

STATE OF TENNESSEE

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February 17, 2010

Opinion No. 10-16

Appointments to County Adult-Oriented Establishment Board

QUESTIONS

1. Is there any authority for a county board of commissioners to appoint the members of that county's adult-oriented establishment board and to set the term of the members to less than four (4) years?
2. If members of a county adult-oriented establishment board are improperly appointed, what action needs to be taken and by whom to properly appoint the board members?
3. If a vacancy occurs on an adult-oriented establishment board, is the county mayor the proper official to appoint a person to fill the vacancy?
4. If a vacancy on an adult-oriented establishment board is filled during the original four (4) year term, does the person filling that vacancy serve the remainder of the original four (4) year term or start a new four (4) year term upon appointment?
5. Once members of an adult-oriented establishment board are properly appointed, do the members of that board have the authority to ratify and reaffirm the actions taken by persons who were improperly appointed to that board?

OPINION

1. No. There is no authority in Tenn. Code Ann. § 7-51-1103 for a county board of commissioners to appoint the members of a county's adult-oriented establishment board or to set the terms of said members to less than four (4) years.
2. If members of an adult-oriented establishment board were improperly appointed, and the members do not voluntarily resign, the appropriate district attorney general for that jurisdiction may bring a *quo warranto* proceeding, in the name of the State, pursuant to Tenn. Code Ann. §§ 29-35-101 (1) and 29-35-109, seeking removal of the improperly appointed board members. After a successful *quo warranto* proceeding, the county mayor would appoint persons to those vacant board positions.

3. The county mayor is the proper official to appoint persons to fill vacancies on that county's adult-oriented establishment board.

4. If a vacancy on an adult-oriented establishment board is filled during an original four (4) year term, the person filling such vacancy serves for the remainder of that original term.

5. Once members of an adult-oriented establishment board are properly appointed, the board has the authority to vote to adopt, modify, or reject the actions taken by the prior improperly appointed board.

ANALYSIS

Tennessee's Adult-Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101, *et. seq.*, "shall be local in effect and shall be effective in a particular county upon the contingency of a two-thirds (2/3) vote of the county legislative body adopting this part." Tenn. Code Ann. § 7-51-1120.

An adult-oriented establishment board is created in any county in which this part is adopted. Tenn. Code Ann. § 7-51-1103(a). Tenn. Code Ann. § 7-51-1103 provides, in pertinent part:

(b) The board shall consist of five (5) members appointed by the county mayor of such counties. If there exists a massage registration board appointed by the county mayor, such board may be used for adult-oriented establishments, as determined by the county mayor.

(c) If the board consists of the massage registration board, the terms of the board members shall be co-extensive with the terms of the massage registration board with no member serving after the expiration of the member's term or removal from the massage registration board. If the board consists of five (5) members appointed by such county mayor, the terms of the board members shall be for four (4) years.

There is no authority in Tenn. Code Ann. § 7-51-1103 for a county board of commissioners to appoint the members of that county's adult-oriented establishment board or to alter the term of said board members to less than four (4) years.

The county mayor is the only one authorized on the face of Tenn. Code Ann. § 7-51-1103(b) or (c) to appoint members to a county's adult-oriented establishment board. Consequently, if board members were improperly appointed, and those board members do not resign, they may be removed through a *quo warranto* proceeding brought in the name of the State, pursuant to Tenn. Code Ann. § 29-35-101(1). Such actions are authorized against a person "whenever any person unlawfully holds or exercises any public office." *Id.* The district

attorney general with jurisdiction for that county is the proper party who may bring a lawsuit to remove those improperly appointed officials. Tenn. Code Ann. 29-35-109.¹

If the board members resign or are removed in a *quo warranto* proceeding, the county mayor should appoint persons to fill the vacancies resulting from those original improper appointments. Furthermore, for any other vacancy occurring on the adult-oriented establishment board, the county mayor is the proper official to appoint a person to fill that vacancy. Nothing prohibits the county mayor from receiving input from the county board of commissioners or other persons regarding the board appointments.

If vacancies result due to the members of the adult-oriented establishment board being originally improperly appointed by the county board of commissioners, the county mayor should properly appoint board members to complete the original four (4) year terms. Likewise, for other vacancies on the board, the person filling such vacancy would serve the remainder of the original four (4) year term.

Once the members of the adult-oriented establishment board are properly appointed, the board may vote regarding the actions taken by the earlier improperly appointed board. It appears that the members of the improperly appointed board were officers de facto and therefore their actions stand as valid until modified or rejected by the new board. An officer de facto “is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of office were exercised . . . under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.” *Heard v. Elliot*, 92 S.W. 764, 765 (Tenn. 1906); see *State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 718 (Tenn. 1995) (explaining that the acts of officers de facto are “valid and binding”). However, as a precaution, once the members of the adult-oriented establishment board are properly appointed, it is advisable that the board review the actions taken by the earlier improperly appointed board and vote to ratify, modify or reject such actions.

¹ In limited situations, a court may have jurisdiction in a *quo warranto* action, upon relation of a private citizen, in the name of the State, when the citizen can show a special interest and injury not common to the public generally. Tenn. Code Ann. § 29-35-110. As the district attorney general is the proper public officer to maintain such actions, it must be shown that the district attorney general acted “arbitrarily or capriciously” or was guilty of “palpable abuse of his discretion” in declining to bring such an action, before the courts will take jurisdiction upon relation of a private citizen in the name of the State. See *Bennett v. Stutts*, 521 S.W.2d 575, 577-78 (Tenn. 1975); *State ex rel. Bee DeSelm v. Owings*, 2009 WL 1470704 (Tenn. App. 2009).

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