**S T A T E  O F  T E N N E S S E E**
OFFICE OF THE
**ATTORNEY GENERAL**
**PO BOX 20207**
**NASHVILLE, TENNESSEE 37202**

April 8, 2009

Opinion No. 09-52

Dismissal of County Administrator of Elections Based On Party Affiliation

## QUESTION

Whether a county administrator of elections can be dismissed solely on the basis of party affiliation.

## OPINION

In light of the all the relevant authority, a court could find that the dismissal of a county administrator of elections solely on the basis of political party affiliation constitutes a violation of that individual's First and Fourteenth Amendment rights under the United States Constitution. If, however, a county election commission can demonstrate that it has delegated broad discretionary policymaking authority regarding budgetary matters and/or the implementation of its goals and programs to the administrator of elections, then under those circumstances a court could find that political affiliation is an appropriate requirement for the effective performance of that particular administrator's position.

## ANALYSIS

The question posed is whether a county administrator of elections may be dismissed based solely upon that administrator's party affiliation. Tenn. Code Ann. § 2-12-201 provides that an administrator of elections shall be appointed by the county election commission. The administrator shall be the "chief administrative officer of the commission and shall be responsible for the daily operations of the commission office and the execution of all elections." Tenn. Code Ann. § 2-12-116(a)(1). The county election commissioners may not appoint themselves or any of their spouses, parents, siblings, in-laws or children to the position of administrator. Tenn. Code Ann. § 2-12-201(a)(14). Additionally, any person appointed for the first time to the position of administrator must possess a high school education or GED. Tenn. Code Ann. § 2-12-116(a)(1). In evaluating a prospective appointee, the county election

commission is to consider the knowledge and experience of such prospective appointee in the following areas: administrative, managerial, instructional, communication, budgetarial, purchasing, promotional, legal and general office skills and other related skills necessary to fulfill the statutory requirements of administrator. *Id*.

The United States Supreme Court has held that the First and Fourteenth Amendments to the United States Constitution protect state and local government employees from discharge or other significant adverse employment actions taken because of their political affiliations. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Elrod v. Burns*, 427 U.S. 347, 359, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). If, however, the exercise of those rights interferes with the discharge of public duties, then the Court has held that the rights may have to yield to the government's interest in maintaining effectiveness and efficiency. *Elrod*, 427 U.S. at 366, 96 S.Ct. 2673.

> Limiting patronage dismissals to policymaking positions is sufficient to achieve the valid governmental objective of preventing holdover employees from undermining the ability of a new administration to implement its policies. *Elrod*, 427 U.S. at 366. In contrast, "[n]onpolicymaking individuals usually have only limited responsibilities and are therefore not in a position to thwart the goals of the in-party."

*Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997) (quoting *Elrod*, 427 U.S. at 367, 96 S.Ct. at 2687). However, the scope of this exception was not clearly delineated by the Court in *Elrod*:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well-defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals.

427 U.S. at 367-368, 96 S.Ct. at 2687.

In *Branti v. Finkel*, 445 U.S. 507, 518, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Court observed that circumstances could exist in which "a position may be appropriately considered political even though it is neither confidential nor policymaking in character," while on the other hand, "party affiliation is not necessarily relevant to every policymaking or confidential position." *Id*. at 518, 100 S.Ct. at 1294. Thus, the *Branti* Court held that the "ultimate inquiry is whether the hiring authority can demonstrate that party affiliation [or sponsorship] is an

appropriate requirement for the effective performance of the public office involved." *Id*. In *Branti*, the Court found that this test could not be met in the case of an assistant public defender, because "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State," and for such an official to be subject to discharge for lack of allegiance to the dominant political party "would undermine, rather than promote, the effective performance of [his] office." *Id*. at 519-520, 100 S.Ct. at 1295.

In elaborating on this *Branti* exception, the Sixth Circuit has held that, in determining whether a position is afforded protection against politically motivated dismissal or other adverse action, any such inquiry "must look beyond the mere job title and examine the actual duties of the specific position." *Hall*, 128 F.3d at 423. As such, it is the inherent duties of the position in question, and the duties as envisioned for the new holder which must be examined, *Faughender v. City of North Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991), rather than the duties as performed by the person currently holding the position. *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990). If this examination reveals that the position is inherently political in nature, then political affiliation is an appropriate requirement for the job. *Blair v. Meade*, 76 F.3d 97, 100 (6th Cir. 1996). However, the Supreme Court has rejected the argument that, because a public employee serves at the pleasure of the public employer and can be dismissed for good cause, bad cause or no cause at all, such employee can be dismissed because of his or her political affiliation. *See O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 716, 116 S.Ct. 2353, 135 L.Ed.2d (1996) ("Government officials may indeed terminate at-will relationships . . . without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views.").

The Sixth Circuit Court of Appeals has not yet had the opportunity to determine whether political party affiliation is required for the position of county administrator of elections. It has, however, set forth a system to assist courts in determining whether political affiliation is an appropriate element of personnel decisions by creating four categories which attempt to capture the positions that could possibly fall into the *Branti* exception. The categories are as follows:

1. Positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;

2. Positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;

3. Confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential

> employees who control the lines of communications to category one positions, category two positions or confidential advisors; and
>
> 4. Positions that are part of a group of positions filled by balancing out political party representation or that are filled by balancing out selections made by different governmental agencies or bodies.

*Heggen v. Lee,* 284 F.3d 675, 682 (6th Cir. 2002) (citing *McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996)).

The duties and responsibilities of a county administrator of election are set out by statute and include: (1) the employment of all office personnel; (2) preparation of the annual operating budget and, upon approval of the commission, submission to the county legislative body for funding; (3) requisition and purchase of supplies necessary for operation of office and conduct of all elections; (4) maintenance of voter registration files, campaign disclosure records and any other required records; (5) conducting of instruction class for poll workers or designation of another qualified person to conduct such class; (6) preparation of all required notices for publication; (7) preparation and maintenance of all fiscal records necessary for daily operation of office and all elections; (8) compilation, maintenance and dissemination of information to public, candidates, voters, press and all inquiring parties in regard to all aspects of the electoral process on all governmental levels; (9) promotion of electoral process through supplemental registrations, public functions, press releases and media advertising; (10) attendance at any required seminar and other education seminars, as funding permits; (11) knowledge of all current laws pertaining to the election process and any changes mandated by the general assembly; and (12) assistance in planning and implementation of any plan of apportionment or reapportionment. Tenn. Code Ann. § 2-12-201.

While many of the statutory duties outlined in Tenn. Code Ann. § 2-12-201 appear to be ministerial, county administrators of elections are given the duty to prepare a budget for approval by the county election commission. The Sixth Circuit has held that because money consistently plays a very important role in politics, "budgetary decisions are among the most significant, and the most political, actions which government officials take" and that the "efficient and orderly administration of a budget is an integral part of the budgetary process and certainly has key political implications and consequences." *Blair v. Meade*, 76 F.3d at 100. Thus, because the county administrator of elections has been delegated the authority to prepare an annual operating budget for approval by the county election commission, that position conceivably falls under Category Two. However, the Sixth Circuit has declined to hold that there is an "inextricable connection between politics and funds" such that any budgetary discretion in a position's duties means Category Two designation is appropriate. *McCloud v. Testa*, 227 F.3d 424, 429 (6th Cir. 2000). Rather, that court has looked to see whether there is any delegated discretionary policymaking authority regarding budgetary matters to determine whether a position falls under Category Two. *Hager v. Pike County Board of Education,* 286 F.3d 366, 376-77 (6th Cir. 2002). While the inherent duties of the county administrator of elections are otherwise well-stated in Tenn. Code Ann. § 2-12-201, there is no clearly defined extent to which the administrator is

delegated discretionary policymaking authority regarding budgetary matters, particularly as the statute requires the budget to be approved by the county election commission. Whether a county election commission has delegated [or intends to delegate] responsibility to make such discretionary decisions to the administrator of elections, such that political affiliation is an appropriate requirement for the position, will therefore depend upon the particular practices and circumstances of each individual county election commission.

We would note that at least one court has addressed the issue of whether political party affiliation is necessary to perform a county general registrar's duties effectively. [1] *See McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987); *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998). In *McConnell*, the incumbent Republican governor was replaced by a Democrat in the 1982 election. As a result of this change, Virginia state law required a Democratic majority on the three-member county electoral board. When the terms of the general registrars for Scott and Lee Counties, both of whom were Republicans, expired, the county electoral boards did not reappoint them as general registrars. The two registrars filed suit under 42 U.S.C. § 1983 against the electoral boards alleging that they were not reappointed solely because they were Republicans. *McConnell*, 829 F.2d at 1322. In defense, the electoral boards argued that the Virginia General Assembly had created a statutory scheme requiring political patronage in the composition of electoral boards, which in turn fostered patronage in the appointment of registrars and, therefore, the General Assembly had determined that political party affiliation was an appropriate requirement for the effective job performance of a registrar or assistant registrar. *Id.* at 1324.

The Fourth Circuit Court of Appeals rejected this argument, noting that while the state statutes required certain political party affiliations for members of the electoral boards, they did not also require that the registrars be members of the majority political party. The court further stated:

> While the Virginia statutory scheme may facilitate political patronage in the appointment of registrars, this alone does not satisfy the *Branti* standard. Party affiliation must be more than a matter of convenience; it must be an appropriate requirement for the position.

*Id*. The court found that the county electoral boards had failed to demonstrate that party affiliation was a requirement for the position of registrar, particularly in light of the testimony of the Secretary of the State Board of Elections that political party affiliation would detract from, rather than enhance, a registrar's job performance. *Id*.

Tennessee's statutory scheme is similar to the Virginia scheme at issue in *McConnell* in that it requires political party affiliations for members of the county election commissions. *See* Tenn. Code Ann. § 2-12-103 (requires three members to be members of the majority party and two members to be members of the minority party). It does not require that the county administrators of elections be members of the majority party, but instead specifically requires that the county election commissions consider a prospective appointee's knowledge and

[1] The position of county general register under Virginia state law is similar to that of county administrator of elections under Tennessee law.

experience in the areas of administrative, managerial, instructional, communication, budgetarial, purchasing, promotional, legal and general office skills and other related skills necessary to fulfill the statutory requirements of administrator. Tenn. Code Ann. § 2-12-116(a)(1). In contrast, Tenn. Code Ann. § 2-12-202 provides that the majority party members of the county election commission shall appoint one precinct registrar for each polling place and the minority party members shall also appoint one precinct registrar for each polling place.

Thus, in light of the all the relevant authority, we think that a court could find that the dismissal of a county administrator of elections solely upon the basis of political party affiliation constitutes a violation of that individual's First and Fourteenth Amendment rights under the United States Constitution. If, however, a county election commission can demonstrate that it has delegated broad discretionary policymaking authority regarding budgetary matters and/or the implementation of its goals and programs to the administrator of elections, then under those circumstances a court could find that political affiliation is an appropriate requirement for the effective performance of that particular administrator's position.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

Requested by:

The Honorable W. Kent Coleman
State Representative

32 Legislative Plaza
Nashville, TN 37243-0149

The Honorable Charlotte Burks
State Senator
304 War Memorial Building
Nashville, Tennessee 37243-0215