STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 11-2

Status of Interim County Mayor as Member of County Commission

QUESTIONS

1. Under Tenn. Code Ann. § 5-5-103(i)(1), when the office of county mayor becomes vacant, the chair of the county legislative body serves as interim county mayor until the county commission fills the vacancy. The interim county mayor has the same powers, duties, and bond as the county mayor.

   a. For purposes of this opinion, assume that the county mayor is not the chair of the county commission; instead, the commission chair is a member of the commission. Once the commission chair becomes interim county mayor, may he vote with the county commission on the appointment of a successor county mayor?

   b. When the county chair assumes the position of interim mayor, is the membership of the county legislative body reduced to reflect the chair's absence from the county legislative body while serving as interim mayor?

   c. County commissioners are elected by district. While the chair is serving as interim mayor, what representation do the citizens of his or her district have on the county commission?

   d. Does the law require the appointment of a "temporary commissioner" to ensure fair representation during the tenure of the chair as interim mayor?

   e. County commissioners are elected by district. While the chair is acting as interim county mayor, what representation do the constituents of his or her district have in the selection of a successor county mayor?

2. Under Tenn. Code Ann. § 5-5-111, a commission member who accepts a nomination to fill the office of county mayor may not participate in the vote. What representation do the constituents of that member's district have in the selection of a successor mayor?

3. For purposes of this opinion, assume that the county commission has nine members, and there is a vacancy in the office of county mayor. The member serving as chair of the county commission will serve as interim mayor. Another member of the commission has been nominated to fill the vacancy. That member may not vote to fill the county mayor vacancy and is

not included in determining whether a majority of votes have been cast. This reduces the number used to determine a majority from nine to eight. Thus, five votes are required to fill the vacancy. Must the interim mayor also be excluded in determining whether a majority of votes have been cast?

OPINIONS

1. a. It is the opinion of this Office that the interim county mayor may continue to vote as a member of the county commission. This authority includes voting on a new mayor under Tenn. Code Ann. § 5-1-104(b)(1).

b. It is the opinion of this Office that the chair continues to be a commission member while serving as interim mayor. Thus, the membership of the commission is not reduced during the chair's service as interim mayor.

c., d., and e. Because the chair continues to be a commission member while serving as interim mayor, these questions are moot.

2. Under Tenn. Code Ann. § 5-5-111, a commission member who is a nominee may not vote on filling the office; therefore, that member's constituents would not be represented on that particular vote. This is a valid policy determination of the General Assembly. A similar result occurs whenever a commission member is unable to attend a commission meeting or abstains from voting on a particular matter.

3. As discussed above, the interim mayor continues to be a member of the county commission. Thus, he or she should not be excluded in determining the majority required to fill the vacancy. Under these circumstances therefore five votes (a majority of eight) are required to fill the vacancy.

ANALYSIS

This opinion concerns several issues related to filling a vacancy in the office of county mayor. The request does not cite an applicable private act, so the opinion will rely on and analyze the general law. Generally, a county mayor is elected under Tenn. Code Ann. § 5-6-102. The county mayor is a nonvoting, ex officio member of the county legislative body. Tenn. Code Ann. § 5-6-106. Generally, each county commission elects a chair and a chair pro tempore from its membership. Tenn. Code Ann. § 5-5-103(b)(1). The county commission may also elect the county mayor to be its chair. *Id.* Tenn. Code Ann. § 5-5-103(i) provides:

> (1) If the office of the county mayor should become vacant pursuant to § 8-48-101, the chair, or if the county mayor served as the chair, the chair pro tempore shall serve as interim county mayor until the vacancy is filled pursuant to § 5-1-104. The interim county mayor shall have the same powers, duties and bond as provided by chapter 6 of this title.

> (2) The provisions of this subsection (i) shall not apply if the method of filling the vacancy in the office of county mayor is established by a metropolitan charter or a private act.

A vacancy in the office of county mayor must be filled by a vote of the county commission. Tenn. Code Ann. § 5-1-104(b)(1).

1. Right of Interim County Mayor to Vote on Appointment of Successor County Mayor

The first question is whether a member of the county commission, who as chair or chair pro tempore becomes interim county mayor under Tenn. Code Ann. § 5-5-103(i)(1), may vote to fill the vacancy in the office of county mayor. As the request notes, this statute provides that the interim county mayor "shall have the same powers, duties and bond as provided" by Tenn. Code Ann. §§ 5-6-101, *et seq.* Generally, a county mayor does not have a vote on the county commission.[1] But the statute does not provide that the chair ceases to be a commission member while exercising the duties of the interim county mayor. In fact, where the mayor has resigned, either the commission chair or, if the mayor served as chair, the chair pro tempore, is a commission member. Commission membership, therefore, is a prerequisite for serving as interim county mayor under this statute.

The Superior Court of New Jersey, Appellate Division, reached a similar conclusion. *Heller v. Ticknor,* 86 N.J. Super. 501, 207 A.2d 336 (1965), *cert. denied*, 44 N.J. 400, 209 A.2d 928 (1965). That case involved a city council with five members. Four were elected from separate wards, while the fifth, Mr. Ticknor, was elected at large. Ticknor was elected president of the city council. Under New Jersey law, the city mayor was not authorized to vote on city council matters except to break a tie. The mayor of the city resigned. State law provided that, upon a vacancy in the office of mayor, the president of the council "shall act as mayor until the next general election; shall be known as acting mayor; shall have all the powers and privileges; be entitled to the same salary, and be chargeable with the same duties and obligations as the mayor of such city . . . ." 207 A.2d at 337.

The city attorney advised Ticknor that, as acting mayor, he could continue to exercise the powers and duties of a council member at large. Citizens and taxpayers filed a suit claiming that the offices of mayor and council member were incompatible, and that their simultaneous exercise by the same person violated the principle of separation of the executive and legislative functions. The plaintiffs argued that, by becoming acting mayor, Ticknor had vacated his position on the council. In the alternative, the plaintiffs argued that, even if he had not vacated his council membership, Ticknor should not be allowed to exercise the powers and duties of that office while serving as acting mayor.

The Court rejected the plaintiffs' arguments. The Court found that Ticknor had not vacated his office as a council member when he assumed the duties of acting mayor. The Court noted that the statute did not provide that the president of the council succeeded to the office of mayor; it merely empowered him to serve as acting mayor until the new mayor could be elected

[1] A county mayor serving as chair may vote to break a tie. Tenn. Code Ann. § 5-5-109(b)(1).

at the next general election. The Court noted that, under the statute, being president of the city council was a condition of being acting mayor.

The Court also found that Ticknor could continue to vote as a council member while serving as acting mayor. The Court interpreted the statute to confer upon the president of the council the additional powers of acting as mayor until the vacancy could be filled. The Court found that combining executive and legislative powers in a single individual under the statute did not violate the constitutional principle of separation of powers. The Court stated:

> Based on our determination that Ticknor's retention of his councilmanic office is a statutory condition of his acting as mayor, the situation presents two alternatives. If Ticknor is permitted to exercise his councilmanic powers and duties at the same time that he is acting as mayor, the result is somewhat less than ideal and possesses a possibility of a conflict in the powers and duties which he may exercise. On the other hand, Ticknor is one of five councilmen elected to the governing body of Englewood. If he is barred from functioning as councilman while he acts as mayor, not only would the legislative intent of a five-man body be frustrated, but also the will of the electorate would be nullified. Under the circumstances, the first alternative is clearly preferable.

207 A.2d at 339. The Court noted the possibility that Ticknor, in attempting to fulfill both offices, could be confronted with a conflict of duties and responsibilities "so fundamental that the public interest requires that, as to the particular matter, he act in only one or the other capacity." *Id.* But the plaintiffs had alleged no particular situation giving rise to such a conflict of interest. The Court, therefore, declined to speculate on what such circumstances might be.

The Court's reasoning in *Ticknor* supports this Office's conclusion. Further, it does not appear that voting to fill a vacancy in the office of county mayor while serving as interim county mayor presents such a fundamental conflict of duties and responsibilities that the public interest would prevent the same individual from acting in both capacities. For all these reasons, it is the opinion of this Office that the interim county mayor may continue to vote as a member of the county commission. This authority includes voting on a new mayor under Tenn. Code Ann. § 5-1-104(b)(1).

b. The next question is whether the membership of the county commission is treated as having been reduced to reflect the chair's absence from the county legislative body while serving as interim mayor. As discussed above, the chair continues to be a commission member while serving as interim mayor. Membership of the commission therefore is not reduced because of the chair's service as interim mayor.

c. The next question is what representation do the citizens of the chair's district have while the chair is serving as interim mayor. This question is moot since the chair continues to be a commission member while serving as interim mayor.

d. The next question is whether the law requires the appointment of a "temporary commissioner" while the chair is serving as interim mayor to ensure fair representation during

the tenure of the chairman as interim mayor. This question is moot since the chair continues to be a commission member while serving as interim mayor.

e. The next question is what representation do the citizens of the chair's district have in the selection of a successor mayor while the chair is serving as interim mayor. This question is moot since the chair continues to be a commission member while serving as interim mayor.

2. Disqualification of Commission Member

The second question concerns the consequences of disqualifying a commission member from voting under Tenn. Code Ann. § 5-5-111. The statute outlines the process that must be followed when a vacancy occurs in any office required to be filled by the county legislative body. It provides in part:

> Should a member of the county legislative body accept a nomination for an office or vacancy that is required by the Tennessee constitution 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 office or vacancy 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 fill the office or vacancy, the 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.
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> To receive an appointment, ***a nominee must receive the votes of a majority of the members of the county legislative body eligible to vote on the appointment.*** The county legislative body shall adopt rules of procedure for eliminating nominees in cases where there are multiple nominees for an appointment and no nominee receives a majority of the initial vote. No secret balloting shall be permitted. Each member's vote regarding the appointment process shall be recorded by the clerk and entered on the minutes of the county legislative body. A tie vote of the county legislative body regarding an appointment may be broken in the same manner that other tie votes of the body may be broken.

Tenn. Code Ann. § 5-5-111(c) and (e) (emphasis added). The question is what representation the constituents of the disqualified member will have in the vote to fill the vacancy in the office of county mayor. Under the statute, a commission member who is a nominee may not vote on filling the office, and thus that member's constituents would not be represented on that particular vote. This is a valid policy determination of the General Assembly. A similar result occurs whenever a commission member is unable to attend a commission meeting or abstains from voting on a particular matter.

3. Filling a Vacancy in the Office of Mayor

The last question concerns application of the laws discussed above to the following circumstances. For purposes of this opinion, we assume that a county commission has nine members. The chair of the commission will serve as interim county mayor. Another member of the commission has been nominated to become county mayor. Under Tenn. Code Ann. § 5-5-111(c), that member may not vote to fill the county mayor vacancy, and the member is not counted in determining a majority vote on this issue. As a result, five votes (a majority of eight) are necessary to fill the vacancy. The request asks whether the interim county mayor should also be excluded in determining a majority vote on this issue. If the interim county mayor were so excluded, a majority of seven, or four votes, would be required to fill the vacancy.

As discussed above, the interim mayor continues to be a member of the county commission. The interim mayor therefore should not be excluded in determining the majority required to fill the vacancy. Thus, under these circumstances, five votes (a majority of eight) are required to fill the vacancy.

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