S T A T E O F T E N N E S S E E
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July 31, 2012

Opinion No. 12-79

Vacancy on County Commission

QUESTIONS

1. If a person is elected and qualified to a county commission seat, and it is subsequently determined the person was not a resident of the district in which he or she was elected and thus did not qualify to hold the county commission seat, does a vacancy exist and when does the vacancy occur?

2. Assuming a vacancy does exist in response to Question # 1, could the county commission revise its district reapportionment so as to place the residence of that county commissioner within the district from which he or she was elected?

3. If the answer to Question 2 is "no" and a vacancy still exists, when is the county commission required by law to fill this vacancy by appointment?

OPINIONS

1. Yes, a vacancy would exist once it is determined the commissioner who has been elected and qualified did not reside in the district in which he or she was elected. This Office has previously opined that a person cannot be properly elected to a county legislative body from a district in which he or she does not reside. Under these circumstances the office in question is automatically vacant with no judicial determination necessary to establish a vacancy.

2. No, the county commission cannot retroactively change the boundries of a county commission district. Furthermore, Tennessee law only permits a county to conduct reapportionment for future elections if reapportionment is necessary to maintain substantially equal representation based on population. Thus, the county legislative body lacks authority to revise its plan of reapportionment so as to place the residence of the commissioner in the district in which he or she was elected.

3. Tenn. Code Ann. § 5-1-104(b)(1) requires the county legislative body to make an appointment to fill this vacancy within 120 days of receiving notice of the vacancy, unless during that time period there is a general election scheduled in the county and there is sufficient

time for the vacancy to be placed on the ballot in accordance with Tenn. Code Ann. § 5-1-104(b)(2).

ANALYSIS

1. This opinion request poses a factual scenario in which a county commissioner is elected and qualified to the county commission and is subsequently determined to not reside in the county commission district which elected him or her. The initial question asks whether these circumstances would create a vacancy in this county commission district and, if so, when would this vacancy occur.

Tenn. Code Ann. § 5-5-102 sets out the qualifications for members of county legislative bodies and specifically requires that "[m]embers shall reside within and be qualified voters of the districts which they represent." Tenn. Code Ann. § 5-5-102(b). Tenn. Code Ann. § 8-48-101(3) provides that any office in this state is vacated by the incumbent "[c]easing to be a resident of the state, or of the district, circuit, or county for which the incumbent was elected or appointed." This Office has previously opined that this statute also applies "where an individual who was never a resident as required for the office is elected to office" and that under these circumstances "an individual who was mistakenly appointed to office without satisfying the residence requirement is deemed to vacate the office" immediately. No judicial determination is necessary to establish this vacancy. Op. Tenn. Att'y Gen. 04-092, at 2 (May 13, 2004). See also Richardson v. Young, 122 Tenn. 471, 551, 125 S.W 664, 683 (1909); Op. Tenn. Att'y Gen. 83-182 (April 15, 1983); Op. Tenn. Att'y Gen. 83-29 (Jan. 13, 1983) [1]

2. Assuming a vacancy does exist, the county legislative body cannot revise its district reapportionment so as to place the residence of this commissioner within the district from which he or she was elected. The reapportionment of county legislative districts is governed by Tenn. Code Ann. § 5-1-111, and this statute does not permit a county legislative body to retroactivelty alter district lines. Tenn. Code Ann. § 5-1-111 only allows prospective reapportionment when necessary to maintain substantially equal representation based on population. County legislative bodies periodically "change the boundaries of districts or redistrict a county entirely *if necessary* to apportion the county legislative body so that the members represent substantially equal populations." Tenn. Code Ann. § 5-1-111(a) (emphasis added). Such reapportionment must have been completed prior to January 1, 1982, and at least every ten years thereafter. *Id*. Tenn. Code Ann. § 5-1-111(c) does not authorize a county legislative body to reapportion at any time but only "if the county legislative body deems such action necessary to maintain substantially equal representation based on population." Thus, the county legislative body lacks authority to retroactively revise its plan of reapportionment so as to place the residence of the commissioner in the district to which he or she was elected. *See Rich v. Tennessee Bd. Of Medical Examiners*, 350 S.W.3d 919, 927 (Tenn. 2011); *Wells v. Tennessee Bd. Of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007) (both cases referencing the general rule of statutory construction that the expression of one thing implies the exclusion of other things not expressly mentioned).

[1] Even though the county commissioner in this factual scenario was not properly elected, the commissioner nonetheless occupied the office by apparent right under the color of law and would be a "de facto" officer whose acts would be valid. See Op. Tenn. Att'y Gen. 10-99, at 2 (Sept. 17, 2010); Op. Tenn. Att'y Gen. 03-144, at 3 (Nov. 7, 2003); Op. Tenn. Att'y Gen. 81-536, at 2 (Sept. 28, 1981)

3. Furthermore, as noted above, the vacancy in the office is automatic and no judicial determination to that effect is necessary. *See Bailey v. Greer*, 63 Tenn. App. 13, 34, 468 S.W.2d 327, 336 (1971). Thus, if a county commissioner does not reside in the district from which he or she was elected, a vacancy in that office will exist. Tenn. Code Ann. § 5-1-104(b)(1) requires that "[v]acancies in county offices required by the Constitution of Tennessee or by any statutory provision to be filled by the people shall be filled by the county legislative body, and any person so appointed shall serve until a successor is elected at the next general election" and qualified. The county legislative body is required to make an appointment to fill this vacancy within 120 days of receiving notice of the vacancy, unless during that time period there is a general election scheduled in the county and there is sufficient time for the vacancy to be placed on the ballot in accordance with the other provisions of this statute. Tenn. Code Ann. § 5-1-104(b)(1). Subsection (b)(2) of this statute provides that if the vacancy occurs more than 60 days prior to a primary election, then party nominees for the office will be selected in the primary election and a successor will be chosen during the August general election. Tenn. Code Ann. § 5-1-104(b)(2). If the vacancy occurs less than 60 days before the primary, but 60 or more days before the August general election, then nominees of political parties shall be selected by party convention and a successor elected at the August general election. *Id.* If the vacancy occurs less than 60 days before the August general election, but 60 or more days before the November election, then nominees are selected by party convention and a successor is chosen in the November election. *Id.*

Accordingly, if the aforementioned vacancy was determined to exist as of the date this opinion is issued, then it would exist less than 60 days before the August 2012 general election and 60 or more days before the November 2012 election. In this case, the vacancy would be placed on the ballot for the November election.

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