

STATE OF TENNESSEE
OFFICE OF THE
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April 19, 2005

Opinion No. 05-049

County School Board Employee on County Election Commission

QUESTIONS

1. In light of Tenn. Code Ann. § 2-1-112, may an individual who works for the Shelby County School Board in an administrative, non-teacher capacity serve on a county election commission?

2. If the local legislative delegation recommends such an individual to the State Election Commission, does that Commission have to appoint the individual, or does the Commission have discretion?

3. What is the State Election Commission's duty, and what are its options?

4. If such person is not eligible to serve by law but is recommended by the local legislative delegation and appointed by the State Election Commission, what action may be taken against the State Election Commission or such person as a sanction?

5. Does the State Election Commission violate any criminal laws by appointing the person if it has notice that the person is ineligible to serve?

6. What is the process for *quo warranto* action to remove either an election commissioner who acted improperly or an election commissioner who is appointed illegally?

7. Is there a remedy other than *quo warranto* that may be taken?

OPINIONS

1. No.

2 & 3. While Tenn. Code Ann. § 2-12-103(b)(4) requires the State Election Commission to consult with the local legislative delegation before appointing members of a county election commission, it does not mandate that the State Election Commission follow the recommendations of the local legislative delegation. The State Election Commission does have a duty, however, to appoint members who meet the qualification requirements of Tenn. Code Ann. §§ 2-12-102 and -103, and are not otherwise prohibited from service by Tenn. Code Ann. § 2-1-112.

4-7. The only grounds generally on which a state or local officer may be removed from office before the end of his or her term are set forth in the ouster statutes in Tenn. Code Ann. §§ 8-47-101, *et seq.*, and the *quo warranto* statutes in Tenn. Code Ann. §§ 29-35-101, *et seq.* It does not appear that the ouster provisions contained in Tenn. Code Ann. §§ 8-47-101, *et seq.*, would be applicable to remove a county election commissioner for dual service as an administrative employee of the Shelby County School Board. Rather, a *quo warranto* action appears to be the proper vehicle for challenging any such individual's qualifications. Additionally, Tenn. Code Ann. § 1-12-101(b) authorizes the State Election Commission to remove a county election commissioner who becomes unqualified.

An ouster proceeding may potentially lie against the members of the State Election Commission, if they were to knowingly appoint an administrative employee of the Shelby County School Board to serve on a county election commission. It could reasonably be argued that, if the members of the State Election Commission intentionally appoint an individual to serve on a county election commission with knowledge that such individual is prohibited from serving by the provisions of Tenn. Code Ann. § 2-1-112, this action could be construed as the knowing or willful neglect to perform duties imposed by law. We are not aware, however, of any law that would make such an action a criminal violation. We are also not aware of any other remedies for the removal of an election commissioner who has acted improperly or been appointed illegally.

ANALYSIS

1. You have asked whether an employee of the Shelby County School Board in an administrative position may be appointed to a county election commission in light of Tenn. Code Ann. § 2-1-112. That statute provides as follows:

(a) Neither an elected official nor an employee of a state, county, municipal or federal governmental body or agency or of an elected official may serve as a member of a county election commission or as a member of a county primary board or as an election official. No candidate in an election may act in connection with that election as a member of any board or commission established under this title or as an election official.

(b)(1) This section does not qualify any person who is within its terms solely because the person is a notary public, an employee, faculty member or instructor at an institution of higher education, a school teacher, or a member of a reserve unit of the United States army, air force, marine corps or navy, or a member of the national guard unless the person is a full-time employee or member of such reserve unit or the national guard, or unless the person is on active duty.

- (2) This section does not disqualify any employee of a county or school system who does not work directly under the supervision of an elected official from serving only on election day as an election official.

Subsection (a) of this statute contains a broad prohibition against elected officials and government employees from serving on county election commissions. There are a few limited exceptions to this broad prohibition contained in subsection (b)(1), including an individual who is employed as a school teacher. Your request indicates, however, that the individual is not employed with the Shelby County School Board as a teacher but as an administrator. As such, the exceptions contained in subsection (b)(1) are not applicable. Additionally, while subsection (b)(2) would be applicable to a county school board employee who does not work directly under the supervision of an elected official, it only authorizes such employee to serve as an election official on election day. Tenn. Code Ann. § 2-1-104(8) defines “election officials” to mean the “officers of elections, judges, voting machine operators, precinct and assistant precinct registrars, and inspectors appointed under this title.” This definition does not include county election commissioners. Thus, Tenn Code Ann. § 2-1-112 would prohibit an employee of the Shelby County School Board, who is not a teacher but an administrator, from serving on a county election commission.

2 & 3. Your next two questions concern the duties and authority of the State Election Commission in appointing members of county election commissions. Specifically, you have asked whether the State Election Commission must follow the recommendations of the local legislative delegation, or whether it may exercise its own discretion.

The appointment of county election commissioners by the State Election Commission is governed primarily by Tenn. Code Ann. §§ 2-12-101 and -103. Tenn. Code Ann. § 2-12-101(a) provides that “[t]he 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.” Tenn. Code Ann. § 2-12-103 provides that three members shall be members of the majority party and appointed by the members of the majority party on the State Election Commission. The remaining two members are to be members of the minority party and appointed by the members of the minority party on the State Election Commission. Subsection (b)(4) provides that “[b]efore appointing county election commissioners, the members of the state election commission shall 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.”

While this provision requires the State Election Commission to consult with the local legislative delegation before appointing members of a county election commission, it does not mandate that the State Election Commission follow the recommendations of the local legislative delegation. The State Election Commission does have a duty, however, to appoint members who meet the qualification requirements of Tenn. Code Ann. § 2-12-102 and are not otherwise prohibited from service by Tenn. Code Ann. § 2-1-112.

4-7. In the instance that the State Election Commission appoints as a county election commissioner an individual who is prohibited from serving by Tenn. Code Ann. § 2-1-112, your remaining questions ask what actions may be taken, either civilly or criminally, against both such individual and the State Election Commission.

The only grounds generally on which a state or local officer may be removed from office before the end of his or her term are set forth in the ouster statutes in Tenn. Code Ann. §§ 8-47-101, *et seq.*, and the *quo warranto* statutes in Tenn. Code Ann. §§ 29-35-101, *et seq.* Tenn. Code Ann. § 8-47-101 provides:

Every person holding any office of trust or profit, under and by virtue of any of the laws of the state, either state, county, or municipal, . . . who shall knowingly or willfully commit misconduct in office, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state, or who shall in any public place be in a state of intoxication produced by strong drink voluntarily taken, or who shall engage in any form of gambling, or who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit such office and shall be ousted from such office in the manner herein provided.

The Attorney General, the District Attorneys General, and the City and County Attorneys within their respective jurisdictions may institute such actions without complaint being made to them or request made of them. However, ouster proceedings should not be brought unless there is a clear and convincing case of official dereliction. *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981); *State ex rel. Thompson v. Walker*, 845 S.W.2d 752 (Tenn. Ct. App. 1992).

A *quo warranto* action lies in the name of the State against the person offending whenever any person unlawfully holds or exercises any public office within this State or whenever any public officer has done, or suffered to be done, any act which works a forfeiture of his office. Tenn. Code Ann. § 29-35-101(1) & (2). Tenn. Code Ann. § 29-35-109 directs that such suit is to be brought by the district attorney general for the district or county, “when directed so to do by the general assembly, or by the governor and attorney general of the state concurring.” Such an action may also be commenced pursuant to Tenn. Code Ann. § 29-35-110 “on the information of any person, upon such person giving security for the costs of the proceedings, to be approved by the clerk of the court in which the bill is filed.” Any such *quo warranto* action is to be filed in either the Circuit or Chancery Court of the county in which the office is usurped or held and shall be conducted as other suits in equity. Tenn. Code Ann. §§ 29-35-111 — 112.

It does not appear that the ouster provisions contained in Tenn. Code Ann. §§ 8-47-101, *et seq.*, would be applicable to remove a county election commissioner for dual service as an administrative employee of the Shelby County School Board. Those sections discuss removal of an officer due to willful neglect to perform his or her duty, or willful misconduct, violation of any penal statute involving moral turpitude, or commission of other specified immoral acts while in

office. There are no allegations of any of these actions by such county election commissioner. Rather, the assertion is that such individual is not qualified or prohibited from holding the office of county election commissioner. As such, a *quo warranto* action appears to be the proper vehicle for challenging any such individual's qualifications. Additionally, we would note that Tenn. Code Ann. § 2-12-101(b) authorizes the State Election Commission to remove any county election commissioner who becomes unqualified to hold that office.

However, an ouster proceeding may potentially lie against the members of the State Election Commission if they were to knowingly appoint an administrative employee of the Shelby County School Board to serve on a county election commission. As discussed, *supra*, while the discretion to appoint the members of county election commissions lies solely with the State Election Commission, the Commission still must comply with the statutory requirements of Tenn. Code Ann. §§ 2-1-112, 2-12-102 and -103. Specifically, the State Election Commission has a duty to appoint individuals to serve on county election commissions who are not prohibited from serving pursuant to Tenn. Code Ann. § 2-1-112. As such, it could reasonably be argued that, if the members of the State Election Commission intentionally appoint an individual to serve on a county election commission with knowledge that such individual is prohibited from serving by the provisions of Tenn. Code Ann. § 2-1-112, that action could be construed as the knowing or willful neglect to perform duties imposed by law.

You have also asked if there are any other remedies available, including criminal prosecution of the members of the State Election Commission, for knowingly appointing an individual to serve on a local county election commission when that individual is prohibited from serving under Tenn. Code Ann. § 2-11-112. We are not aware of any law that would make such an action a criminal violation. We are also not aware of any other remedies for the removal of an election commissioner who has acted improperly or been appointed illegally.¹

¹ While a writ of mandamus could be sought compelling the State Election Commission to either appoint qualified individuals or remove unqualified individuals from a local county election commission, we think it is unlikely that a court would issue such a writ, as it is within the discretion of the State Election Commission in the first instance to determine whether an individual possesses the qualifications prescribed by law. See *Buford v. State Bd. of Elections*, 206 Tenn. 480, 334 S.W.2d 726 (Tenn. 1960).

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