the opportunity for a public hearing, and a two-thirds vote of the governing body of the governmental entity that approved the commissioner's appointment in order to remove the commissioner.
2. No. There is no provision in the Water and Wastewater Treatment Authority Act ("WWTA Act"), Tenn. Code Ann. § 68-221-601 *et seq.*, authorizing a mayor to temporarily appoint or designate a person to be the city's representative.

ANALYSIS

1. The WWTA Act authorizes cities, metropolitan governments and counties to create governmental bodies to see to the acquisition, financing and operation of water and wastewater treatment works. The bodies act as instrumentalities of the creating and participating governmental entities. Tenn. Code Ann. § 68-221-602(a). The WWTA Act provides that the bodies are governed by a board of commissioners appointed by the executive officer of the creating or participating governmental entity and approved by that entity's governing body. Tenn. Code Ann. § 68-221-605.

The WWTA Act also contains provisions concerning removal of a commissioner.¹ In particular, the WWTA Act specifies that the commissioner must be served with notice of the

¹ We do not suggest that the provisions of the WWTA Act constitute the sole method for removal of a commissioner. For example, the Ouster Law, Tenn. Code Ann. § 8-47-101 *et seq.*, may provide a means for

cause of the proposed removal and afforded an opportunity for a public hearing. Thereafter, the commissioner may be removed from office by a two-thirds vote of the governing body of the governmental entity which approved the commissioner's appointment. Tenn. Code Ann. § 68-221-605(d)(3).

This approach is consistent with well-established principles governing removal of individuals from public office. As this Office has previously noted, an individual accepts a public office subject to any conditions placed on that office, including conditions for removal. *See* Op. Tenn. Att'y Gen. 90-27 (February 27, 1990). State law may prescribe conditions for removal so long as it remains within the confines of the constitutional mandate for due process.

In this context, the concept of due process is a flexible one that "calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)); *see also* *Wilson v. Wilson*, 984 S.W.2d 898, 902 (Tenn. 1998); *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993). The touchstones, however, are notice and an opportunity to be heard. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); *Phillips*, 863 S.W.2d at 50; *State v. Pearson*, 858 S.W.2d 879, 884 (Tenn. 1993); *In re Riggs*, 612 S.W.2d 461, 465 (Tenn. Ct. App. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981).

Thus, it is the opinion of this Office that the framework established by the WWTA Act comports with due process guarantees. The WWTA Act authorizes the removal of a commissioner by the relevant governing body after notice to the commissioner and an opportunity for a public hearing.

2. Upon removal of a commissioner, the question remains as to the appointment of a successor. The WWTA Act provides that any "vacancy by reason of nonresidence, incapacity, resignation or death shall be filled in like manner for the unexpired term." Tenn. Code Ann. § 68-221-605(d)(1). The use of "in like manner" refers to the method for appointment of commissioners outlined in the preceding statutory provisions. To simplify, commissioners are appointed by the executive officer of the creating or participating governmental entity and approved by its governing body. Tenn. Code Ann. §§ 68-221-605(a)(1), 68-221-605(b)(1).

The WWTA Act contains no provision authorizing a mayor to appoint or designate a person temporarily to be the city's representative in lieu of a "properly-appointed" commissioner.² We recognize that the provision of the WWTA Act that speaks to filling vacancies does not specifically mention vacancies created by removal of a commissioner. Rather, the WWTA Act mentions only vacancies created by reason of nonresidence, incapacity, resignation or death. Tenn. Code Ann. § 68-221-605(d)(1).

removal of a commissioner. Given the specific treatment of the subject by the WWTA Act itself, however, our focus in this opinion rests on the WWTA Act.

² By "properly-appointed" commissioner, we assume that the question posed in the opinion request refers to whether a mayor may appoint a commissioner without approval by the city's governing body.

It is significant, however, that the provision governing removal of a commissioner lies within the same statutory section as the provision governing filling vacancies. *See* Tenn. Code Ann. §§ 68-221-605(d)(1), 68-221-605(d)(3). The different parts of a statute reflect light upon each other, and statutory provisions should be read *in pari materia* where they are parts of the same act. Thus, a statute should be construed in its entirety, and all parts of the act should be considered and construed together. *See, e.g., Worrall v. Kroger Co.*, 545 S.W.2d 736, 738 (Tenn. 1977). We also note that the legislative history of the WWTA Act reveals no basis to treat filling a vacancy caused by removal differently from filling a vacancy caused by one of the reasons enumerated in the statute. Given these circumstances, we see no reason to distinguish between filling a vacancy caused by one of the reasons listed in section 68-221-605(d)(1) and filling a vacancy caused by removal.

It is therefore the opinion of this Office that a mayor may not unilaterally appoint or designate a person to be the city's temporary representative on the board of commissioners of a water and wastewater treatment authority. The WWTA Act contains no provision authorizing such a procedure, and in fact the language and structure of the WWTA Act suggest that the city's governing body must approve the appointment of a successor commissioner following removal.

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