

Minutes State Election Commission Meeting October 20, 2009

The State Election Commission meeting was called to order by Chairman Wallace at 11:15 a.m. with Commissioners Blackburn, DuBois, Head, and Younce present. Commissioner Duckett participated by phone. Election staff members present were Mark Goins - Coordinator of Elections and Kathy Summers - Elections Specialist.

Motion was made, seconded and unanimously approved to adopt the minutes from August 18, 2009 and September 15, 2009 (telephonic meeting) meetings.

Pursuant to T.C.A. § 2-12-101 and 2-12-106, motion was made, seconded and unanimously approved to accept the nominations for county election commission appointments as submitted and to leave the nomination process open until 4:30 p.m. central time October 20, 2009. **(See attached New Appointment Status Report for appointments made.)**

New business

Coordinator Goins advised commissioners of a letter received, prior to the start of the meeting, from Dick Williams of Common Cause. Mr. Williams is questioning the wording of the minutes from July 21, 2009. (Letter from Dick Williams of Common Cause is attached.)

Chairman Wallace stated Common Cause has sued the State Election Commission and the Coordinator of Elections. Chairman Wallace recognized Mr. Williams to tell the commission his argument or points he would like to make before the commission to correct the July 21, 2009 minutes.

Mr. Williams stated the following on October 20, 2009:

“Right obviously I am not going to address the lawsuit per se. Although this question is central to the lawsuit about the standard required. And I certainly don’t want to take your minutes to argue my case or yours, but just to reflect what I meant. At least I hope I said, I think you have a tape and I’d be very embarrassed if I said exactly what is in the minutes. And I know you are not actually quoting me here I understand that. But I would be very surprised and embarrassed if I said we lobbied for the quote “higher 2005 machine standards.” I imagine that I did...had frequently said that we in bringing the bill and advocating for it and working on amendments, did want to require in the law that the federal standards, even though they are voluntary, that we wanted them to be required...and we wanted them to be

high standards but at the time we did not even know or think anything about anything about 2002 versus 2005. And we certainly would not have wanted to require standards in the law that would mandate machines that did not exist at the time let alone maybe now. So again, I suggest possible language that I think reflects what I have said. I certainly would defer to if you have a tape recording of it and want to go into that detail or have anything else that I said about we wanted higher federal standards but not use the figure 2005 for sure. I would be happy to entertain any questions or comments or to what extent you want to get into it. This point won't affect the lawsuit either way it could well embarrass me but I am sure you are not worried about that. I am concerned that the record not reflect something that I am certain I would not have said. Certainly should not have said and certainly did not mean."

Chairman Wallace read the specific section of the July 21, 2009, minutes in question.

The section in question reads:

Dick Williams of Common Cause spoke about how his group lobbied for the higher 2005 machine standards mandated in the Tennessee Voter Confidence Act (TVCA). Mr. Williams also spoke about the overall intent in the TVCA was for optical scan machines to be used in future elections.

Chairman Wallace requested the playing of the tape from the July 21, 2009 meeting.

The tape of July 21, 2009 was played and the following was the statement of Mr. Williams:

"I know you do not want to get into a running debate especially with a non member but just two points. I agree with all the facts that Mark and I interacted with Gary Odom and Senator Joe Haynes almost as much as he has...well over the years more than he has. But two points that we would make and I personally don't necessarily believe the elections have been stolen but the possibility or the probability of either error or (inaudible on tape) we believe are much greater on DRE's. So we think two possible solutions...and it is a dilemma it is as Tre pointed out in his editorial Sunday. 'I told the Senate Committee we are in a Catch - 22 on this.' We and I was involved in drafting the Voters Confidence Act. I am not a lawyer. So I can't speak to some of the technicalities. We were going for what we considered to be the highest standards which would be 2005 EAC standards. We did not realize at the time that nothing would qualify for a optical scan 2005 standard now or maybe by 2010. But there are two possible solutions. One would be a legal interpretation that the intent of the law was to implement paper ballot optical scan equipment by 2010. And it is an important but a technical point about what's standard. And there are

states...there are over thirty (30) states and countries that are doing some form of optical scan equipment that is acceptable and while it is not 2005 standards it is not as good as what might become with 2005 standards. It's better for confidence in our point of view than the existing system in 93 of the counties. And then secondly it would be easy to amend...amend the law. Of course that cannot be done until January...January 1st (inaudible on tape) obviously. It could be amended if you don't go with a court interpretation that the intent supersedes a small technicality. Then it could easily be intended not to say 2002 EAC standards, which don't exist. Which in the rhetoric we say sometimes it has been said go back to 2002. But you could take standards that are in use, that you could even go see, hopefully, in an election for 2010 for optical scan paper equipment that we would like to see done. Now it is up to the legislature of course to agree to that or to a court to agree to that intent. And I agree with you. It would be good if this body came to a firm consensus even though I might not like what consensus you come to it might be comfortable for the legislature."

Tape continues and Commissioner Younce asked since he is a new member on the commission that the speaker please identify himself.

Mr. Williams continues as follows:

"I am Dick Williams. I am the State Chairperson of Common Cause in Tennessee. I have lobbied the legislature on these kinds of issues. I appreciate it. I know I meant to introduce myself to you. Again, I tend to get in a running debate but I wanted to make those points from our point of view."

The October 20, 2009 tape was turned back on and Dick Williams stated:

"Obviously at that point and time, at this meeting, I did agree that Sally Swaney's legal opinion was the only thing the legal opinion had and it said the language did mean 2005. However, we did not lobby for quote "the higher and we question even the term higher 2005 standard." So I was saying there that the language we did lobby for high federal standards. But we certainly did not lobby for standards that we did not know at the time could not be met and so even if you wanted to say we lobbied for standards that were interpreted later to be 2005 or whatever. I think it misstates what my intent that I may have not stated as clearly as I should have to say that we lobbied for 2005 machine standards. We agreed with the language not knowing that it meant something that could not be enforced at the time."

Motion was made, seconded and unanimously approved to transcribe Mr. Williams's testimony from the July 21, 2009 meeting. Chairman Wallace stated to include the letter from Mr. Williams with the minutes of October 20th and in those minutes include what Mr. Williams said and transcribe

word for word what he said in the July 21, 2009 meeting. Chairman Wallace stated that the playing of the July 21, 2009 tape confirms the original minutes were correct.

Chairman Wallace advised commission members there has been a complaint filed against County Election Commissioner David Amonette in Sumner County. Mr. Amonette serves as a city attorney for one of the cities in Sumner County. Chairman Wallace requested a notice be sent to have him appear at our next meeting.

Coordinator Goins - Update:

- ⇒ Coordinator Goins spoke regarding the complaint filed on Commissioner Amonette. Commissioner Amonette has contacted our office on behalf of the city seeking election guidance. Our office has also contacted him when there have been issues regarding city elections. There are concerns should a contest of election on behalf of the city be filed he is a county election commissioner it would be a conflict of interest.
- ⇒ Coordinator Goins addressed additional concerns regarding the qualifications of James Crowe. He is a commissioner in Stewart County. Concerns have arisen he may be a state government employee.
- ⇒ Coordinator Goins also addressed Beau Pemberton of Weakley County. Questions have been raised regarding his residency. Concerns have been that he does not meet the residency requirement of two (2) years to qualify as a member of the county election commission.
- ⇒ Coordinator Goins handed out machine packets from Dominion and Unisyn. Both companies are seeking certification to the 2005 EAC standards.
- ⇒ Election results for the recent special election were entered in real time by the local county election commissions and automatically uploaded to the Elections website. This process will work for most counties.

Commissioner Head requested, prior to the next meeting, staff provide State Election Commissioners with the specific law regarding appointments and residency.

Commissioner Duckett also asked if there could be an opinion given on whether or not by registering in another county does that technically change

a person's residence for the purpose of county election commission appointments.

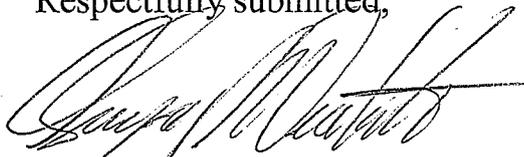
⇒ Coordinator Goins addressed the complaints filed regarding the Unicoi and Cumberland County Election Commissions and the possible violations of the Sunshine Law.

Commission members discussed the complaints. It was agreed the Coordinator's office would send a letter to the county election commissions advising them of their obligation to meet the Sunshine Law and any perceived violation could be reviewed before the courts. (Copies of complaints attached.)

The next meeting will be held on November 17, 2009 at 11:00 a.m. in the Robertson Room of the William R. Snodgrass-Tennessee Tower.

Motion was made to adjourn, and there being no further business to come before the commission at this time, the meeting was adjourned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Greg Duckett", written over a horizontal line.

Greg Duckett, Secretary
State Election Commission

Vacant Status

20-Oct-09

Anderson

D Tom Wheeler
R Kent Younce

R

Benton

D Greg Duckett
R Jimmy Wallace

D

Hamilton

D Tom Wheeler
R Judy Blackburn

R

Houston

D Greg Duckett
R Tom DuBois

D

Jackson

D Tommy Head
R Kent Younce

D

Perry

D Greg Duckett
R Tom DuBois

D

Sevier

D Tom Wheeler
R Judy Blackburn

D

Total Vacancies: 7

New Appointment Status

20-Oct-09

		Appointment
Anderson	D Tom Wheeler / R Kent Younce R Mark Thomas Smith	10/20/2009
Benton	D Greg Duckett / R Jimmy Wallace D Emory Florence	10/20/2009
Houston	D Greg Duckett / R Tom DuBois D Nora DeJuliis	10/20/2009

Total New Commissioners: 3



P.O. Box 150781 Nashville, TN 37215

(615) 321-9072

October 19, 2009

Coordinator Goins & Acting Secretary Head

State Election Commissioners

I only recently downloaded the minutes from the July 21, 2009 meeting of the State Election Commission. I appreciate your including mention of my comments to the commission. However, I must suggest a correction to the wording where the minutes state that (I), on behalf of Common Cause, spoke about how (my) group lobbied "for the higher 2005 machine standards...."

While I was speaking extemporaneously, without notes, I am certain that I would not have put it that way. We absolutely lobbied to have the TVCA require the "applicable" federal standards and agreed to the language that was adopted in the bill. However we never thought, nor did the legislature in 2008 discuss "2005" or any standards to which no machine could comply at the time. I appreciate the second sentence of the paragraph reflecting my statement about the "overall intent" of the Act.

I have recognized that the "Swaney Memorandum" of June 2009 interprets certain language in the bill to mean the "2005 standards" and I understand why many in the Legislature and the Secretary of State/Election Commission agree, but we have challenged that interpretation both literally and in light of clear legislative history.

I am requesting that the minutes of July 21 be revised at your next meeting or that this memo be appended to either the July minutes or those of the next meeting where it can be considered.

I don't expect an extensive rewrite, nor do I expect to dictate the wording of your minutes, but I believe that something like the following replacement for the sentence referenced above would follow the style and detail of your minutes without incorrectly reflecting my position: "Dick Williams of Common Cause spoke about how his group lobbied for appropriate federal standards to be mandated in the Tennessee Voter Confidence Act (TVCA)."

Thank you for your consideration and I will be happy to discuss this at your next meeting, as appropriate.

Dick Williams, State Chair of Common Cause/TN



STATE OF TENNESSEE
ELECTIONS COMPLAINT FORM

2009 JUL 21 PM 9:10

Instruction/checklist:

- Please complete the following information. Please **PRINT**.
- Provide all relevant information. You may attach any other information to your complaint form.
- This complaint is not confidential.
- If your complaint involves voting systems, accessibility issues for those individuals with disabilities, provisional voting, voter information requirements, or Tennessee's computerized statewide voter registration list, you must complete a Title III HAVA complaint form.

1. In what city and county, did the following activities occur?

Unicoi and Unicoi County
City County

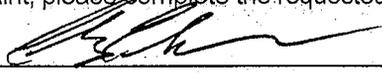
2. On what day(s) did the incident occur? from April 6, thru July 7, 2009

3. Please explain what happened. Be as specific as possible. Include the names of anyone involved (if applicable) and/or the activity that took place? _____

Violation of his Oath of Office, "to support the Constitution and Laws of the United States
and the Constitution and Laws of the State of Tennessee," and to "faithfully and impartially
discharge the duties of his office" by Chairman Thomas M. Reeves. Unethical activities,
and deliberating in secret with other Commissioners, in violation of the Tennessee Open
Meetings Act, T.C.A. 8-44-101 subdivision (a)

(Please See Attachments for Specific Details)

If you would like a written response to this complaint, please complete the requested information below.

Complainant's Name: Charles E. Apple 

Address: 321 Golf Course Road, Unicoi, Tennessee, 37692-6419
City State Zip Code

Telephone Number [optional]: (423) 7 3 5 0 4 9 4

Agenda Item

Events relative to Chairman Reeves

2009 JUL 24 AM 9:40

1. Friday, July 3, 2009, an Agenda Item is mailed to the Administrator of Elections, and to all members of the Election Commission (see attachment for specifics of the Agenda Item).
2. Tuesday, July 7, 2009, Chairman Thomas M. Reeves called me and asked that I withdraw the Agenda Item regarding the Administrator of Elections. The discussion became heated, and Chairman Reeves told me "I have the votes! Do you?" regarding the Agenda Item to Reconsider the appointment of Administrator of Elections on November 1, 2005.
3. Saturday, July 11, 2009, I received the Notice of Meeting, and the Agenda Items, which included my Agenda Item of July 3, 2009, to be introduced, and deliberated by Commissioners during the public meeting scheduled for Monday, July 20, 2009 at 5:00 pm.
4. Sunday, July 12, 2009, I decided that it would be pointless to pursue the matter any further, since Chairman Reeves had, obviously from his statement, deliberated with others to gain the necessary votes to defeat any attempts at a remedial cure, relative to the appointment of Administrator of Elections, on November 1, 2005; and to withdraw my Agenda Items and resign as an Election Commissioner, since I would not be a party to unethical or illegal activities.
5. On or about Monday, July 13, 2009, Chairman Thomas M. Reeves, of the Unicoi County Election Commission, told a reporter that "he has decided how he will vote" (Note: that this is seven days before, he has heard or seen, the issues which are scheduled to be presented at the public meeting of July 20, 2009 at 5:00 pm).
6. Tuesday, July 14, 2009, the article was published in the Johnson City Daily Press, titled "Unicoi County election commission meeting agenda changes", Page 4A, reported by Jim Wozniak, Erwin Bureau Chief, containing Chairman Thomas M. Reeves statement that "he has decided how he will vote".

July 3, 2009

2009 JUL 24 AM 9:40

Charles E. Apple, Election Commissioner
321 Golf Course Road
Unicoi, Tennessee 37692-6419

Reference: Agenda Item addition

Mrs. Sarah F. Bailey, Administrator of Elections
Unicoi County Election Commission
106 Nolichucky Avenue
P.O. Box 76
Erwin, Tennessee 37650

Dear Mrs. Bailey:

Please add the following motion to the Agenda, as an Agenda Item;

1. AGENDA ITEM:

Motion is made for a "New and Substantial Reconsideration of the issues," relative to the appointment of Administrator of Elections on November 1, 2005.

In the spirit of being open, transparent, and inclusive of all members, I am sending copies of this Agenda Item to each of the Election Commissioners.

Thank you for your assistance,

Charles E. Apple

File

Cc: Commissioner Reeves, Thomas M., Chairman
Commissioner Logan, David, Secretary
Commissioner Parshall, Richard, Member
Commissioner Rogers, Marvin H., Member

July 12, 2009

2009 JUL 24 AM 9:40

Charles E. Apple, Election Commissioner
321 Golf Course Road
Unicoi, Tennessee 37692-6419

Reference: Agenda Item Withdrawal's

Mrs. Sarah F. Bailey, Administrator of Elections
Unicoi County Election Commission
106 Nolichucky Avenue
P.O. Box 76
Erwin, Tennessee 37650

Dear Mrs. Bailey:

I am formally withdrawing the following items from the Agenda, scheduled for the meeting of July 20, 2009 at 5:00 pm;

1. **Item VIII. B.** Consideration of "Rules of Procedure" for public participation, during meetings of the Unicoi County Election Commission, in a fair and orderly manner, pursuant to the rules of decorum.
2. **Item VIII. C.** Motion is made for a "New and Substantial Reconsideration of the issues," relative to the appointment of Administrator of Elections on November 1, 2005.
3. **Item VIII. D.** Motion is hereby made to adopt a standardized "Meeting Notification and Agenda" format that complies with the State of Tennessee Open Meetings Requirements.

The above referenced Agenda Items will neither be moved, nor considered by me.

Thank you for your assistance,

Charles E. Apple



STATE OF TENNESSEE ELECTIONS COMPLAINT FORM

2009 JUL 21 AM 9:40

Instruction/checklist:

- Please complete the following information. Please **PRINT**.
- Provide all relevant information. You may attach any other information to your complaint form.
- This complaint is not confidential.
- If your complaint involves voting systems, accessibility issues for those individuals with disabilities, provisional voting, voter information requirements, or Tennessee's computerized statewide voter registration list, you must complete a Title III HAVA complaint form.

1. In what city and county, did the following activities occur?

Unicoi and Unicoi County
City County

2. On what day(s) did the incident occur? November 1, 2005 to present

3. Please explain what happened. Be as specific as possible. Include the names of anyone involved (if applicable) and/or the activity that took place? _____

1. Violation of T.C.A. 8-44-101 subdivision (a); Tennessee Open Meetings Act of 1974.

2. Violation of T.C.A. 2-12-116 subdivision (a)(1); Evaluation of Administrator of Elections.

3. Violation of their Oath(s) of Office by Election Commissioners on November 1, 2005

thru April 5, 2009. 4. Violation of their Oath(s) of Office by the, remaining, Election

Commissioners as of July 20, 2009 for failure to properly address the above violations.

(Please See Attached Documentation for Specific Details)

If you would like a written response to this complaint, please complete the requested information below.

Complainant's Name: Charles E. Apple 

Address: 321 Golf Course Road, Unicoi, Tennessee, 37692-6419

City State Zip Code

Telephone Number [optional]: (423) 7 3 5 0 4 9 4

This form and/or information is available in alternative formats. To receive a copy contact the State Coordinator of Elections at (615) 741-7956.

Analysis of Appointment Cover Page

2009 JUL 24 AM 9:40

The attached analysis begins with seven (7) specific questions, and the answer to that specific question immediately follows the question itself.

The remainder of the report is a Summary, and Analysis of the relevant events surrounding the appointment of Administrator of Elections, on November 1, 2005, and subsequent reappointment on July 20, 2009. Citations of relevant court cases have been including as inline text to support conclusions.

Attachments include;

1. Minutes of November 1, 2005
2. Minutes of November 14, 2005
3. Election Commissioners on November 1, 2005
4. Election Commissioners on July 20, 2009
5. Cause and Effect Diagram

The purpose of this cover page is to assist the reader in navigating this rather lengthy analysis.

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:40

I. QUESTIONS:

1. Was the appointment of Mrs. Sarah F. Bailey, to the position of Administrator of Elections, on November 1, 2005, in violation of the Tennessee Open Meetings Act of 1974, and/or, Tennessee State Statutes? YES.
2. Do the Election Commissioners have the authority to correct any prior violations of the Tennessee Open Meetings Act of 1974, which may have occurred? YES.
3. Were the Election Commissioners, responsible for the appointment, of Mrs. Sarah F. Bailey, in violation of their Oath(s) of Office, "to support the Constitution and Laws of the United States and the Constitution and Laws of the State of Tennessee," and to "faithfully and impartially discharge the duties of their office," pursuant to T.C.A. § 2-12-104, and T.C.A. § 2-1-111? YES.
4. Were the Election Commissioners, responsible for the reappointment, of Mrs. Sarah F. Bailey, to the position of Administrator of Elections, on July 20, 2009, in violation of their Oath(s) of Office, "to support the Constitution and Laws of the United States and the Constitution and Laws of the State of Tennessee," and to "faithfully and impartially discharge the duties of their office," pursuant to T.C.A. § 2-12-104, and T.C.A. § 2-1-111? YES.
5. Did the ratification, of Mrs. Sarah F. Bailey to the position of Administrator of Elections, at the public meeting of July 20, 2009, have any effect? NO.
6. Were the events that took place during the public meeting on July 20, 2009 consistent with those of the public Notice of Meeting, and published Agenda Items, dated July 10, 2009? NO.

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:40

7. Were the events that took place during the public meeting on July 20, 2009 in compliance with the public Notice of Meeting requirements of the Tennessee Open Meetings Act of 1974? NO.

II. SUMMARY:

In recent months the hardened and/or impassioned rhetoric of a few have attempted to give the impression that this issue is motivated by personalities, emotional opinion, and/or political affiliation; On the contrary, this issue is not about, *who*, was appointed, however, it is about the, *procedures*, used to make that appointment. The minutes of the Unicoi County Election Commission reflect a serious disregard for the Constitution and Laws of the State of Tennessee, and a potential violation of their Oath(s) of Office, by Election Commissioners; which may have rendered the appointment, on November 1, 2005, of Mrs. Sarah F. Bailey, to the position of Administrator of Elections, "*Void and of no effect*," pursuant to T.C.A. § 8-44-105. The failure of Election Commissioners to hold subsequent meetings to effect a cure to, apparent and alleged, violations is indicative of a continued, and open defiance of the Constitution and Laws of the State of Tennessee.

It is well accepted that the formation of public policy and decisions is public business and shall not be conducted in secret," T.C.A. § 8-44-101 subdivision (a). "Tennessee recognizes that the Sunshine Laws are remedial in nature and, as such, should be broadly construed to promote openness and accountability on the part of the government and to protect citizens from private deliberations at all stages in the political process. Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992) (citations omitted); Souder v. Health Partners, Inc., 997 S.W.2d 140, 145 (Tenn. Ct. App. 1998) (citations omitted); John McElroy II v. Thomas Strickland, et. al., Case No. 168933-2 (Chancery Court for Knox County, Tennessee, 2007).

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

III. ANALYSIS:

Background:

The Constitutional Convention of 1787 produced the most enduring written document ever produced by human hands, the Constitution of the United States of America. The founding fathers hammered out a document that was the result of dozens of compromises, and shaped by the failures of the United States under the Articles of Confederation, as well as the failures of all well known European governments of the time. They had a clean slate from which to write, however, the founding fathers recognized the wisdom of the "Rule of Law", to limit government to its proper role, that of protecting the rights of the people.

Similarly, Article I, Section 1, of the Constitution of the State of Tennessee provides; "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness." Article I, Section 19, provides; "That the printing press shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." To further reinforce these principles, the Tennessee State Legislature passed the Open Meetings Act of 1974.

In support of these principles, and to assist deliberative assemblies in the performance of their duties, Major Henry Martyn Robert, (*subsequently attaining the rank of Brigadier General in the United States Army*), published his 1st Edition of "*Robert's Rules of Order*", in February of 1876. The essence of parliamentary procedure, as presented in "*Robert's Rules of Order*," is for ". . . the majority to give to the minority a full, free opportunity to present their side of the case, and then for the minority, having failed to win a majority to their views, gracefully to submit, and to recognize the action as

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

that of the entire organization, and cheerfully to assist in carrying it out, until they can secure its repeal," RONR (10th ed.), p. XLIV.

Through a collaborative effort of the voting members of an assembly, in conjunction with the input of the citizens, and guided by the "Rule of Law", we are able to create a resource that is far superior to anything that any of us could have accomplished alone.

Key Issue No. 1 – The Citizens of Unicoi County were denied knowledge of the Vacancy, and Appointment, before the fact:

1.1 Vacancy – It is apparent from a thorough review of the official minutes of the Unicoi County Election Commission that the Citizens of Unicoi County were not given Public Notice of the pending resignation, of Mrs. Margo Herndon, from the position of Administrator of Elections:

It is recognized that in many circumstances, the resignation of an employee cannot be anticipated sufficiently in advance to provide adequate Public Notice, prior to a meeting taking place; however, if this had been "New" information, presented for the first time, Election Commissioners were prohibited by the State of Tennessee Open Meetings Act of 1974 from discussing, deliberating, or taking action on the item until, such time, that the item was properly noticed according to the State of Tennessee Open Meetings requirements.

The official minutes of the Unicoi County Election Commission meeting of November 1, 2005, reveal that the Election Commissioners did, in fact, discuss, deliberate and take action on the resignation, of Mrs. Margo Herndon, prior to the item being given adequate Public Notice as required by the State of Tennessee Open Meetings Act of 1974.

In support of the allegations that some Election Commissioners had prior knowledge of the vacancy, the minutes reflect that two or more Commissioners were, at least, sufficiently aware of the pending

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

vacancy in order to deliberate, (*in secret*), toward an immediate replacement to fill that vacancy, following the reading of Mrs. Margo Herndon's resignation at the Public Meeting of November 1, 2005.

- 1.2 Appointment** – It is apparent from a thorough review of the official minutes of the Unicoi County Election Commission that there was no Public Notice given for the appointment of Mrs. Sarah F. Bailey, to the vacant position of Administrator of Elections, prior to the Public Meeting of November 1, 2005.

The minutes reflect that two or more Commissioners deliberated, (*in secret*), toward appointing Mrs. Sarah F. Bailey, to the vacant position of Administrator of Elections, prior to the Public Meeting of November 1, 2005, at least to the extent, that one Commissioner moved to make the appointment, and another Commissioner seconded that motion. In order to make, and second this motion, there must have been prior knowledge of the fact, and, reasonably assured, that such a motion would prevail.

The manner in which the vacancy and the appointment were made, appear to have circumvented the intent of the General Assembly and the Spirit of the Open Meetings Act of 1974, T.C.A. § 8-44-101, subdivision (a).

Courts have held that; "Simple knowledge of the final acts or vote seldom provides the public an understanding of governmental activities;" John McElroy II v. Thomas Strickland, et. al., Case No. 168933-2 (Chancery Court for Knox County, Tennessee, 2007). "That if the Open Meetings Act is to be broadly construed to promote openness and accountability on the part of the government that simply exposing the activities of a governing body only in those instances where a quorum, or so-called "walking quorum", is present only leaves the public with the end of the story without insight into the deliberative process that led up to the ultimate decision;" John McElroy II v. Thomas Strickland, et. al., Case No. 168933-2 (Chancery Court for Knox County, Tennessee, 2007).

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 26 AM 9:41

Key Issue No. 2 – Selected Commissioners were denied knowledge of the Vacancy, and Appointment, before the fact:

- 2.1 Vacancy** – It is apparent from a thorough review of the official minutes of the Unicoi County Election Commission that the Election Commissioners were not given a Published Agenda containing, as an Agenda Item, the pending resignation of Mrs. Margo Herndon, from the position of Administrator of Elections.

It is recognized that in many circumstances, the resignation of an employee cannot be anticipated sufficiently in advance to provide adequate Public Notice, prior to a meeting taking place; however, if this had been "New" information, presented for the first time, Election Commissioners were prohibited by the State of Tennessee Open Meetings Act of 1974 from discussing, deliberating, or taking action on the item until, such time, that the item was properly noticed according the State of Tennessee Open Meetings requirements as an agenda item.

The official minutes of the Unicoi County Election Commission meeting of November 1, 2005, reveal that the Election Commissioners did, in fact, discuss, deliberate and take action on the resignation, of Mrs. Margo Herndon, prior to the item being published as an Agenda Item, as required by the State of Tennessee Open Meetings Act of 1974.

In support of the allegations that some Election Commissioners had prior knowledge of the vacancy, the minutes reflect that two or more Commissioners were, at least, sufficiently aware of the pending vacancy in order to deliberate, (*in secret*), toward an immediate replacement to fill that vacancy, following the reading of Mrs. Margo Herndon's resignation at the Public Meeting of November 1, 2005.

- 2.2 Appointment** – It is apparent from a thorough review of the official minutes of the Unicoi County Election Commission that there was no Published Agenda given that included the pending appointment of

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

Mrs. Sarah F. Bailey, to the vacant position of Administrator of Elections, prior to the Public Meeting of November 1, 2005.

The minutes reflect that two or more Commissioners deliberated, (*in secret*), toward appointing Mrs. Sarah F. Bailey, to the vacant position of Administrator of Elections, prior to the Public Meeting of November 1, 2005, at least to the extent, that one Commissioner moved to make the appointment, and another Commissioner seconded that motion. It is reasonable to conclude that to make such a motion, and to second the same motion, there must have been sufficient prior knowledge of the fact, and, being reasonably assured, that such a motion would prevail.

The absence of a Published Agenda is inextricably related to the absence of a Public Notice; and had a dual effect of depriving; (1) The Citizens of Unicoi County; and (2) various members of the Unicoi County Election Commission, of knowledge of both the pending vacancy and appointment of Administrator of Elections; which appear to have circumvented the intent of the General Assembly and the Spirit of the Open Meetings Act of 1974, T.C.A. § 8-44-101, subdivision (a).

Key Issue No. 3 – The Citizens of Unicoi County were not given the opportunity to apply for, Administrator of Elections, and be given fair, and equal consideration:

3.1 Applications/Resumes – It is apparent from a thorough review of the official minutes of the Unicoi County Election Commission that there was no public request for Applications and/or Resumes, for the vacant position of Administrator of Elections. The intent of not doing so would only be speculative, at best; however, it is equally obvious that the appointment was driven by reasons other than, seeking the best qualified candidate to fill the vacancy of Administrator of Elections.

3.2 Equal Access Denied – The failure of Commissioners to publicly request Applications and/or Resumes, had the effect of depriving the

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

Citizens of Unicoi County of the opportunity to apply for, and be given equal consideration for the position of Administrator of Elections.

The failure of Commissioners to provide equal access to the position of Administrator of Elections had a detrimental effect on the integrity and purposes of the Unicoi County Election Commission, to provide a fair, efficient, impartial and non-partisan election process in which the Citizens of Unicoi County will have confidence.

Key Issue No. 4 – There was no Formal Evaluation Process:

4.1 Chairman of the Commission – The minutes of November 14, 2005, reflect that the Chairman did, in fact, evaluate the qualifications of Mrs. Sarah F. Bailey, for the position of Administrator of Elections. However, the question remains, against whom did he evaluate Mrs. Bailey's qualifications? The Citizens of Unicoi County were not given the opportunity to apply for the position of Administrator of Elections; therefore, there were no other applicants against whom Mrs. Bailey could be evaluated. The Chairman's admission of evaluating Mrs. Bailey's qualifications suggests that he was also aware of the pending vacancy, and the subsequent appointment of Mrs. Bailey to the position of Administrator of Elections, prior to the Public Meeting of November 1, 2005.

4.2 Members of the Commission – The minutes of November 14, 2005, reflect that two (2) Commissioners, *did not*, evaluate the qualifications of Mrs. Sarah F. Bailey, for the position of Administrator of Elections. It is important to note, that one of these two (2) Commissioners is the same Commissioner that moved to appoint Mrs. Bailey, on November 1, 2005; and the other is the same Commissioner that seconded the motion to appoint Mrs. Bailey, on November 1, 2005. The question cries out; why would anyone move to appoint someone to a position of

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

importance, whose qualifications they have never seen or interviewed?
And, why would anyone second such a motion?

The Unicoi County Election Commission is composed of five (5) Election Commissioner's; One (1) admitted to evaluating, Mrs. Sarah F. Bailey, Two (2) admitted that they, *did not*, One (1) expressed his disappointment in the process used, and One (1) remained silent on the question. Therefore, it can only be concluded that a formal and public evaluation process never took place, pursuant to T.C.A. § 2-12-116 subdivision (a)(1); which provides that, "After May 31, 1993, any administrator appointed at large for the first time to such a position shall possess a high school education or GED. In evaluating a prospective appointee, the Commission shall consider the knowledge and experience of such prospective appointee in the following areas;"

- Administration
- Managerial
- Instructional
- Communication
- Budgetarial
- Purchasing
- Promotional
- Legal Skills
- General Office Skills
- Other Related Skills necessary to fulfill the statutory requirements of administrator.

Key Issue No. 5 – Authority to correct previous violations.

During the public Meeting of July 20, 2009 Chairman Thomas M. Reeves stated, "This board has no authority to change history." In contradiction of Chairman Reeve's statement, "The Courts of Tennessee, and the Tennessee Attorney General have held otherwise;

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:51

Courts have held that a governing body, which may have violated the Open Meetings Act, may cure its violations by conducting a subsequent meeting at which it ratifies the prior action. Neese v. Paris Special School District, 813 S.W.2d 432 (Tenn. Ct. App. 1990); Tenn. Atty. Gen. Op. No. 00-095, 2000; Souder vs. Health Partners, Inc., 997 S.W.2d 140 (Tenn. Ct. App. 1998).

Key Issue No. 6 – Ratification on July 20, 2009 was of No Effect.

On July 20, 2009 the statement appeared in the local media, “the Unicoi County Election Commission voted unanimously to retain Sarah Bailey as administrator of elections;” Bailey retained as elections administrator, by Mark A. Stevens, Publisher, (The Erwin Record, July 21, 2009, page 1).

Actions similar to that taken by Election Commissioners on July 20, 2009, have been addressed previously by various Tennessee Courts; and they have held that; “A cure meeting will not be effective, however, unless the ultimate decision is made in accordance with the Open Meetings Act, and it is a “new and substantial reconsideration of the issues” involved. Neese v. Paris Special School District, 813 S.W.2d 432 (Tenn. Ct. App. 1990); Tenn. Atty. Gen. Op. No. 00-095, 2000; Souder vs. Health Partners, Inc., 997 S.W.2d 140 (Tenn. Ct. App. 1998).

Key Issue No. 7 – Public Notice and Agenda for July 20, 2009.

The Public Notice and Published Agenda on July 10, 2009 were not consistent with each other. Items listed in each are as follows;

1. Public Notice – “to discuss personnel issues”.
2. Agenda Item – “Discussion of 2009 TACEO Law Seminar.”
3. Agenda Item – “Consideration of “Rules of Procedure””
4. Agenda Item – “Motion for a “New and Substantial”

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

5. Agenda Item – “Motion to adopt “Meeting Notification”

As can be seen from the above, the primary purpose of the meeting given in the Public Notice of Meeting, dated July 10, 2009, is not listed as an Agenda Item on the Published Agenda. The primary purpose “to discuss personnel issues” as given, is extremely vague. It can cover a wide latitude of issues ranging from the time an individual is employed to such time as he or she retires, resigns, or is terminated, and everything in between. The only action given is limited to “discuss,” whatever issues may come forth.

In an unpublished opinion, the Tennessee Court of Appeals for the Eastern Section outlined a three-pronged test. Under that test, the second prong states, “the contents of the notice must reasonably describe the purpose of the meeting, or the action proposed to be taken.” Englewood Citizens for Alternate B v Town of Englewood, No. 03A01-9803-CH-00098, slip op. (E.S. Tenn. Ct. App. June 24, 1999).

The primary reason given in the public Notice of Meeting is not listed as an Agenda Item, nor does it reasonably describe the purpose of the meeting or the actions that were taken at the meeting of July 20, 2009.

Key Issue No. 8 – Allowed Actions by Commissioners on July 20, 2009.

Of the four (4) Agenda Items, (see Key Issue No. 7), published on July 10, 2009, three were withdrawn, leaving only one (1) Agenda Item, to wit;

1. Agenda Item - “Discussion of 2009 TACEO Law Seminar.”

The primary reason given in the public Notice of Meeting is vague, and not part of the Published Agenda, therefore, it has been excluded; however, even if included, actions would be limited solely to “Discussions”, only.

Election Commissioners at the meeting of July 20, 2009 were limited to the discussion of this single Agenda Item. Any actions presented or taken beyond that were in violation of the Tennessee Open Meetings Act of 1974.

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

IV. POLITICAL AFFILIATION:

In light of the fact that the local media, and a few others, have attempted to sensationalize, and/or, give the impression that these issues are motivated solely by political affiliation, it would be remiss to conclude this analysis without addressing the issue of political affiliation.

It would be difficult to express my thoughts, relative to political affiliation, more succinctly than did President George Washington during his Farewell Address to the People of the United States, on September 17, 1796; therefore, the following excerpts from his Farewell Address, relative to political affiliation, accurately reflect my thoughts, as well;

"Let me now . . . Warn you in the most solemn manner against the baneful effects of the spirit of party [*political party affiliation*], generally."

"This spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or repressed; but, in those of the popular form, it is seen in its greatest rankness, and is truly their worst enemy."

"It serves always to distract the Public Councils, and enfeeble the Public Administration. It agitates the Community with ill-founded jealousies and false alarms; kindles the animosity of one part against another, foment occasionally riot and insurrection."

"There is an opinion, that parties in free countries are useful checks upon the administration of the Government, and serve to keep alive the spirit of Liberty. This within certain limits is probably true; and in Governments of a Monarchical cast, Patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those of the popular character, in Governments purely elective, it is a spirit not to be encouraged."

Unicoi County Election Commission

Analysis of Appointment

Administrator of Elections

2009 JUL 24 AM 9:41

V. CONCLUSIONS:

Little doubt remains, following the preceding analysis, that question No's 1, 2, 3, and 4, presented in Section I, may well be answered in the affirmative; and that question No's 5, 6, and 7, presented in Section I, may well be answered in the negative. With the preponderance of extant case law, a Judge of competent jurisdiction could definitively hold that; the appointment of Administrator of Elections, on November 1, 2005, was, "*Void and of no effect,*" pursuant to T.C.A. § 8-44-105; and, that the Election Commissioners, responsible for that appointment, and subsequent reappointment, were in violation of their Oath(s) of Office, "to support the Constitution and Laws of the United States and the Constitution and Laws of the State of Tennessee," and to "faithfully and impartially discharge the duties of their office," pursuant to T.C.A. § 2-12-104, and T.C.A. § 2-1-111.

VI. VICTIMS:

Most of this analysis has been focused on the appointment, and reappointment of, Mrs. Sarah F. Bailey, to the position of Administrator of Elections. In her defense, Mrs. Sarah F. Bailey was, and still is, as much of a victim, if not more so, in this travesty as was the thousands of Citizens of Unicoi County, by the unethical, and potentially illegal activities by Election Commissioners to exact their own will, for whatever reason, in circumvention of the intent of the Tennessee General Assembly, and the Spirit of the Open Meetings Act of 1974.

VII. ATTACHMENTS:

- Unicoi County Election Commission, minutes of November 1, 2005.
- Unicoi County Election Commission, minutes of November 14, 2005.
- Election Commissioners on November 1, 2005.
- Election Commissioners on July 20, 2009.
- Cause and Effect diagram.

UNICOI COUNTY ELECTION COMMISSION
NOVEMBER 1, 2005
5:30 P.M.

2009 JUL 24 AM 9:41

The Unicoi County Election Commission met Tuesday, November 1, 2005 at 5:30 P.M. in the Election Commission office. All the Commissioners were present. Chairman John Hashe called the meeting to order.

The minutes of the previous meeting were read by Deputy Administrator Teresa McFadden. Commissioner Chambers made a motion to approve the minutes as read. Commissioner Rogers seconded. The minutes were approved as read.

Chairman John Hashe welcomed new Commissioner Marvin Rogers.

Chairman Hashe announced that there would be a meeting with the Building and Grounds Committee and the County Mayor to discuss plans for the new building. The meeting is to be on Thursday, November 3 at 4:00 P.M. and all members were urged to attend.

Administrator Margo Herndon's letter of resignation was read and approved with a motion from Commissioner Chambers and seconded by Commissioner Rogers.

Commissioner Rogers made the motion that they accept Sarah Bailey as Administrator. The motion was seconded by Commissioner Edwards. After discussion, Commissioner Chambers called for a Roll Call Vote. The Commission was unanimous in favor of appointing Sarah Bailey as Administrator.

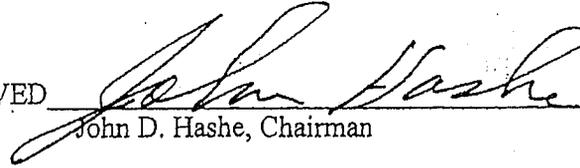
The next meeting of the Election Commission was set for Monday, November 14 at 5:30 to call for the Republican Primary, if necessary.

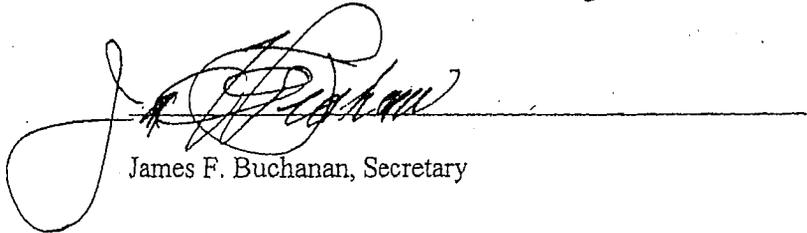
Commissioner Buchanan recommended drawing up a resolution for Margo Herndon. Commissioner Chambers also suggested getting a plaque for her. There was also discussion about the late Commissioner Pat Curtis' resolution.

As there was no further business the meeting was adjourned.

2009 JUL 24 AM 9:41

APPROVED


John D. Hashe, Chairman


James F. Buchanan, Secretary

Prepared by: Paula Tipton, Deputy
Signed: 11-14-05

UNICOI COUNTY ELECTION COMMISSION
NOVEMBER 14, 2005
5:30 P.M.

2005 JUN 24 AM 9:41

The Unicoi County Election Commission met Monday, November 14, 2005 at 5:30 P.M. in the Election Commission office. All the Commissioners were present. Chairman John Hashe called the meeting to order.

Chairman Hashe welcomed Clara Curtis, widow of the late Commissioner Pat Curtis to the meeting. Commissioner Buchanan read a resolution honoring him for his service. Chairman Hashe presented Mrs. Curtis with a copy of the resolution.

The minutes of the previous meeting were read by Deputy Administrator Teresa McFadden. Commissioner Chambers made a motion to approve the minutes as read. Commissioner Edwards seconded. The minutes were approved as read.

Commissioner Buchanan read a letter from the Unicoi County Republican Party informing the Election Commission of their decision to hold a Republican Primary on May 2, 2005. Motion was made by Commissioner Chambers to accept the letter and seconded by Commissioner Rogers. All were in favor.

Commissioner Chambers questioned the procedure used for hiring the new Administrator. He asked Commissioners Hashe, Edwards, and Rogers if they evaluated Mrs. Bailey regarding the qualifications for the job of Administrator. Commissioners Edwards and Rogers said they did not. Chairman Hashe said that he had. Commissioner Chambers expressed disappointment with the way the appointment of a new Administrator was handled.

Commissioner Chambers stated that since the hiring of a new Administrator was not on the agenda for their last meeting, someone should have waived Robert's Rules of Order.

Commissioner Chambers then asked about the salary for the new Administrator. He expressed concern about the county not receiving the State's supplement to her salary as she is not yet certified. Chairman Hashe was asked to clarify with Nashville if the State's supplement would cease if there were a lapse between her six months of service and when the test was to be offered by the State. Chairman Hashe agreed to call Nashville the next day and report back to the Commission at a meeting called for November 15, 2005 at 5:30 P.M. to propose a salary for Sarah Bailey. Motion was made by Commissioner Rogers and seconded by Commissioner Buchanan. All were in favor.

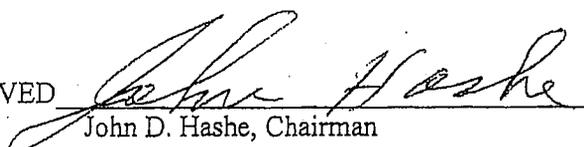
Commissioner Chambers made the motion that the Commission include an agenda with their notification of meetings to the media. The motion was seconded by Commissioner Buchanan. All were in favor.

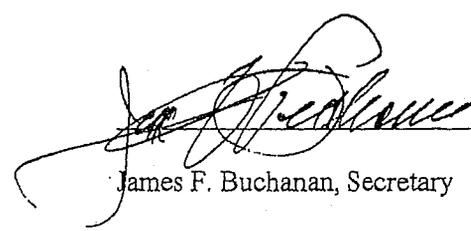
2009 JUL 24 AM 9:44

Commissioner Rogers expressed concern about compliance with the HAVA act in time for the upcoming election. The Commission discussed sending a letter to the County Commission Chairman Lee Brown and County Mayor Larry Rose requesting to be put on the agenda for their November 28, 2005 meeting. Motion was made by Commissioner Buchanan and seconded by Commissioner Rogers. All were in favor.

As there was no further business the meeting was adjourned.

APPROVED


John D. Hashe, Chairman


James F. Buchanan, Secretary

Election Commissioners

on
November 1, 2005

2009 JUL 24 AM 9:42

Name of Commissioners	Position Held		Party
Commissioner, John D. Hashe	Chairman		D
Commissioner, James F. Buchanan	Secretary		R
Commissioner, Joe A. Chambers	Member		R
Commissioner, Marsha C. Edwards	Member		D
Commissioner, Marvin H. Rogers	Member	1 st mtg.	D

Election Commissioners

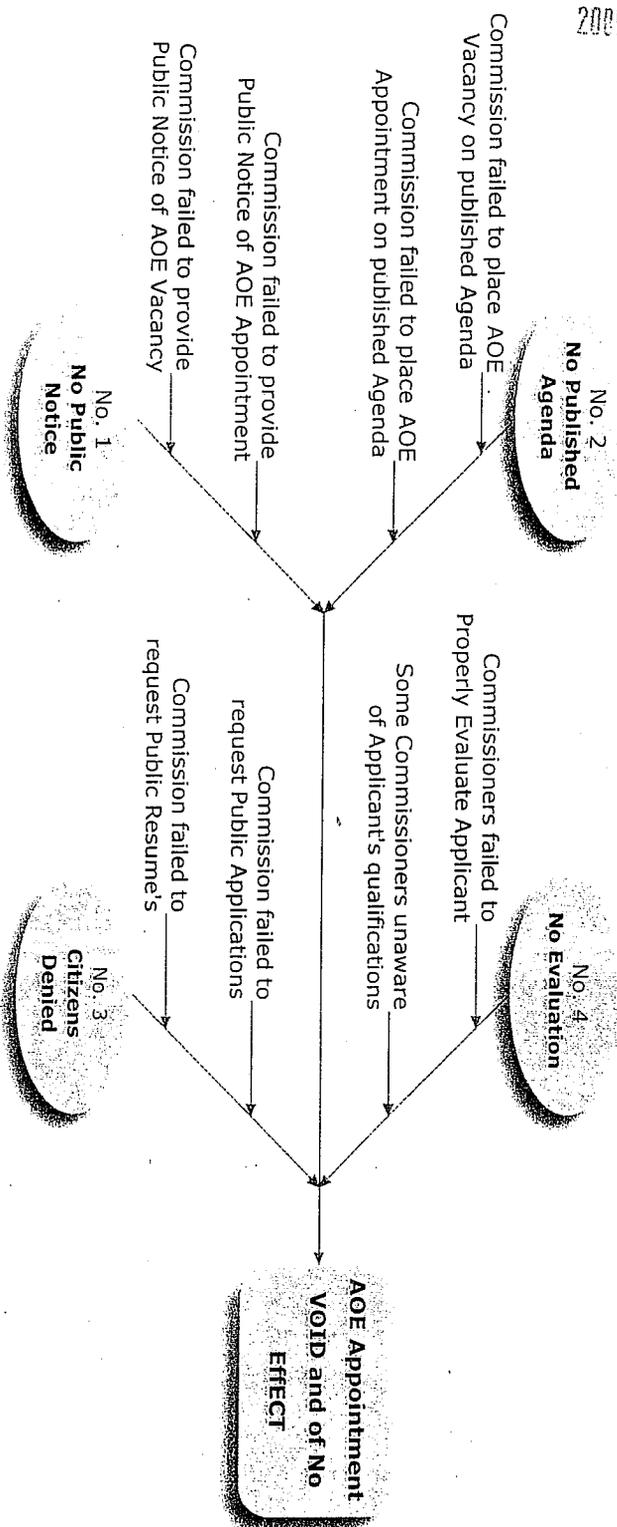
on
July 20, 2009

2009 JUL 24 AM 9:42

Name of Commissioners	Position Held		Party
Commissioner, Thomas M. Reeves	Chairman		R
Commissioner, David G. Logan	Secretary		D
Commissioner, Marvin H. Rogers	Member		D

2009 JUL 26 AM 9:42

Unicoi County Election Commission Meeting of November 1 & 14, 2005



Problems Noted:

- No Public Notice Given.
- No Published Agenda.
- No Adequate Evaluation prior to the appointment.
- Citizens of Unicoi County, and some Commissioners were unaware of the vacancy, and subsequent appointment.
- Citizens of Unicoi County were denied the opportunity to apply for and be given equal consideration for position.

We on the Executive Committee of the Cumberland County Democratic Party would like to express our concern about the state of our Cumberland County Election Commission and Election Administrator's office.

Earlier this year, three new Republican commissioners were appointed following their selection by State Representative Eric Swafford, and it seems that the commission has been in chaos since that time. Despite a letter to Rep. Swafford from the county's Republican officeholders urging him and the commission to retain our experienced and extremely competent Election Administrator, and despite a resolution urging the same which passed our County Commission with only one dissenting vote, the three new commissioners proceeded to summarily dismiss the previous administrator and hire a new one. This took place at their very first official meeting.

Since that time, the previous administrator has filed a lawsuit against these three commissioners for matters relating to her dismissal. Now these commissioners have admitted that they are guilty of violating the Tennessee Open Meetings Act. According to their answer filed with the court in relation to former Administrator Suzanne Smith's suit, the defendants – Denver Cole, Thomas Henderson, and Calvin Smart – “admit that they agreed and decided in advance of the April 22, 2009 Election Commission meeting that they would appoint Sharon York as Administrator of Elections, which resulted in the termination of the plaintiff (Suzanne Smith) as Administrator of Elections.”

The court documents go on to state that, “the three Republican commissioners did not allow anyone to apply for the position of Administrator of Elections. They did not allow any consideration of an application or review process.”

Now, in an apparent effort to go back and “undo” their illegal acts, the three commissioners announced that they would take applications for the positions of both Interim Election Administrator and permanent Election Administrator. This action, of course, comes AFTER they have already hired a new administrator. It does not appear that they have a process in place to fairly consider the applicants that they have applied and it appears from their statements that the Republican members of the Election Commission are continuing to meet and make decisions outside of the regularly scheduled meetings.

2009 AUG 20 AM 9:51

RECEIVED

It appears that these three new commissioners, appointed by Rep. Swafford, are continuing to receive direction from some source outside of their official meetings and are continuing to meet and come to decisions prior to the meetings. If they cannot grasp the rules of the Open Meetings Act, how can we expect them to follow the much more complex rules regarding holding fair and impartial elections? They have admitted to the court that they are lawbreakers, but they are continuing to break the law.

Given their actions over the past few months, we believe that these commissioners must be removed from office. The voting process is at the very heart of our democratic system, and at the present time Cumberland Countians cannot be assured that we have a competent and professional team administering our elections. We call on you to take appropriate action in removing these three commissioners.

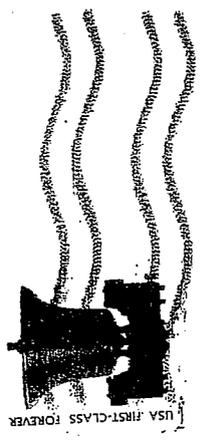
RECEIVED

2009 AUG 20 AM 9:51

CLERK OF COURT

Cumberland Co. Democratic Party
P.O. Box 298
Crossville, TN 38557

WASHVILLE TN 372
19 AUG 2009 PM 4 T



State of Tennessee
State Election Commission
312 Rosa P. Parks Avenue
Franklin Jones, 9th Floor
Nashville, TN 37203