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November 2, 2022

Linda Phillips
Administrator of Elections
Shelby County Election Commission
150 Washington Avenue, Suite 205
Memphis, TN 38103

Re: Residency Requirements for Memphis Mayor and City Council Members

Dear Linda:

I am responding to recent requests from counsel for the Election Commission and from you about the residency requirements for Mayor and Council Members for the City of Memphis. I provided you with guidance by letter dated March 15, 2019 and verbally this year. (A copy of the 2019 Opinion is attached). Apparently, there is still confusion regarding this issue despite my prior advice so I am providing you with a second opinion to clarify any statements in my 2019 Opinion that may not have been crystal clear.

LEGISLATIVE HISTORY

The City's Charter was restored by the Tennessee Acts of 1879 and was subsequently amended by the Acts of 1905 and 1909 relative to the qualifications for offices of Mayor and the legislative council. ¹ The 1909 Acts created a Mayor Commission form of government to replace the Mayor/Legislative Council form of government created by the Acts of 1879.

The 1909 Act largely continued the qualification requirements imposed by the Acts of 1879 and 1905, namely:

The qualifications of said Mayor and of the members of said Board of Commissioners shall be those now required by law for the members of the present legislative council, and the Mayor shall have the additional qualifications now provided by law for said office; provided, however, that no

¹ The Acts of 1909 adopted the Mayor Commission form of government for the City, which is the predecessor to the present Mayor Council form of government adopted in the City's Home Rule Charter in 1966. *See* Memphis Ref. Ordinance No. 1852 (Nov. 8, 1966).

person shall be ineligible to said office because of having heretofore held said office.

(Acts 1909, ch. 298, § 2)

These requirements carried forward to the Mayor Commission form of government by the 1909 Act were as follows:

No person shall be eligible to a seat in either Board of the Legislative Council who is not a citizen of the United States, or who holds any office or agency under the City of Memphis, County of Shelby, or State of Tennessee (Acts 1905, Ch. 54, Sec. 16); or who has not resided five years next preceding his election in the City of Memphis (Ibid., Acts 1879, ch. 11, secs. 5, 7; Acts 1899, ch. 200, sec. 1); or who is not a freeholder (Acts 1905, ch. 54, sec. 16); or who is in arrears for taxes (Acts 1905, ch. 54, sec. 16; Acts 1879, ch. 11, sec. 7.)

No person shall be eligible for the office of Mayor who is not at least thirty years of age, of good moral character, and who has not been a bona fide resident of the City of Memphis for five years next preceding his election, and not in arrears for taxes, or who at the time of his election and qualification holds any other office, or who is directly or indirectly interested in any contract with the City. (Acts 1905, ch. 54, § 6).

By Referendum Ordinance No. 1852 Memphis Voters adopted Home Rule pursuant to Article XI, § 9 of the Tennessee Constitution on November 8, 1966. This Home Rule Amendment created a Mayor Council form of government and continued all laws constituting the previous charter except for any laws in conflict with the Home Rule Amendment, which were expressly repealed. *See* Memphis Ref Ord. No. 1852, § 17 (Nov. 8, 1966).

The second and fourth unnumbered grammatical paragraphs of Section 1 of Referendum Ordinance No. 1852 contained the following qualifications for the Legislative Council in the home ruled government:

The Council shall consist of thirteen (13) members, six (6) elected from the City at large and seven (7) elected from the seven districts hereinafter described. Each member shall be a resident of the City and each district Councilman shall be a resident of the district from which he or she is elected. There shall be no more than seven (7) districts.

No person shall be elected or appointed as a Councilman unless he or she shall have been a resident voter and taxpayer of the City of Memphis for not less than five (5) years preceding his or her election or appointment, or unless he or she shall have resided during the five (5) years preceding his

or her election or appointment in territory that has been annexed to and at the time of such election or appointment forms a part of the City of Memphis, but it shall not be necessary for the territory in which such person resides to be annexed for five (5) years; nor shall any person be elected or appointed as a member of the Council from a particular council district unless he or she has been a resident of such district for not less than six (6) months preceding his or her election.

The second unnumbered grammatical paragraph of Section 4 of Referendum Ordinance No. 1852 contained the following qualifications for the Mayor in the home ruled government:

The qualifications of the Mayor shall be the same as those required herein for members of the Council, and no candidate for Mayor shall qualify for any other elective office.

The City's Home Rule Charter was amended by Referendum Ordinance No. 4346 by referendum vote of Memphis voters in accordance with Article XI § 9 on November 5, 1996 to approve the following Question:

QUESTION:

Shall the Home Rule Charter of the City of Memphis, Tennessee, be amended to require that the Memphis Electoral System be composed of nine districts, seven of them having the same boundaries as the existing Districts 1 through 7 and being represented, as now, by one Council Member each; that District 8 be composed of all those precincts in the existing Districts 3, 4, 6, and 7, less the 14 precincts needed to reduce District 8's population to approximately one-half the total City's population, and that District 8 be represented by three (3) Council Members elected by position; that District 9 be composed of all those precincts presently in Districts 1, 2, and 5 plus the 14 precincts needed to increase District 9's population to approximately one-half the City's population, and that District 9 be represented by three (3) Council Members elected by position. That no run-off election will be required for Districts 8 and 9. **That each Council Member shall be a resident, as defined by State election laws, of the City and of the District from which he or she is elected.**

Emphasis Added.

Section 1 of Referendum Ordinance 4346 explained:

A. Section 1 of the Memphis Referendum Ordinance No. 1852 adopted November 8, 1966 ("P.O.P. Home Rule Amendment"), is hereby amended by deleting the second (2nd) and the fourth (4th) paragraph of Section 1 and by substituting in lieu thereof the following unnumbered grammatical

paragraphs which shall be placed after the first grammatical paragraph of Section 1, to-wit:

That the Council shall be composed of nine (9) districts, with districts 1 through 7, both inclusive, being represented by one (1) council member each and with multi-member districts 8 and 9 each being composed of approximately one-half the city's total population and each being represented by three (3) council members elected by position. There is no run-off election required for candidates seeking election in multi-member districts 8 or 9. Each member shall be a resident, as defined by state election laws, of the City and of the district from which he or she is elected.

B. The following language shall be added immediately preceding the penultimate unnumbered grammatical paragraph of Section 1 of the P.O.P. Home Rule Amendments:

The City's Home Rule Charter has not been amended since Referendum Ordinance 4346 to change the qualifications for the Legislative Council and no amendment has changed the language in Section 4 of Home Rule Amendment No. 1852 pertaining the qualification requirements for the Mayor.

OPINIONS

Presently there are no durational residency requirements for the offices of Legislative Council and Mayor. The previous requirements have been expressly repealed and replaced. ² Tennessee's Election Laws defer to the charter of a local government for the qualifications to serve in an elected office for such local government. Referendum Ordinance No. 4346 provides that "[e]ach member shall be a resident, as defined by state election laws, of the City and of the district from which he or she is elected." Tennessee's Election Laws define residency in the context of eligibility to vote and the place at which a person may vote. The reference in Referendum Ordinance No. 4346 to Tennessee's Election Laws was not intended to require that a person qualifying to serve as Mayor or Council member be a qualified voter, but only that the provisions of the Election Code that define a person's residence be used to determine whether a person qualifying to serve as Mayor or Council member is a resident "of the City and of the district from which he or she is elected."

The principal provision of Tennessee's Election Laws relevant to this determination is Tennessee Code Annotated § 2-2-122. Tennessee Code Annotated § 2-2-122 equates residency with domicile such that a person can only have one residence for purposes of the Election Code. For the purposes of clarity and completeness the provisions of Tennessee Code Annotated § 2-2-122 most relevant to Memphis are reproduced below, namely:

² The previous provisions were arguably ambiguous and inimical to the main purposes of Referendum Ordinance No. 4346, which was to remedy discrimination in voting practices.

§ 2-2-122. Residence

(a) The determination of whether a person is a resident or where the person resides or has residence for purposes of the election code shall be made in the light of the following principles:

(1) The residence of a person is that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has a definite intention to return; provided, that a person may not register to vote using a business location as the registration address when the sole basis for the person's presence at such location is based on a business or commercial use;

(2) A change of residence is generally made only by the act of removal joined with the intent to remain in another place. There can be only one (1) residence;

(3) A person does not become a resident of a place solely by intending to make it the person's residence. There must be appropriate action consistent with the intention;

(4) A person does not lose residence if, with the definite intention of returning, the person leaves home and goes to another country, state or place within this state for temporary purposes, even if of one or more years duration;

(5) The place where a married person's spouse and family have their habitation is presumed to be the person's place of residence, but a married person who takes up or continues abode with the intention of remaining at a place other than where the person's family resides is a resident where the person abides;

(6) A person may be a resident of a place regardless of the nature of the person's habitation, whether house or apartment, mobile home or public institution, owned or rented; however, a commercial address may not be used for residential purposes, unless the applicant provides evidence of such applicant's residential use of such address;

(7) A person does not gain or lose residence solely by reason of the person's presence or absence while employed in the service of the United States or of this state, or while a student at an institution of learning, or while kept in an institution at public expense, or while confined in a public prison or while living on a military reservation; and

(8) No member of the armed forces of the United States, or such member's spouse or dependent, is a resident of this state solely by reason of being stationed in this state.

(b)(1) The following factors, among other relevant matters, may be considered in the determination of where a person is a resident:

(A) The person's possession, acquisition or surrender of inhabitable property;

(B) Location of the person's occupation;

(C) Place of licensing or registration of the person's personal property;

(D) Place of payment of taxes which are governed by residence;

(E) Purpose of the person's presence in a particular place; and

(F) Place of the person's licensing for activities such as driving.

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(2) In determining the residency of a person involuntarily confined in a state institution, the mere anticipation of a future grant of living quarters in a specific half-way house shall not be sufficient to establish intent to reside in such half-way house following release from the institution.

Finally, a person's qualifications to serve as Mayor or City Council member are determined at the time he or she is elected. All prior Charter provisions speak of qualifications "for a seat" or qualifications "next preceding" or "preceding" his or her election. Moreover, Referendum Ordinance No. 4346 provides that the Mayor or Council members "shall be a resident of the City and of the district from which he or she is elected." Thus, the qualification provisions are requirements to serve not to run for office.

Thus, for the purposes of administering City elections, your office should not refuse a candidate's petition based on questions about residency; of course, your office may refuse to place the name of any candidate on the ballot if you have evidence that such a person is ineligible under Tennessee Law to hold any elected office, irrespective of residency.

Please let me know if you have any questions concerning these matters.

Very truly yours,

/s/ Allan J. Wade

CC: Mark Goins, Tn. Coordinator of Elections
Beth Henry Robertson, Deputy Coordinator of Elections
Mayor Jim Strickland
Jennifer Sink, City Attorney

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Allan J. Wade
Brandy S. Parrish

March 15, 2019

Linda Phillips
Administrator of Elections
Shelby County Election Commission
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Memphis, TN 38103

Dear Ms. Phillips:

I am responding to your email in which you wrote:

We are taking a sizeable number of phone calls from people interested in running for elective office for the City of Memphis. My problem is that I have three conflicting documents that lists the qualifications for City of Memphis office. One specifies a minimum age; another specifies a different minimum and the third does not have a minimum age. None of them address the Super Districts and one reference Members of the Board of Education, which suggests that none of them are particularly current. TCA § 8-18-101 suggests that a person has to be 18 to run for office.

I couldn't find anything on the City website (other than the Charter and the Ordinances) that explained the requirements.

So, what do you all think the requirements are? I read the charter and Ordinance 1852 and 2246 but do not know what, if any, court cases might have modified this. I've attached what is slightly ahead of a stab in the dark. I really do need this information pretty quickly; we are taking 3 - 5 calls per day on this topic.

I guess I don't understand the problem. As to who is eligible to run for offices of City Council and Mayor, the City's charter has provided since 1966 that no person shall be elected or appointed to the Council unless such person is a "resident voter and taxpayer of the City of Memphis." See Referendum Ordinance No. 1852, § 1. Referendum Ordinance No. 1852, § 4 provides that the qualifications for the Mayor shall be the same as for Council members. This has been the requirements for every election since

1967. Certainly, the Election Commission knows who is a "resident voter."

The term "resident voter" was construed by the Tennessee Supreme Court in *Halbert v. Shelby Cty. Election Comm'n*, 31 S.W.3d 246, 249 (Tenn. 2000). At issue was Section 937 of the Charter of the Memphis City Schools, which used the eligibility language in the City's Home Rule Charter verbatim, including the term "resident voter." The Supreme Court held in that case "that the term "resident voter" as used in the School Board's charter provision establishing the eligibility requirements for service on the Board of Education of the Memphis City Schools requires the candidate to possess the legal qualifications which would entitle him or her to vote in the election if registered. We hold also that registration laws do not affect the qualifications for voting; they merely regulate how "voters" may exercise this right. *Halbert v. Shelby Cty. Election Comm'n*, 31 S.W.3d at 249.

So, let's start with the basics of the Election Code. Tenn. Code Ann. § 2-1-105 addresses Voting eligibility and provides that "Only qualified voters who are registered under this title may vote at elections in Tennessee. (Emphasis ours).

Tenn. Code Ann. § 2-2-102 addresses qualifications of voters and provides that "A citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter unless the citizen is disqualified under the provisions of this title or under a judgment of infamy pursuant to § 40-20-112." Tenn. Code Ann. § 2-2-122 outlines the principles for determining residency for purposes of the Election Code.

In *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) the United States Supreme Court struck down a Tennessee durational residency requirement which authorized the registration of only those persons who, at the time of the next election, will have been residents of the State for a year and residents of the county for three months. The Court held that durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of "a fundamental political right..." The Court did hold however that "[i]t is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud. *Id.* at 348.

In response to this holding the City's Charter was amended by Referendum Ordinance No. 4346 to define residence and durational requirements to be the same as defined by state election laws.

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Tenn. Code Ann. § 2-2-109 provides that a qualified voter may register or have the voter's registration altered at the commission office at any time the office is open, except that applications for registration shall not be processed for twenty-nine (29) days before an election.

In sum, we have consistently opined that "resident voter" is the same as a voter qualified to vote in an election under state election laws. Moreover, a qualified candidate for Council or Mayor need only be a resident of the City and a district for 30 days before the election. While the charter provisions relating to City Court Clerk and City Judges have not been amended, it is our opinion that absent a court decision that justifies a five (5) year durational residency requirement for those positions, such a restriction must yield to the holding in *Dunn v. Blumstein*. Thus, the rules applicable to Mayor and Council members apply to the City Court Clerk and City Judges.

I trust I have adequately responded to your inquiry.

Very truly yours,

/s/ Allan J. Wade

Allan J. Wade

Cc: Jim Strickland, Mayor
City Council Members
Bruce McMullen, City Attorney
John Ryder, Esq