

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
6TH JUDICIAL DISTRICT, KNOX COUNTY**

JAMES GRAY,)
)
 Chairman of the)
 Democratic Party of Knox)
 County Tennessee)
)
 Plaintiff,)
)
)
 v.)
)
 TIMOTHY HUTCHINSON, and KNOX)
 COUNTY ELECTION COMMISSION,)
)
 Defendants.)

No. 166649-1

FILED

**HOWARD G. HOGAN
CLERK & MASTER
(unofficial computer reproduction)**

**RESPONSE OF KNOX COUNTY ELECTION COMMISSION TO PLAINTIFF'S
APPLICATION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

In response to the Plaintiff's Application for Declaratory Judgment and Injunctive Relief (the "Application"), the Knox County Election Commission (the "Election Commission"), by and through counsel, respectfully states as follows:

In his Application, the Plaintiff requests that (1) this case be consolidated with the pending case of *DeSelm, et al., v. Hutchinson, et al.*, Knox County Chancery Court, Docket No. 164615-1 (the "DeSelm Case"), (2) the Court grant an immediate hearing on Plaintiff's application for an injunction requiring the Election Commission to remove the name of Knox County Sheriff Timothy Hutchinson ("Hutchinson") from the ballot for the May 2, 2006, Republican primary election, (3) the Court issue a declaratory judgment that Hutchinson is disqualified from seeking office for a fourth term as Knox County Sheriff, (4) the Court issue a declaratory judgment that the Election Commission is required to remove Hutchinson's name from the ballot for the May 2, 2006, Republican primary election, (5) the Court issue a mandatory injunction requiring the Election Commission to remove Hutchinson's name from the

ballot for the May 2, 2006, Republican primary election, (6) the Court issue a declaratory judgment that the election of Hutchinson to his present term is void, removing Hutchinson from office, declaring the office of Knox County Sheriff is vacant and enjoining Hutchinson from exercising any of the duties of the office of sheriff, and (7) for such other relief, including injunction and attorneys fees, as may be appropriate pursuant to Tenn. Code. Ann. § 29-14-110.

The Election Commission responds that this Court should deny the Plaintiff's Application because (1) the Plaintiff lacks standing to pursue these claims, and (2) there is no basis in law for the Election Commission to remove Hutchinson's name from the ballot for the May 2, 2006, Republican primary election.

I. The Plaintiff lack standings to pursue his claim that Hutchinson is ineligible to be a candidate for Sheriff in the May 2, 2006, Republican primary election.

The Plaintiff alleges in the Application that he has a special interest not held by the public to assure that qualified candidates be presented to the public for election of the office of the Sheriff of Knox County. (App. at ¶ 2.) The Plaintiff further alleges that is bringing this action as a civic minded citizen to effectuate (1) the will of the community to participate in the full, lawful and certain elections of the Knox County sheriff; (2) to have an election of the Knox County sheriff that will be certain and (3) to avoid insecure and uncertain results in the election of the Knox County sheriff. (App. at ¶ 2-3.) Neither these allegations, nor his position as Chair of the Knox County Democratic Party, would confer standing on Plaintiff to challenge the eligibility of Hutchinson to be a candidate for Sheriff of Knox County in the May 2, 2006, Republican primary election.

The law in Tennessee is clear that a private citizen "cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally. *Sachs v. Shelby County Election*

Commission, 525 S.W.2d 672, 673 (Tenn.1975) *see also Metropolitan Gov't of Nashville and Davidson County ex rel. Anderson v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985) (“the plaintiff must show a special interest, status or wrong, which is not common to the body of citizens as a whole”). Addressing the plaintiff’s standing, the Supreme Court stated:

Petitioner alleged no facts which would indicate he stood in a position different from that of every other resident and registered voter of the district, nor did he allege any fact which would indicate that he had any particular interest in having [the candidate’s] name stricken from the ballot. Neither did the District Attorney General join in the petition for Writ of Mandamus. It follows under the authorities above cited, that the petitioner did not have standing to file the petition and that the chancellor should have dismissed the petition on motion of the defendants, without holding an evidentiary hearing and without issuing any mandatory directions to the election commission.

Sachs, 525 S.W.2d at 674.

The special interest requirement is fulfilled when the plaintiff is a candidate and seeks to have an opposing candidate in the same election declared ineligible. *Comer v. Ashe*, 514 S.W.2d 730, 742 (Tenn. 1974). The fact that the candidates must be in the same election is highlighted by the Supreme Court’s holding that a candidate in the Republican primary does not have standing to challenge the eligibility of a candidate in the Democratic primary. *Payne v. Ramsey*, 591 S.W.2d 434, 436 (Tenn. 1979).

In this case, the Plaintiff is not a candidate for Sheriff in the May 2, 2006, Republican primary election and, thus, does not have standing to challenge Hutchinson’s qualifications. The Plaintiff position as Chair of the Knox County Democratic Party does not provide him with standing to challenge the qualifications of a candidate in the Republican primary, nor does it provide him with any interest not common to the other citizens of Knox County. Plaintiff alleges that he has an interest in assuring that qualified candidates are presented to the public for election of the office of the Sheriff of Knox County and he brings this action to effectuate (1) the will of

the community to participate in the full, lawful and certain elections of the Knox County sheriff; (2) to have an election of the Knox County sheriff that will be certain and (3) to avoid insecure and uncertain results in the election of the Knox County sheriff. However, these are interests which are shared by all the residents and registered voters in Knox County. Thus Plaintiff has failed to show that he stands in a position different from that of every other resident and registered voter of Knox County. Since the Plaintiff is not a candidate for Sheriff in the Republican primary election, and has not shown that he has any special interest nor any special injury other than an interest shared in common with all other members of the public, he does not have standing to challenge the qualifications of Hutchinson. Accordingly, the Application should be denied.

II. There is no basis in law for the Election Commission to remove Hutchinson's name from the ballot for the May 2, 2006, Republican primary election.

Even if the Plaintiff had standing, the relief that he seeks – removal of Hutchinson's name from the ballot for Sheriff in the May 2, 2006, Republican primary election – is not allowed by law. The Election Commission has only ministerial duties. *City of Memphis v. Shelby County Election Comm'n*, 146 S.W.3d 531, 535 (Tenn. 2004). A ministerial officer is one who “performs specified legal duties when the appropriate conditions have been met, but who does not exercise personal judgment or discretion in performing those duties.” *Id.*

The election of the Knox County Sheriff is governed by the Tennessee Constitution, the state Election Code and the Charter of Knox County. The Tennessee Constitution provides that civil officers¹ will be elected “on the first Thursday in August, one thousand eight hundred and

¹ All governmental officers are civil unless military. *State ex rel. Thomas v. Davis*, 159 Tenn. 693, 21 S.W.2d 623, 624 (1929).

seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service.” Tenn. Const. Art. VII, § 5.

The Election Code provides that the Sheriff will be elected at the “regular August election,” which is defined as “the election held on the first Thursday in August of every even-numbered year.” Tenn. Code Ann. §§ 2-1-104(24); 2-3-202. The Election Code also provides that “[p]rimaries, if any, for nominating candidates for any office which will appear on the regular August election ballot shall be held on the first Tuesday in May before the August election.” Tenn. Code Ann. § 2-13-203(d). The Knox County Charter similarly provides that “[t]he primary election to nominate candidates for the County general election shall be held on the first Tuesday in May next proceeding the County August general election.” Knox County Charter at § 7.02. These election dates cannot be changed by the Election Commission, which only holds ministerial duties.

The Election Code provides for qualifying deadlines that cannot be changed and that have already passed. The qualifying deadline for the May 2, 2006, Republican primary election was the third Thursday in February, which was February 16, 2006. Tenn. Code Ann. § 2-5-101(a)(2). Hutchinson filed his qualifying petition by that deadline.

The Election Commission thereafter examined the qualifications of Hutchinson and found him to be a qualified candidate. The Election Commission must place the name of each qualified candidate on the ballot. Tenn. Code Ann. § 2-5-204(a). The only exceptions to this requirement are: a candidate dies before the ballots are printed, a candidate requests that his name not appear on the ballot or the party executive committee determines that a candidate is not a *bona fide* member of the party. *Id.* Since Hutchinson was a qualified candidate at the time the Election Commission performed its examination, he was placed on the ballot. Those ballots have already been printed, absentee voting has commenced pursuant to Tenn. Code Ann. §§ 2-6-

101, *et seq.*, and ballots for members of the armed services temporarily outside the United States who are eligible to vote in the May 2, 2006, Republican primary election have been mailed pursuant to Tenn. Code Ann. § 2-6-503.

The Election Code provides for specific instances in which additional candidates may become qualified even after the qualifying deadline. Tenn. Code Ann. § 2-5-101(g). In the event additional candidates were qualified, the Election Commission would be required to place the names of those candidates on the ballot. Tenn. Code Ann. § 2-5-204(a). However, the circumstances under which additional candidates are allowed to become qualified do not apply here. Specifically, Section 2-5-101(g) provides that new candidates may become qualified if the only candidate for the nomination is declared ineligible or disqualified by a court at least forty (40) days before the election. Here, less than forty (40) days remain before the election. As a result, there is no basis to allow additional candidates to qualify and, thus, no basis to print additional ballots.

The Election Code's provisions concerning a candidate's death, which is another method by which a candidate could become ineligible to hold office, are instructive. The Election Code provides that if a candidate dies within forty (40) days before an election, the decedent's name must remain on the ballot. Tenn. Code Ann. § 2-5-204(e). It is noteworthy that the Election Code's provisions concerning reopening qualifying when the sole candidate for nomination is declared ineligible were passed in the same Act as the provisions concerning a candidate's death. 1999 Tenn. Pub. Acts, Chapter 6, §§ 2, 3. 1999 Tenn. Pub. Acts, Chapter 6 changed the deadline by which a disqualification must occur in order for new candidates to qualify from thirty (30) to forty (40) days, and created the provision requiring a deceased candidate's name to remain on the ballot if the candidate dies less than forty (40) days before the election. 1999 Tenn. Pub. Acts, Chapter 6, §§ 2, 3. The intent of the General Assembly is unmistakable: no event occurring less

than forty (40) days before an election will cause the removal of a candidate's name from the ballot or the printing of new ballots. Here, Hutchinson has not been declared ineligible for election in the Republican primary election, but even if he were declared ineligible, such declaration would occur less than forty (40) days before the Republican primary election. As a result, his name cannot be removed from the ballot. For the Election Commission to remove Hutchinson's name from the ballot would be to act outside the statutory authority and exceed the limited ministerial duties granted to it.

WHEREFORE, the Election Commission respectfully requests that the Plaintiff's Application be denied and that the Court grant the Election Commission such other relief as is proper and just.

DATED: April 3, 2006.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

James L. Murphy III (No. 9589)
Austin L. McMullen (No. 20877)
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, Tennessee 37203
(615) 252-2303

Attorneys for Knox County Election Commission

CERTIFICATE OF SERVICE

I hereby certify that an copy of the foregoing has been placed in the First Class U.S. Mail, postage prepaid, to:

Herbert S. Moncier
550 W. Main Avenue, Suite 775
Knoxville, TN 37902

Attorney for the Plaintiff

Robert H. Watson, Jr.
Watson & Hollow
900 S. Gay Street, Suite 1500
Knoxville, TN 37901

Attorney for Timothy Hutchinson in his individual capacity

John Edward Owings
Chief Deputy Law Director
400 Main Avenue, Suite 612
City-County Bldg
Knoxville, TN 37902

Attorney for Knox County, Tennessee, Timothy Hutchinson in his official capacity and Michael W. Moyers in his official capacity

William Harrison Crabtree
Assistant District Attorney
400 Main Street, Suite 168
Knoxville, TN 37901

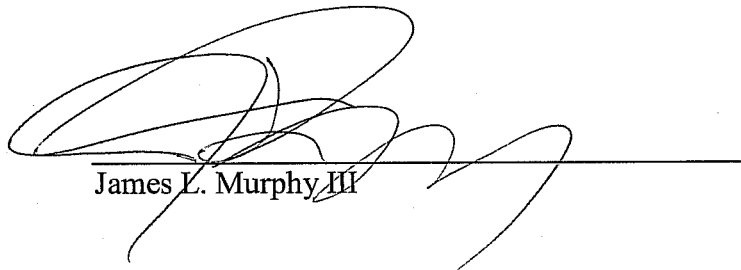
Jerrold L. Becker
Becker, Fleishman, Brown & Knight PC
800 S. Gay Street, Suite 600
Knoxville, TN 37901

Attorney for Michael W. Moyers in his individual capacity

Janet Kleinfelter
Assistant Attorney General
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

Attorney for Brook K. Thompson

on this the 3d day of April, 2006.


James L. Murphy III