

MEMORANDUM

FROM: Sid Hemsley, Senior Law Consultant
DATE: August 22, 2006
RE: Vice-mayor's elevation to mayor under General Law Mayor-Aldermanic Charter

You have the following questions, which are based on the facts that the city is chartered under the general law mayor-aldermanic charter, and that the city has a mayor, whose term of office expires in November, 2008, and two aldermen, whose terms of office expire in November 2006:

1. If the mayor resigns, does the vice-mayor become the mayor until the expiration of the mayor's term in 2008?

The answer is yes.

Sections 6-3-107(a) and (b)(1) of the general law mayor-aldermanic charter provide that:

(a) The board shall elect an alderman to the office of vice-mayor, who shall serve as mayor when the mayor is absent or unable to discharge the duties of the mayor's office, and in case of a vacancy in the office of mayor, until the next regular municipal election.

(b)(1) By affirmative vote of a majority of the remaining members, the board shall fill a vacancy of the office of alderman for the unexpired term, but any portion of an unexpired four-year term for alderman or mayor that remains beyond the next municipal election shall be filled by the voters at that election, if the vacancy occurs at least twenty (20) days before the latest time for filing nominating petitions for candidates in that election.

Those provisions appear to make it clear that the alderman who serves as the vice-mayor and who is elevated to the office of mayor when the mayor's office becomes vacant, serves until the next municipal election. The next election in the City, within the meaning of those provisions, is November, 2008.

2. What happens to the vacant alderman's seat? Is there an election in November, 2006

for two aldermen?

I calculate the last date that a candidate for a municipal office can have his name removed from the ballot in a November election as Thursday, August 24. [Tennessee Code Annotated, " 2-5-101 and 2-5-204.] After that date, the 2006 election for aldermen will go forward with all the names of the candidates of aldermen on the ballot unless any candidate has his name removed by that date. The alderman who is the vice-mayor may win or lose that election. If he loses, obviously, another candidate will take that office. If he "wins" there will be a vacancy in the office of alderman, which will be filled by the remaining members of the board of mayor and aldermen for a term that will expire on the date of the November 2008, election, and his successor will be elected for a term that will expire on the date of the 2010 election.

An interesting aspect of this question is that where an aldermen appointed to the office of vice-mayor, and who is elevated to the office of mayor upon the mayor's resignation at the beginning of his [the vice-mayor's] term, loses two years of his office as alderman. Does he have a remedy for that?

Oaths of office are prescribed by Section 6-3-105 of the general law mayor-aldermanic charter for the office of mayor and aldermen. The oath appears to apply to regular elections in which are elected a mayor and aldermen, but by strong implication applies to any mayor or aldermen at any time they take office.

Oaths of office in Tennessee are mandatory. That answer is supported most recently by the Tennessee Supreme Court in State ex rel. Wyrick v. Wright, 678 S.W.2d 612 (Tenn. 1984). There a Rockwood City Councilman died before taking the oath of office. The question was whether he had taken office by virtue of his election even though he had not taken the oath of office. The Rockwood City Charter expressly provided that city councilmen "shall" take an oath of office before entering upon the duties of their offices. He did not hold office at his death because he had not taken the oath of office, held the court, reasoning that:

In State ex rel. Gann v. Malone, 131 Tenn. 149,172 S.W. 257 (1915), the Tennessee Supreme Court stated that when the statute required the taking of an oath of office, the elected officer does not qualify and the term of office does not commence until the prescribed oath is taken....Other authorities have recognized that the statutory requirement of taking the oath of office is mandatory rather than directory and the term of office does not commence until the oath is taken. See *City of Evansville v. Brown*, 171 Ind. App. 284, 356 N.E.2d 691 (1976); *Kohler v. Cobb*, 31 N.J. 369, 157 A.2d 681 (1960); *Hickey v. Hargraves*, 194 Ark. 64, 105 S.W.2d 88 (1937); *Logan County Bd. Of Educ*, 241 Ky. 166, 43 S.W.2d 691 (1931); see also R. Cooley, *Handbook of the Law of Municipal Corporations* ' 57, at 206-07 (1931); 3 E. McQuillin, *The Law of Municipal Corporations* ' 12.97 (3rd ed. 1982); 2 C.

Sands & M. Libonati, *Local Government Law* ' 10.18 (1981).... It follows that the office to which Cole was elected was vacant on July 1, 1983, and because of Cole's failure to take the oath and qualify prior to his death on July 8, it remained vacant until filled by the election of Wright on July 18, 1983, in accord with Article IV, Section 3 of the Rockwood City charter. [At 64-65.]

Presumably, a person elected by the board to the office of vice-mayor could decide not to take the oath of office as the mayor without losing his seat as a member of the board of mayor and aldermen. Needless to say, a city would want to insure that the person selected to be the vice-mayor would want to succeed to the office of mayor in the event that office became vacant.

As you can see, Section 6-3-107 needs some legislative attention, especially with respect to the fact that an alderman can, in some instances, lose two years of his aldermanic office if he ascends to the office of mayor.