

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 02-117

Local Government Official on State Election Commission

QUESTION

May an elected county or municipal official be appointed to serve on the State Election Commission?

OPINION

Yes. But Tenn. Code Ann. § 2-1-112(a) prohibits a candidate for election or re-election to any state or local office from serving as a member of the State Election Commission.

ANALYSIS

This opinion concerns whether an elected county or municipal official may be appointed to serve on the State Election Commission. The Commission is established and operates under Tenn. Code Ann. §§ 2-11-101, *et seq.* The Commission has five members, who are elected by the General Assembly for four-year terms. Three members of the Commission are members of the majority party, and two members are members of the minority party. Each member to be elected is nominated by a joint Senate-House caucus of the members of the party of whom such person is a member. Tenn. Code Ann. § 2-11-103. Vacancies that occur while the Legislature is in session are filled by the Legislature in the same manner. Tenn. Code Ann. § 2-11-105(b). Vacancies that occur while the Legislature is not in session are filled by the remaining members of the Commission or, if the members are unable to agree on a successor within thirty days, by the Secretary of State, the Comptroller, and the State Treasurer or a majority of these three officers if all three are unable to agree. Tenn. Code Ann. § 2-11-205(c). Qualifications for members are listed in Tenn. Code Ann. § 2-11-102.

Tenn. Code Ann. § 2-1-112(a) provides:

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.

As used in Title 2, unless a different meaning is clearly intended:

“Election officials” means the officers of elections, judges, voting machine operators, precinct and assistant precinct registrars, and inspectors appointed under this title[.]

Tenn. Code Ann. § 2-1-104(a)(8). The question is whether a member of the State Election Commission is an “election official” within the meaning of the prohibition in the first sentence of Tenn. Code Ann. § 2-1-112(a). The term “officer of elections” refers to the individual placed in charge of each polling place. Tenn. Code Ann. § 2-7-101(a). All of the other positions listed within the meaning of “election officials” as used in the statute also refer to the individuals who supervise the actual conduct of elections within specific polling places. Tenn. Code Ann. § 2-1-112(a), therefore, would not prohibit a city or county elected official from serving on the State Election Commission.

Under the second sentence of Tenn. Code Ann. § 2-1-112(a), no candidate in an election may act in connection with that election as a member of *any* board or commission established under Title 2 or as an election official. This prohibition would apply to a member of the State Election Commission who holds a local elective office if he or she becomes a candidate for re-election or to run for election to any other state or local office. Although the State Election Commission does not directly supervise local elections, it is extensively involved in supervising ballot preparation and the entire voting process. *See, e.g.*, Tenn. Code Ann. § 2-9-117 (State Election Commission must approve new voting machines and reexamine and certify machines at least every eight years after the 2002 election cycle). For this reason, we think the statute prohibits a candidate for election or re-election to a county or city office or for election to any other state or local office from serving as a member of the State Election Commission.

Under Article II, Section 26 of the Tennessee Constitution, no person in the State may hold more than one “lucrative office” at the same time. Membership on the State Election Commission is a “lucrative office” within the meaning of this provision. Tenn. Code Ann. § 2-11-107 (State Election Commission member to receive compensation); *State ex rel. Carey v. Bratton*, 148 Tenn. 174, 253 S.W. 705 (1923) (membership in the State Board of Elections is a state office under Tenn. Const. Art. II, Section 10 prohibiting a legislator from serving in an office for which the power of appointment is vested in the Legislature or the Executive). But Article II, Section 26 does not prohibit an individual from holding a lucrative state and a local office at the same time. *Phillips v. West*, 213 S.W.2d 3 (1948). It would not prohibit the same individual from serving on the State Election Commission and holding a local elective office at the same time.

In addition, there is a common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 316

(1905). This prohibition is generally applied when an individual occupies two inherently inconsistent offices. 63C Am. Jur. 2d *Public Officers and Employees* § 62 (1997). Elections, including those for city and county office, are conducted under the supervision of county election commissions. The State Election Commission appoints the members of the county election commissions and exercises some supervisory authority over these commissions. But we do not think this circumstance renders the offices of membership on the State Election Commission and city or county elective office to be incompatible under the common law. No other provision of state law would prevent the same individual from serving in both offices, unless, as discussed above, the individual runs for re-election to the local office or for election to another state or local office.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Larry Trail
State Senator
Suite 3, Legislative Plaza
Nashville, TN 37243-0216