

STATE OF TENNESSEE

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Opinion No. 04-075

Vacancy on County Commission

QUESTIONS

1. Under Tenn. Code Ann. § 5-1-104(b)(1), vacancies on the county commission must be filled by the county legislative body, and the person so appointed serves until a successor is elected at the next general election. When should the county commission fill the vacancy?
2. May the commission leave the position vacant until it is filled at the next county general election?

OPINIONS

1. The statute specifies no time within which the county commission must fill the vacancy.
2. The law imposes no penalty if the commission leaves the position vacant until it is filled at the next county general election.

ANALYSIS

This opinion concerns the time within which remaining county commissioners must fill a vacancy on the county commission. Tenn. Code Ann. § 5-1-104(b)(1) provides:

Vacancies 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, as defined in § 2-1-104, in the county and is qualified; provided, that the candidates have sufficient time to qualify for the office, as provided for in § 2-14-106.

County commissioners are required to be elected by the qualified voters of the county. Tenn. Const. Art. VII, § 1. Under the statute, therefore, vacancies in the county commission are filled by the remaining members of the county commission.

The first question is when the county commission must fill the vacancy. The statute specifies no time within which the county commission must fill the vacancy. The second question is whether the county commission may leave the position vacant until it is filled at the next county general election. The statute provides that the vacancy “shall” be filled by the county commission. It is a general rule of law that the word “shall” is ordinarily construed as being mandatory when used in constitutions or statutes. *West Tenn. Motor Express, Inc. v. Public Service Comm’n*, 514 S.W.2d 742, 746 (Tenn. 1974). But the statute includes no sanction if the commission does not fill the vacancy before the next election. A writ of mandamus may be issued against a public official to require performance of a ministerial, non-discretionary act of the official. *State ex rel. Cole v. Francisco*, 643 S.W.2d 105 (Tenn. 1982). The decision by the county commission to fill a vacancy in the commission, however, is not ministerial and non-discretionary. The law imposes no penalty, therefore, if the commission leaves the position vacant until it is filled at the next county general election.

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