

STATE OF TENNESSEE

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Opinion No. 04-164

Judicial Commissioners in Metropolitan Counties Seeking Higher Office

QUESTIONS

Under Tenn. Code Ann. §§ 40-5-201, *et seq.*, the legislative body of a metropolitan county may provide for judicial commissioners and their term of office. Under this statutory scheme, judicial commissioners are appointed by the general sessions judges and serve at their pleasure. Under this statutory scheme:

1. May a judicial commissioner seeking to become a candidate for a higher judicial office in a primary or general election retain the position of judicial commissioner during the primary or general election process?
2. May a judicial commissioner seeking to become a candidate for higher judicial office in a primary or general election be legally fired or otherwise terminated from the position of judicial commissioner for becoming a candidate for higher judicial office?
3. Under what circumstances may a judicial commissioner be removed from his or her position during the term?

OPINIONS

1. A judicial commissioner seeking to become a candidate for a higher judicial office in a primary or general election may retain the position of judicial commissioner during the primary or general election process.
2. Under Tenn. Code Ann. § 40-5-204, judicial commissioners are appointed by a majority of the general sessions judges in the county and serve at the pleasure of the majority of such general sessions judges. As a general matter, officials who serve at the pleasure of the appointing authority may be removed for any reason that does not violate the Tennessee Constitution or the United States Constitution. Since there is no fundamental constitutional right to run for office, dismissing a commissioner for this reason alone would not violate the commissioner's constitutional rights. This Office is unaware of any authority that would prohibit the judges from dismissing a judicial commissioner who was running as a rival candidate to one of the judges. But since this Office cannot authoritatively interpret the Judicial Code of Conduct, we do not address whether this action might violate that Code.

3. As a general matter, officials who serve at the pleasure of the appointing authority may be removed for any reason that does not violate the Tennessee Constitution or the United States Constitution.

ANALYSIS

1. Authority to Run for Higher Judicial Office

This opinion concerns judicial commissioners in metropolitan counties that have created the position under Tenn. Code Ann. §§ 40-5-201, *et seq.* This statutory scheme is materially different from the other statutes regarding judicial commissioners such as Tenn. Code Ann. § 40-1-111. For that reason, the reasoning in opinion letters of this Office concerning judicial commissioners serving under other statutes does not necessarily apply to judicial commissioners in metropolitan counties.

Tenn. Code Ann. § 40-5-201(a) provides that “[t]he legislative body of any county having a metropolitan form of government may, by ordinance, create the position of one (1) or more judicial commissioners.” Subsection (b) lists the duties of commissioners serving under this statute. Under Tenn. Code Ann. § 40-5-202:

The term or terms of the judicial commissioner or commissioners shall be established by the majority of general sessions judges of such county and in no event shall the term or terms exceed four (4) years. No employee, officer or official of the metropolitan government shall be eligible for appointment or serve as a judicial commissioner.

Judicial commissioners serving under this statute are paid from the general fund of the county, in an amount to be determined by the majority of general sessions judges of the county and subject to the approval of the legislative body. Tenn. Code Ann. § 40-5-203. Section 40-5-204 provides:

The judicial commissioner or commissioners shall be appointed by a majority of the general sessions judges in such county and serve at the pleasure of the majority of such general sessions judges.

The first question is whether a judicial commissioner seeking to become a candidate for a higher judicial office in a primary or general election may retain the office of judicial commissioner during the primary or general election process. No statute prohibits a judicial commissioner in a metropolitan county from running for any office while still serving as a judicial commissioner. As the request notes, however, a judicial commissioner is a “judge” subject to the Code of Judicial Conduct. Tenn. R. Sup. Ct. 10, Application of the Code of Judicial Conduct, Part A. Only the Judicial Ethics Committee and reviewing courts may authoritatively interpret the Code of Judicial Conduct. Tenn. R. Sup. Ct. 9, § 26.6. Under Canon 5(A)(2) of Supreme Court Rule 10, a judge must generally resign from judicial office upon becoming a candidate for a *nonjudicial* office either in a primary or a general election. As a “judge” subject to the Code of Judicial Conduct, therefore, a judicial commissioner must resign his or her position upon becoming a candidate for nonjudicial

office. But the rules do not require a “judge” — including a judicial commissioner — to resign from his or her position on becoming a candidate for judicial office.

2. Removal Upon Becoming a Candidate

The next question is whether a majority of the general sessions judges in the county could remove a judicial commissioner from his or position if that individual becomes a candidate for higher judicial office. Under Tenn. Code Ann. § 40-5-204, judicial commissioners appointed under the statute are appointed by a majority of the general sessions judges in the county “and serve at the pleasure of the majority of such general sessions judges.” As a general matter, officials who serve at the pleasure of the appointing authority may be removed for any reason that does not violate the Tennessee Constitution or the United States Constitution. *Op. Tenn. Att’y Gen. 90-27* (February 27, 1990), n. 1; 63C Am.Jur.2d *Public Officers and Employees*, § 175 (1997). But an individual serving at the pleasure of an authority may not be terminated for exercising a constitutional right or on a basis that infringes upon constitutionally protected interests. *Hoover v. Radabaugh*, 307 F.3d 460 (6th Cir. 2002) (qualified immunity for claim for dismissal of employee for exercising constitutional right); 63C Am.Jur.2d *Public Officers and Employees*, §§ 176-177 (1997). There is no fundamental right to run as a candidate for elective public office or to be appointed to public office. *Civil Service Merit Board of Knoxville v. Burson*, 816 S.W.2d 725 (Tenn. 1991); *Bullock v. Carter*, 405 U.S. 134, 142-43, 92 S.Ct. 849 (1972) (no fundamental right to run as a candidate for elective public office). Since there is no fundamental constitutional right to run for office, dismissing a commissioner for this reason alone would not violate the commissioner’s constitutional rights. Under the statute, therefore, a majority of the general sessions judges in the county could remove a judicial commissioner if the individual becomes a candidate for higher judicial officer. This Office is unaware of any authority that would prohibit the judges from dismissing a judicial commissioner who was running as a rival candidate to one of the judges. But since this Office cannot authoritatively interpret the Judicial Code of Conduct, we do not address whether this action might, depending on the circumstances, violate that Code.

3. Dismissal of Individual Holding At-will Position

The last question concerns the circumstances under which a judicial commissioner may be removed from his or her position during the term. As discussed above, as a general matter, officials who serve at the pleasure of the appointing authority may be removed for any reason that does not violate the Tennessee Constitution or the United States Constitution.

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