

July 7, 2008

Dear Sir:

You have the following question: May a person, otherwise qualified, be appointed to the Electric, Power, Water & Sewerage Board, if at the time of the appointment the person is a member of any other local appointive board, e.g. County Road Board, County Equalization Board, Parks and Recreation Board of the City, etc., or elective board, e.g. City Council or County Commission?

That question arises from what is apparently Private Acts 1957, Chapter 202, which provides, among other things, that: “No person who holds any other public office or employment shall be eligible for appointment or election as a member of the [Electric, Power, Water & Sewerage] Board during such term of office or employment....”

The answer is probably no. That answer is certain with respect to the county offices listed, and to city elective offices. But it is less certain with respect to some city offices, including the one listed. I specifically analyze the appointive city office listed, and other appointive city offices: the Airport Authority, the planning commission, and the board of zoning appeals.

Officers Generally

You sent to me references to the cases of Sitton v. Fulton and Johnson v. Williamson. I am familiar with Sitton, but not with Johnson v. Williamson, which I was unable to find. But I have written extensively on the question of the distinction between officers and employees in a number of contexts under Sitton and many other cases on that question..

Who is an “officer” as opposed to an “employee” is not always an easy question to answer. A county attorney in Ross v. Fleming, 364 S.W.2d 892 (1963) and the director of law for the Nashville-Davidson County Metropolitan Government in Sitton v. Fulton, 566 S.W.2d 887 (1978) were declared to be officers. In the former case, the Tennessee Supreme Court, citing Glass v. Sloan, 282 S.W.2d 397, said:

In deciding whether a particular employment is an office within the meaning of the Constitution or statutory provisions, it is necessary that each case be determined by a consideration of the particular facts and circumstances involved; the intention and subject matter

of the enactment, the nature of the duties, the method by which they are to be executed, the end to be obtained, etc.

The line between the public office and public employment is sometimes not too clearly marked by judicial decisions. One of the criteria of public office is the right of the officer to claim the emolument of said office attached to it by law. Another one of the criteria of public office is the oath required by law of the public officials,...another the bond required by law of certain public officials. But in determining the question of whether or not this Act under consideration creates an office or employment it is not necessary that all the criteria be present, however, it has been held on good authority that tenure, oath, bond, official designation, compensation and dignity of position may be considered along with many other things. [At 894]

In the latter case, the Tennessee Court of Appeals, citing 67 C.J.S., ' 2 Officers, defined "public officer" as:

...an incumbent to a public office; an individual who has been appointed to or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises functions concerning the public assigned to him by law. [At 889]

Then citing 63 Am. Jur.2d Public Officers and Employees, ' 10, the same Court said: "A public office embraces the idea of tenure, duration and continuity, and the duties connected therewith are generally continuing and permanent." [At 889]

It was not necessary that the charter specifically declare the law director to be an "officer," said the Court. The charter established the position of law director, prescribed the performance of certain duties on behalf of the public for a fixed period of time, set salary, etc.

The county attorney and the law director in Ross and Sitton were elected or appointed for a definite term. Those cases also involved the question of whether those positions were public officials within the meaning of Art. 11, ' 9 of the Tennessee Constitution prohibiting shortening of the term of office, or alteration of the salary, of a local government officer by private act.

In Wise v. City of Knoxville, 250 S.W.2d 29 (Tenn. 1952), the Tennessee Supreme Court

considered the question of whether a policeman was an officer or an employee. The policeman was suspended and terminated, and subsequently reinstated to the position of police officer. He sued for full back salary as a police officer, claiming that the city was not entitled to deduct the money he had earned during the period of his suspension and termination. The Court held that while a public officer would have been entitled to his full salary for the period he had been wrongfully excluded from office, that rule did not apply to the plaintiff because a policeman was not a public officer. The Court reasoned that:

An “officer” when used in the sense of one who holds an “office” which entitles him to the salary for the entire term, carries with it the idea of tenure for definite duration, definite emoluments *and definite duties which are fixed by statute*. [Citations omitted.] [Emphasis is mine.]

The charter of the City of Knoxville from beginning to end refers to policemen as employees. Charter, secs. 121, 123 and 124. In these charter provisions, policemen and firemen are referred to together. Certainly it cannot be said that a fireman is an officer.

If a policeman is injured in the line of duty, he receives employee benefits as a railroad employee would. If the mayor, who is an officer, is injured in the line of duty, he does not receive employee benefits in such a manner.

A City Director, under the charter of Knoxville can retire a policeman or any other employee but cannot retire an official.

The city policeman is paid a salary like a railroad engineer or a brakeman. He must report at a certain hour and goes off duty at a certain hour. He does the work assigned to him like a secretary or a nurse at a municipal hospital.

A policeman is not an officer, but a mayor, a sheriff or a judge is an officer. [At 31]

However, in Gamblin v. Town of Bruceton, 803 S.W.2d 690 (Tenn. App. 1990), the Court, citing the first paragraph of Sitton quoted above, held that an appointed recorder who did not have a definite term was an officer under the charter. That case indicates that the threshold for being an officer under a municipal charter is quite low in Tennessee. There the recorder argued he was an employee covered by the city's personnel policies regulating termination.

Citing its definition of “officer” in Sitton v. Fulton, the Court rejected that claim, pointing to Section 3.04 of the Bruceton City Charter, which provided that:

Section 3.04. Town recorderBappointment and duties. The board shall appoint a town recorder who shall have the following powers and duties as may be provided by ordinance not inconsistent with this Charter:.... [At 692]

Without even outlining those powers and duties, the Court pointed to Gamblin’s appointment by the board of mayor and aldermen and declared that, "It is clear that Gamblin is a public officer or official and not an employee." [At 693]

Although the Court did not outline them, the Bruceton City Charter prescribed the following duties for the recorder in Gamblin:

- (a) To keep and preserve the town seal and all official records not required by law or ordinance to be filed [filed?] elsewhere.
- (b) To attend all meetings of the council and to maintain a journal showing the proceedings of all such meetings, the councilmen present and absent, each motion considered, the title of each resolution and ordinance considered, and the vote of each councilman on each question. This journal shall be open to the public during regular office hours of the town subject to reasonable restrictions exercised by the town recorder.
- (c) To prepare and certify copies of official records in his office....
- (d) To serve as head of the Department of Finance.
- (e) To serve as town judge if appointed by the council.
- (f) To coordinate under the supervision of the mayor, the activities of all administrative divisions or line departments, serve as special liaison between the Mayor and divisions, departments, boards, commissions and other bodies, and perform such administrative and executive duties as may from time to time be assigned to him by the mayor.

Gamblin, by itself, suggests that it is not difficult to be a public officer in Tennessee.

Elective City and County Positions

It goes without saying that a person who is a member of the city council, or of the county commission, is an officer within the meaning of the above case law.

Appointees to City Boards

Parks and Recreation Board. It seems to me a close question whether the members of the city's parks and recreation board are officers. That board appears to be established under the Municipal Code, ' 1-1001 et seq.. Under ' 1-1001, that board is to consist of 10 members appointed for terms of two years. It has various powers under Section 1-1004 to operate a parks system. With respect to personnel powers over control over parks and recreation personnel, the board can only make "recommendations," but it does have the authority to establish a parks and recreation system, and to impose fees and charges for the maintenance and operation of the parks and recreation system. Apparently, the statutory foundation of the board is found in Article I, ' 4(15), of the City Charter, which gives the city the authority to "establish, open, locate.... parks.... and public grounds and properties within or without the corporate limits, and to regulate the use thereof."

Nothing in either the Municipal Code nor the Municipal Charter mention Tennessee Code Annotated, ' 11-24-103B105, which authorize cities (and counties) to establish parks and recreation programs under "one (1) *and only one (1) of the following methods* [outlined in two statutes]" The first method is contained in Tennessee Code Annotated, ' 12-4-103. It authorizes a city governing body to appoint a recreation board, but the board is an advisory board that expressly has no personnel authority, cannot expend public funds, and cannot promulgate rules and regulations. All those powers remain in the city's governing body. There are no terms prescribed by that statute for members of the parks and recreation board. The second method is contained in Tennessee Code Annotated, ' 11-24-104, which authorizes the governing body of the city to establish a recreation system under the control of a recreation board or commission, school board, or park board, which actually operates the recreational program. That statute prescribes a term of five years for members of the parks and recreation board, and they have broad authority to operate the recreation program. .

Tennessee Code Annotated, ' 11-24-103 was amended by Public Acts 1985, Chapter 133, to provide that:

Nothing in this section shall be interpreted as abolishing or limiting the powers or authority of local parks and recreation boards or special boards of trustees with responsibility for park properties pursuant to existing state law.

I do not know when the city's parks and recreation board was established. One could ask the question at this point whether the parks and recreation board is legally established. However, if we simply assume that the Parks and Recreation Board is legally established under the Municipal Charter and Municipal Code, the question remains: are its members officers.

Its members have terms under the Municipal Code, which is one of the indices of

whether a person is an officer, but it is difficult to argue that the parks and recreation board is assigned any “definite duties fixed by statute,” at least in the sense of a state statute. Article I, ' 4(15) gives the city the authority to establish and operate parks, but prescribes no scheme for how that may be done, and certainly assigns no definite duties to whoever operates the park. It could as well be done by the city’s governing body as a park board. But Pope v. Commissioner of Internal Revenue, 138 F.2d 1006 (6th Cir. 1943) declares that:

Giving the word “office” the sovereignty of the state attaches for its technical qualities, five elements would seem indispensable in order to make a public office of a civil nature. (1) It must be created by the Constitution or the Legislature. (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public. (3) The powers conferred and the duties to be discharged must be defined either directly or indirectly by the Legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The office must have some permanency and continuity and the officer must take an oath. [At 1009]

Under that definition of “office,” members of the Parks and Recreation Board seem to be officers, with the possible exception of the taking of an oath. That definition contemplates a government being able to create an office if it has the authority under statute to do so, and to assign to that office sovereign power. If it is accepted that the City can establish a parks and recreation board under its municipal code *through its charter* as well as under Tennessee Code Annotated, ' 11-24-103B104, it can be argued that members of that board meet the Pope definition of “officers.”

I will point out here that Pope has been ignored in Tennessee cases involving the definition of “officer,” and has been cited in only one Tennessee Attorney General Opinion (95-115) which deals with the question of whether a certain public officer can refuse a salary increase. It may be that the Tennessee state courts would hold that the state statute itself must define the duties that make the person in question an officer. But even though it is a close question whether the members of the Parks and Recreation Board are officers I conclude that they probably are. They have terms, and some of the duties of officers, even though they are fairly limited, even though their terms and duties derive indirectly from state law through the city’s charter.

Airport Authority. The Airport Authority is provided for in the Municipal Code, Title

1, Chapter 9. This chapter expressly confers upon the airport authority all the powers, etc., that are conferred upon airport authorities under the Airport Authorities Act, codified in Tennessee Code Annotated, Title 42, Chapter 3. However, the Airport Authority Act provides for a term of five years for members of the airport authority, whereas under the Municipal Code, ' 1-901, they serve at the pleasure of the city's governing body.

But Article I, ' 4(30) authorizes the city to “purchase, acquire, establish operate for said City a Municipal airport or landing field for the use of aircraft either within or without the limits of said City....” Presumably, the Airport Authority is established under that provision, and is given the powers of airport authorities established under Tennessee Code Annotated, Title 42, Chapter 3 (except the authority to acquire real estate without the approval of the city council).

The members of the parks and recreation board have terms, the members of the airport authority have none. But the powers of the airport authority are much broader than are the powers of the parks and recreation board. The city recorder in Gamblin v. Town of Bruceton did not have a term, but he did have duties prescribed by law, in that case the city charter. The duties prescribed for the members of the airport authority do not derive directly from the state law, but from a city ordinance establishing the airport authority and prescribing the duties of the members of that authority. Whether that prescription would satisfy Gamblin v. Town of Bruceton isn't certain, but it apparently meets the prescription of Pope, which would allow indirect duties prescribed by the city, if authorized by state statute.

The fifth element that goes into making a person an officer under Pope requires that “[t]he office must have some permanency and continuity.” The members of the Airport Authority have no term, but the “office” of airport authority member itself is probably one of permanency and continuity.

Again, it may be a close question whether members of the Airport Authority are officers, my conclusion is that they are.

Other city boards. The Municipal Code indicates there are only the Parks and Recreation Board and the Airport Authority. There may be other boards and commissions which do not appear in that Code. It is likewise true that there is probably also a municipal planning commission, and a board of zoning appeals. I think it is safe to assume that due to the terms and duties prescribed for members of the latter two boards that those members are public officers. Whether that is true of the members of any board that does not appear in the Municipal Code must be answered on an individual basis.

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Bedford County Equalization Board. There appears no question but that members of county boards of equalization are officers under any definition of the term. Tennessee Code Annotated, 67-1-401 et seq. and 67-5-1401 et seq., prescribe the appointment of such boards by county governing bodies, prescribe a term for members of equalization boards, prescribe an oath of office, and prescribe in exquisite detail a statutory list of high and significant duties for members of such boards.

Bedford County Road Board. The Bedford County Road Board appears to be established by Private Acts 1975, Chapter 30, as amended. Members of the road board are elected by districts from nine road districts. The road superintendent is also elected, but in a county election. He has broad operational powers over the county highway department, but the road board itself has significant legislative duties, including budgetary functions. The road commissioners take an oath of office. For those reasons, it also appears certain that members of the county road board are public officers.

I hope this letter answers your question, at least to the extent that there is a solid answer with respect to the members of some city boards. If I can help you further, please let me know. You may want to review the case law cited in this letter to determine whether we are in agreement on its conclusions.

Sincerely,

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Senior Law Consultant

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