

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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March 5, 2012

Opinion No. 12-30

House Election Contest

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**QUESTION**

If an election contest is decided in a previous General Assembly, may a subsequent General Assembly renew or reexamine the election contest, including for the purpose of considering a request for an award of costs and attorney's fees?

**OPINION**

In accordance with the plain language of Article II, § 11, of the Tennessee Constitution, the power to judge the qualification and elections of members of a particular General Assembly is vested solely in each House of that General Assembly. Consequently, a succeeding General Assembly has no authority to judge the qualifications and election of the members of a prior General Assembly and, therefore, would have no authority to renew or reexamine an election contest arising out of the election of a member of a prior General Assembly.

**ANALYSIS**

Per the opinion request, in the November 2008 General Election, Dr. Rishi Saxena and Representative Donna Rowland were candidates for the office of Tennessee House of Representatives for the 34<sup>th</sup> District. Representative Rowland defeated Dr. Saxena by a margin of 11,650 votes, and the election results were subsequently certified. Dr. Saxena timely filed an election contest asserting that Representative Rowland was not a qualified voter of District 34 because she lived in another district. In light of the election contest, Representative Rowland was provisionally seated as Representative for the 34<sup>th</sup> House District on January 13, 2009.

Pursuant to House Resolution 41 of the 106<sup>th</sup> General Assembly, the District 34 Ad Hoc Committee was created to hear the election contest initiated by Dr. Saxena. The Committee was charged with receiving and thoroughly reviewing evidence pertaining to Dr. Saxena's complaint and to report its findings and recommendations to the full House of Representatives. House Resolution 41 specifically authorized the Committee "to exercise such powers and authorities granted in Tennessee Code Annotated, Title 3, chapters 3 and 4, and to operate under the rules of the House of Representatives and to adopt such other rules as may be necessary to complete its duties in a fair and responsible manner." H.R. 0041, 106<sup>th</sup> Gen. Assembly (Tenn. 2009).

A hearing on Dr. Saxena's complaint was held by the Committee on April 20, 2009. Upon the conclusion of Dr. Saxena's case-in-chief, the Committee members voted unanimously to recommend to the House of Representatives that the contest be dismissed. The Committee subsequently filed its report and recommendation with the House in which it recommended that:

1. The complaint filed by Rishi K. Saxena with respect to the thirty-fourth representative district be dismissed;
2. Representative Donna Rowland's "provisional" status be lifted; and
3. Representative Rowland be seated as all other members of the House of Representatives of the 106<sup>th</sup> General Assembly are seated.

The report and recommendation of the Ad Hoc Committee was adopted by the House of Representatives on April 27, 2009, by a vote of 97-0. While the Committee's report and recommendation did make a finding that Dr. Saxena's claim "was frivolous in nature," it did not recommend any award of costs and attorney's fees to Representative Rowland, nor did it reserve the issue of an award of costs and attorney's fees for future reconsideration.<sup>1</sup> In accordance with the terms of House Resolution 41, upon submission of the committee's report and recommendation the District 34 Ad Hoc Committee ceased to exist.

On May 18, 2009, Representative Rowland filed suit against Dr. Saxena in Rutherford County Chancery Court seeking an award of attorney's fees based upon the provisions of Tenn. Code Ann. § 2-17-115 and the findings of the District 34 Ad Hoc Committee that Dr. Saxena's complaint "was frivolous in nature." The Chancery Court found, however, that pursuant to Art. 2, § 11 of the Tennessee Constitution sole jurisdiction was vested in the General Assembly to decide election contests in the State House and State Senate and that Tenn. Code Ann. § 2-17-115 did not create an independent cause of action for attorney's fees. Accordingly, the Chancery Court dismissed the Complaint for lack of jurisdiction. *See Rowland v. Saxena*, No. M2010-00640-COA-R3-CV, 2011 WL 345827 (Tenn. Ct. App. Jan. 31, 2011).

Representative Rowland appealed the dismissal of her case and on appeal, the Court of Appeals stated that it was called upon to "determine whether Tenn. Code Ann. § 2-17-115 allows a Chancery Court to entertain an action solely to recover counsel fees and costs incurred in an election contest for a seat in the Tennessee House of Representatives." *Id.* at \*1. The Court of Appeals affirmed the Chancery Court's ruling that Tenn. Code Ann. § 2-17-115 does not create a separate cause of action to recover attorney's fees, although it did note in *dicta* that the statute "constitutes the statutory basis upon which the tribunal makes such an award." *Id.* at \*4.<sup>2</sup>

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<sup>1</sup> Indeed the issue of whether to award attorney's fees and costs was raised in the course of this proceeding, and the Committee was advised it lacked authority "to award statutory attorney fees." *Rowland v. Saxena*, No. M2010-00640-COA-R3-CV, 2011 WL 34582, at \*3 (Tenn. Ct. App. Jan. 31, 2011). Thus presumably the Committee made a conscious decision not to award fees and costs based on this advice.

<sup>2</sup> Nonetheless any reexamination of a contested election would have to be conducted in accordance with the Rules of Order adopted at the beginning of each General Assembly, given Article II, § 12 of the Tennessee Constitution

In the interim, Representative Rowland did not seek re-election as Representative of House District 34 in the November 2010 general election and thus her term has expired. The term of the 106<sup>th</sup> General Assembly also expired as of the date of the November 2010 general election.

The question presented is whether the current General Assembly (107<sup>th</sup> General Assembly) could renew or reexamine this election contest, including for the purpose of considering a request for an award of costs and attorney's fees by former Representative Rowland. The determination of the answer to this question begins with an analysis of Article II, § 11 of the Tennessee Constitution, which vests each House of the General Assembly with the authority to judge the qualifications and elections of its members. The constitutional provision provides in pertinent part as follows:

The Senate and House of Representatives, when assembled, shall each choose a speaker and its other officers; be judges of the qualifications and election of its members; and sit upon its own adjournment from day to day . . . .

Tenn. Const. art. II, § 11. This section of the Constitution has been construed as vesting sole and exclusive authority in the House and Senate to judge the qualifications and election of their respective members after each legislative body is constituted as of the day of the November general election. *State ex rel. Ezzell v. Shumate*, 172 Tenn. 451, 459-60, 113 S.W.2d 381, 384-85 (1938); *Gates v. Long*, 172 Tenn. 471, 474, 113 S.W.2d 388, 389 (1938); *Comer v. Ashe*, 514 S.W.2d 730, 741 (Tenn. 1974). Pursuant to Article II, § 11, the General Assembly has enacted Tenn. Code Ann. § 2-17-102, which provides that “contests for the office of Senator in the General Assembly are decided by the Senate, and contests for the office of Representative in the General Assembly are decided in the House of Representatives.”

While there is no Tennessee case law addressing the question of whether a subsequent General Assembly can reexamine an election contest filed in a prior General Assembly, this Office concludes that the question is controlled by the plain language of Article II, § 11 of the Tennessee Constitution. In accordance with the express language of Article II, § 11, the authority of the House and Senate to judge the “qualifications and election of *its* members” attaches to the House and Senate “. . . *when assembled* . . . .” (emphasis added). In *Comer v. Ashe*, the Supreme Court noted the significance of the phrase “when assembled,” as used in Article II, § 11, and observed that “[t]his Article shows on its face that it is operative only when the General Assembly is in session.” *Comer v. Ashe*, 514 S.W.2d at 733. Thus, once assembled, the House and Senate may, without question, take appropriate action relative to election contests involving their respective members. However, it is equally clear that the power to judge the qualification and elections of members of a particular General Assembly is vested solely in each House of that General Assembly. Thus, the House of Representatives of the 106<sup>th</sup> General Assembly was vested solely with the power to judge the qualifications and election of *its* members. Consequently, the 107<sup>th</sup> General Assembly has no authority to judge the qualifications and

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provides that each house has the authority to establish the rules of its own proceedings. In this case, no rule of the House of the 106<sup>th</sup> General Assembly appears to have existed authorizing the award of attorney's fees or costs in an election contest before that body.

election of the members of the 106<sup>th</sup> General Assembly and, therefore, would have no authority to renew or reexamine an election contest arising out of the election of a member of the 106<sup>th</sup> General Assembly.

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