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

September 17, 2010

Opinion No. 10-99

Validity of Actions Taken by Board of Regents Where Board Was Improperly Composed

QUESTIONS

Tenn. Code Ann. § 49-8-201 sets out the requirements for the composition of the Tennessee Board of Regents. Tenn. Code Ann. § 49-8-201(a)(9) requires that each of the two leading political parties shall be represented by at least three appointive members.

1. If either of the two leading political parties is not represented on the Tennessee Board of Regents as required by Tenn. Code. Ann. § 49-8-201(a)(9), are decisions made by such a Board binding?

2. If the decisions of such a board are binding, what provision of state law provides for this?

OPINIONS

1. Tennessee case law provides that in cases where a court declares that a public body such as a board or commission is improperly composed, the actions of that body prior to such a declaration are still valid under Tennessee law. Members of such a board or commission who are determined to be ineligible for service for some reason are considered de facto officers whose previous actions while serving on the board or commission are regarded as valid.

2. As noted above, the legal principles upon which members of public bodies are considered de facto officers derive from Tennessee case law, rather than from the language of the Board of Regents statute.

ANALYSIS

In *Jordan v. Knox County*, 213 S.W.3d 751, 774–78 (Tenn. 2007), the Tennessee Supreme Court examined the long history of the doctrine of de facto officers in Tennessee jurisprudence in the context of its holding that the Knox County charter was invalid and that the government that had been formed under that charter was a de facto form of government.

> A de facto government is one existing in fact, having effect even without a formal or legal basis. *Norton v. Shelby County*, 118 U.S. 425, 448, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). While the de facto doctrine has not been applied in this state to a

> charter for a local governmental entity, this Court has applied the principle to public officials and, in particular, to judicial officers.
>
> * * *
>
> The doctrine of de facto officers had become a part of Tennessee jurisprudence by 1848. In *Bates v. Dyer*, 28 Tenn. (9 Hum.) 162 (1848), this Court made the following observations about the actions of a sheriff who lacked eligibility to serve:
>
> > At the time the deed was executed . . . Newman was the acting sheriff of the county under an election made in due form; and although he was, at the time of his election, ineligible on account of his defalcation, yet this does not avoid his acts done as sheriff before his election was annulled by the proper authority; previous to the event, though he was not sheriff *de jure*, yet he was *de facto*; and from public necessity, the acts of a public officer, exercising his office *de facto*, though not *de jure*, are valid as to third persons, and cannot be controverted in a collateral issue such as this.

Jordan, 213 S.W.2d 774-78 (Citations omitted).

The *Jordan* Court examined numerous Tennessee cases applying the de facto officer doctrine to, *inter alia*, a judge determined to be ineligible (*Beaver v. Hall*, 142 Tenn. 416, 217 S.W. 649 (1920)), an improperly composed school board (*State ex.rel Roberts v. Hart*, 106 Tenn. 269, 61 S.W. 780 (1901)), an ineligible member of a county court (*Shoup Voting Machine Corp. v. Hamilton County*, 178 Tenn. 14, 152 S.W. 2d 1029 (1941)), and even members of the General Assembly where the validity of an apportionment statute had been called into question (*Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (1956)). The *Jordan* Court further noted that this doctrine had been applied and upheld in several other states, including Minnesota, Missouri, Rhode Island, Connecticut, Oklahoma, Kansas and Idaho. *Jordan*, 213 S.W.2d at 776.

In addition, this Office has had occasion to examine the de facto officer doctrine a number of times. *See e.g.*, Op. Tenn. Att'y Gen. 03-144 (November 7, 2003) (County Utility District); Op. Tenn. Att'y Gen. 93-09 (January 28, 1993) (parole eligibility review board); Op. Tenn. Att'y Gen. 83-205 (April 22, 1983) (service by legislators on state boards and commissions). We stated in Op. Tenn. Att'y Gen. 93-09, that:

> The term 'de facto officer' has been defined as one whose acts were exercised under color of a known election or appointment which is void because the officer was not eligible for the office, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in the exercise of the appointing power. *Evers v. Hollman*, 196 Tenn. 364, 369, 268 S.W.2d 102 (1954) (acts of a beer board appointed by the wrong appointing authority held valid). *See also State ex rel. Smith v. Bomar*, 212 Tenn. 149, 368 S.W.2d 748 (1963) (acts of the legislature which had not been constitutionally reapportioned since 1901 held valid).

Accordingly, it is the opinion of this Office that, in the event a member or members of the Tennessee Board of Regents were declared ineligible for service on the Board, or in the event the Board itself were declared by a court to be improperly composed, the acts taken by that board prior to such a declaration would be regarded as valid acts of a de facto board. While Tenn. Code Ann. § 49-8-201, the statute that sets forth the requirements for the composition of the Board of Regents, is silent as to this issue, long-established Tennessee case law supports this conclusion.

ROBERT E. COOPER, JR.
Attorney General and Reporter

CHARLES L. LEWIS
Deputy Attorney General

KEVIN STEILING
Deputy Attorney General

Requested by:

The Honorable Bill Ketron
State Senator
13 Legislative Plaza
Nashville, TN 37243

The Honorable Jim Tracy
State Senator
Suite 2, Legislative Plaza
Nashville, TN 37243