

The Tennessee Journal

The weekly insiders newsletter on Tennessee government, politics, and business

Vol. 39, No. 44
November 15, 2013

'Confidential' evaluation saga puts judges in spotlight

It isn't every day Tennessee's chief justice publicly questions decisions of the Judicial Evaluation Commission or the lieutenant governor applauds a recommendation to give some jurists the boot.

But a judicial soap opera of sorts has been playing out since Oct. 25, when the nine-member Judicial Performance Evaluation Commission tentatively decided to recommend against retention of three appellate judges.

The commission voted in the negative on Court of Criminal Appeals Judges Jerry Smith and Camille McMullen and Court of Appeals Judge Andy Bennett. Each judge will get a chance to respond after the commission approves written comments and sends them to the judges for their review. The commission will meet Dec. 6 to discuss and possibly approve a draft.

The negative vote that drew the most surprise and interest from the legal community was the one involving Bennett, who serves on the Middle District panel and is a former chief deputy state attorney general.

In peer ratings by the Court of Appeals, he came out on top, though he was rated less favorably by trial judges. And his interview apparently did not go well.

From several accounts, though, it wasn't as bad as that of McMullen, who was perceived as displeased with having to go through the process. Also, her pace in turning out opinions was said to be below average.

The commission does not keep minutes, and there is no official record of its actions.

By statute and Supreme Court rule, the review documents are confidential except as included in the commission's published report on the evaluations. The report will come out next year, so voters will have the findings before the Aug. 7 retention election for members of the intermediate appellate courts and the Supreme Court.

Rule 27 requires evaluations to be conducted "in strict confidence" and forbids release of information pertaining to the performance and evaluation of individual judges except for the published reports. It goes so far as to dictate that records on any judge be destroyed within six months of the judge's retirement or death. At the same time, though, it provides for a "public interview" of

each appellate judge and declares that "the commission's meetings and deliberations shall be public."

Indeed, the Oct. 25 meeting technically was a public session — but only staff attended. That almost certainly won't be the case Dec. 6, and it will be interesting to see how the panel juggles the confidentiality rules.

DUI. In Smith's case, the big problem was a DUI conviction last June — which some members regarded as disqualifying for a criminal appeals judge. Smith, who turns 60 next month, has told colleagues he now likely will not seek another term in the 2014 election.

A judge recommended for replacement still may run for a new eight-year term — but must do so in a contested election. This has never happened.

Chief wades in. In an interview with *The Knoxville News-Sentinel* published last Sunday, Chief Justice Gary Wade said he believes all three judges tentatively recommended for replacement deserve new terms. He said McMullen, 42, a former assistant U.S. attorney who has served on the Court of Criminal Appeals since 2008, is "very well-qualified" and "her potential has not been realized." He also raised the matter of diversity.

McMullen is one of three black appellate judges and the only black woman. But Henrietta Grant, a black commission member from Knoxville, told the newspaper that should not be an issue — "you're either capable or you're not."

Also weighing in was Charles Susano of Knoxville, presiding judge of the Court of Appeals, who limited his comments to Bennett, whom he called "one of the best among us" and "dependable and steady as a rock."

Bennett wrote opinions in two complicated appeals that went against clients of one of the commissioners, attorney Woody Woodruff of Nashville. Both opinions were overturned by the Supreme Court. Woodruff, declining to discuss the cases, told the *News-Sentinel* the review process was "fair, comprehensive, and completely free of politics."

Bennett, 56, was appointed to the court in 2007. On the ballot for retention in August 2008, he received 293,060 votes for retention, 86,651 against.

On Oct. 25, he received two positive votes from the commission, six negative votes, and one abstention.

Structure. The old Judicial Evaluation Commission had 11 members, some of whom were appointed by the Judicial Council, which the legislature allowed to expire in 2010. The commission was reconstituted as the Judicial Performance Evaluation Commission in 2009. Four members are appointed by the Senate speaker, four by the House speaker, and one by the speakers jointly.

Grant, a Democrat, has served as an evaluator for 12 years, having been reappointed by House Speaker Kent Williams (I-Elizabethton) in 2009.

Replacement votes rare. The evaluation commission has never published a report calling for voters to reject a judge. In rare instances in which the commission decided to do so, the judge chose not to run. By law, the commission does not issue reports on judges who die, retire, or do not file papers to run again.

Last week, in a wide-ranging news conference, Lt. Gov. Ron Ramsey hailed the commission's tentative votes against three judges as evidence it is doing its job. He also said he hopes it won't allow itself to be lobbied out of the decisions. He did not say anything negative about any specific judge, but he did remark that because negative votes by the commission are uncommon, it must mean the judges "weren't doing their jobs."

Part of the process involves giving judges a chance to respond to written findings before a final vote. In one well-known case, that of Court of Appeals Judge Bill Koch in 2006, a negative recommendation based on his slow pace in turning out opinions was reversed after the judge made his case to the panel and promised to spend less time perfecting decisions in routine cases. The following year Koch was appointed to the Supreme Court.

Of the 29 appellate judges — 12 each on the Court of Criminal Appeals and the Court of Appeals and five on the Supreme Court — 24 were evaluated. Justice Janice Holder of Memphis and four appeals judges announced earlier this year they would not be running again. Gov. Bill Haslam named three replacements in August who won't take office until September 2014.

Eighteen of the 21 judges the commission recommended for retention received unanimous votes. Koch was one of the three who did not win unanimous approval, receiving a 6-3 favorable vote.

Nominees. This week, the newly constituted Governor's Commission for Judicial Appointments sent Haslam slates of nominees to replace Justice Holder and Court of Appeals Judge David Farmer of Jackson.

The Supreme Court nominees are Court of Appeals Judge Holly Kirby of Memphis, Shelby County Criminal Court Judge Christopher Craft, and Brook Latham, a partner in the Memphis office of Bass, Berry & Sims.

The Court of Appeals nominees are Shelby County Chancellor Kenny Armstrong, Jackson attorney Brandon Gibson, and Memphis attorney Dorothy Pounders.

Holder. Justice Holder, 64, a former chief justice who was named to the court in 1996 by Gov. Don Sundquist, is the only Supreme Court member not seeking

another term. Wade is 65, Koch 66, and Justice Connie Clark 63. Justice Sharon Lee turns 60 on Dec. 8.

Had she sought another term, Holder may have faced an organized campaign to defeat her. She is the last remaining member of the 2000 Supreme Court that in *Planned Parenthood v. Sundquist* struck down several abortion restrictions and subjected any restriction to a "strict scrutiny" analysis, a more rigorous test than the "undue burden" analysis used by the U.S. Supreme Court. She voted with the majority in the 4-1 decision.

Governor expects tough budget

Sluggish state revenue collections are complicating Gov. Bill Haslam's budget planning, especially his well-publicized priority of raising pay for teachers.

As the annual departmental spending hearings kicked off this week, Haslam said the 2014-15 budget will be the toughest since he took office in 2011. Receipts in the present fiscal year have lagged and could leave a lower-than-expected revenue base.

The State Funding Board is set to meet Dec. 10 and 17 to estimate revenue growth for the next fiscal year. The ranges the board settles on will be used by Haslam in the spending blueprint he submits to the legislature.

The 2013-14 budget — the current one — assumes a 3.89% increase in collections for the general fund. So far, it is well below that.

The most disappointing — and puzzling — numbers have been those for franchise and excise tax collections. Those taxes on corporate assets and income not only have failed to meet growth expectations for the past three months, they have yielded substantially less than in the same months of 2012. This is certain to be a topic of discussion for the funding board next month.

Still, the sales tax, which generates the majority of state tax revenue and is generally the most reliable economic indicator, has shown modest growth, though below budgeted projections. Sales tax receipts were up 3.8% in August, the first month of the fiscal year on an accrual basis, and 3.5% in September. In October, though \$8.3 million below budget, collections showed 2.9% growth. The growth rate for the quarter was 3.38%.

Cuts. As he has before, Haslam asked department heads to present budgets with hypothetical 5% cuts. This doesn't mean reductions of that level will be made across the board. The governor says cuts will be "strategic and surgical." He hopes to take it easy on departments that already have experienced major reductions. At the same time, money he targets for improvements will have to come from somewhere.

Haslam expects the bulk of revenue growth next year to be consumed by TennCare, the state's nearly \$10 billion managed-care Medicaid program, and the Department of Education, which needs an extra \$55.8 million to fund growth in the Basic Education Program, which the department estimates will total \$4.08 billion. Haslam has shielded K-12 education from budget cuts each year.

TennCare, which presents its budget Monday, is gearing up for the long-anticipated "woodwork effect" of

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● The State Building Commission on Thursday named Peter Heimbach the new state architect. Heimbach, who previously worked in the real estate and asset management division of the Department of General Services, succeeds Bob Oglesby, who in August became general services commissioner.

● As recommended by the Workers Compensation Advisory Council, Commerce and Insurance Commissioner

Julie Mix McPeak on Wednesday ordered a 6.95% loss cost reduction effective March 1, 2014. In a separate order based on a “law-only” filing by the National Council on Compensation Insurance, McPeak set another 5.9% decrease to take effect July 1, 2014.

● A comptroller’s audit released this week criticizes the state’s contract for facility assessments and management with Jones Lang LaSalle, saying that,

though it didn’t violate state policy, it was intentionally made broad so specific services later could be procured through contract amendments. Department of General Services officials disagree and say it will save the state millions.

● Republican activist Judy Veeneman, sister of Rep. Kent Williams (I-Elizabethton), will seek her brother’s District 4 House seat next year. Williams plans to run for Carter County mayor.

the Affordable Care Act. In a budget presentation last fall, the TennCare Bureau estimated that 53,000 people, already eligible but not enrolled, would sign up by 2014-15 at a cost to the state of \$137.5 million.

TennCare, like other programs, will outline its options for 5% cuts. Providers, particularly financially ailing hospitals, won’t welcome the idea of cuts in their payments.

Since 2010, hospitals have paid a “coverage assessment” on revenues, which now is set at 4.5%. Some of the money finds its way back, matched with federal dollars. The “voluntary” assessment, formally requested by the Tennessee Hospital Association, has been renewed a year at a time.

Expansion? Last March, Haslam announced a decision not to participate in an optional Medicaid expansion under the Affordable Care Act, or Obamacare. But he said he was discussing with the U.S. Department of Health and Human Services a proposal to use the expansion money to buy private insurance for the eligible population — those up to 138% of poverty not covered by traditional Medicaid. As part of the proposal, the governor wants to institute behavioral incentives and cost-sharing for patients and an outcome-based payment system for health care providers.

He would need a Medicaid waiver for the plan and so far has not requested one. He indicated months ago he likely would not submit a waiver proposal to HHS unless and until, through negotiations, he knows it will be approved. But he is expected to send a letter by Thanksgiving outlining what he wants to do and perhaps fleshing out some of the ideas he and others in the administration have discussed with federal officials.

The expansion issue is difficult both because HHS has indicated it can’t allow some of the things Haslam wants to do and because it is politically explosive. Many legislators want nothing to do with Obamacare. The program’s website fiasco and an outcry against cancellation of low-cost commercial policies prior to its implementation have heightened the sentiment. Last week, Lt. Gov. Ron Ramsey publicly stated he believes further discussions of expansion would be a waste of time.

Apart from providing health insurance to another 175,000 or so people, the expansion would infuse \$1 billion a year in federal money into the state’s economy. The hospital association and the Tennessee Medical Association are pushing for it.

The federal government would pay 100% of the expansion cost for the first three years, then gradually reduce its percentage to 90% by 2020 — still a more generous ratio than the roughly two-thirds the federal government pays of regular TennCare services.

Legislators critical of expansion have questioned, given the federal budget deficit, whether the 100% and 90% rates are sustainable. And Haslam has worried aloud about TennCare spiraling out of control. His Democratic predecessor, Phil Bredesen, when confronted with ballooning costs, slashed optional programs in 2005, kicking 190,000 people off the rolls.

Last week, while suggesting that Haslam has “perfectly logical reasons for the direction he is taking,” Bredesen told reporters he sees the issue this way: Tennesseans pay federal taxes that will fund expansions, and they will pay on the debt from the government borrowing, so Tennessee should benefit from expansion.

Salaries. Haslam made public last month a goal of making Tennessee the fastest-improving state in the nation for teacher pay. It is an aggregate objective for his time in office, not for any given year alone. But he promised to make teacher pay a budget priority every year.

In announcing the goal, the governor sought to quell unrest within teacher associations, which in Nashville and Rutherford County had taken votes of no confidence in Education Commissioner Kevin Huffman, the lightning rod for criticism of teacher evaluations, especially the focus on student achievement growth. Later, the Memphis teachers union also took a stand against Huffman. And this week Williamson County teachers announced one — delayed so as not to coincide with the celebration last week of the state’s best-in-the-nation gains on the National Assessment of Educational Progress, a test given every two years in all 50 states.

A salary proposal was not part of Huffman’s presentation this week, and a figure won’t be decided on until Haslam has a full picture of the state’s needs and resources for next year.

The governor told reporters he would like to treat teachers, state employees, and higher education workers “fairly similarly,” though he feels he has an “ongoing commitment” to teachers. The raise in all three categories last year was 1.5%, but the \$80 million implementation of a compensation study pushed the average increase for state employees to more than 5%.

Tennessee Notes & Quotes

■ Four weeks ago, after meeting in New York with all three of the major bond rating agencies, Gov. **Bill Haslam** and the state's constitutional officers thought they had a shot at a triple-A rating from Standard & Poor's, which previously had given the state an AA+. But it didn't happen. The S&P rating is the same as before, and the state keeps its triple-A ratings from Moody's and Fitch.

■ Voters in House District 91 will pick a successor to the late Rep. **Lois DeBerry** (D-Memphis) in a special election Thursday. The heavily favored Democratic nominee, **Raumesh Akbari**, reported Thursday she raised \$8,000 in contributions from Sept. 29 through Nov. 11. Her opponent, Libertarian candidate **Jim Tomasik**, reported no itemized contributions, but he had receipts of \$5,500, mostly in loans. Akbari, an attorney, still has \$21,000 in debt from the Oct. 9 primary.

■ "Volkswagen is led by its board, and not by politicians." — **Bernd Osterloh**, a top Volkswagen labor official, on statements by Sen. **Bob Corker** (R-Chattanooga) and Gov. **Bill Haslam** that management at the Chattanooga VW plant should require a secret ballot vote on unionization rather than recognize the United Auto Workers on the basis of collected signatures from workers. Osterloh, who favors a German-style "works council" at the plant and interprets U.S. law to require recognition of a union in order to have one, said he has no position on a secret ballot.

■ Osterloh met privately with Gov. **Bill Haslam** Thursday at the Capitol, where the governor expressed concern that unionization of the plant could hinder Tennessee's industrial recruitment efforts. The labor official's public comments came from an Associated Press interview — conducted in German by Capitol Hill reporter **Erik Schelzig**, who is fluent in the language.

■ American Airlines and US Airways, whose planned \$17 billion merger was challenged in an anti-trust action by the Justice Department, settled the case Tuesday with some concessions and guarantees of continued service to certain cities. In Tennessee's case, it means the new, combined airline must continue for at least five years service to airports in Nashville, Memphis, Knoxville, Chattanooga, and Tri-Cities — not that anyone could envision it halting service to Nashville or Memphis anyway. Tennessee was one of six states that joined the Justice Department in the action.

■ In a lengthy story on the settlement, *The Wall Street Journal* never mentioned the involvement of Tennessee. But that's okay. In a news release from the Tennessee attorney general's office, the Justice Department wasn't mentioned until the last two paragraphs.

■ Long before Occupy Nashville staged its five-month protest for no easily discernible reason, a smaller group with an actual grievance — TennCare enrollment cuts — camped inside the Capitol for more than two months in 2005, creating drama however they could, including handcuffing themselves to chairs. One of them, **Karl**

Davidson, sued Gov. **Phil Bredesen** and his top deputy, **Dave Cooley**, as individuals, claiming they violated his First Amendment rights by not letting him bring in extra underwear, sanctioning noise that made it hard for him to sleep, limiting his stock of food and water, locking him out if he left in the middle of the night, and so forth. He lost the suit in Chancery Court, and on Oct. 29 the Court of Appeals upheld the ruling.

■ The appellate decision, written by Judge **Richard Dinkins** and joined by Judges **Patricia Cottrell** and **Frank Clement Jr.**, likely would have gotten little notice had it not been for a finding that some of the notes taken by the governor's deputy legal counsel during discussions of the protest were exempt from the public records law as part of the "deliberative process." The court previously had suggested such an exemption applied in Tennessee, but Tennessee Press Association attorney **Richard Hollow** told the Associated Press this was the first time it had been explicitly applied in a specific case. The ruling doesn't spell out the parameters of the deliberative privilege, but Hollow worries it now will be claimed by "every public official, starting at the lowest level and running to the top."

■ The Chattanooga City Council approved 5-4 Tuesday, on the first of two required readings, a proposal to provide benefits to domestic partners of unmarried city employees, regardless of sexual orientation, once they've been together for a year. An opposition group is circulating a petition to force a referendum. Knoxville Mayor **Madeline Rogero** announced last month she is implementing a similar plan in her city administratively.

■ "You could fit everyone who signed up for Obamacare in the first month into Neyland Stadium and still have room for the Pride of the Southland marching band." — Sen. **Lamar Alexander** (R-Maryville), on the 106,185 people who enrolled in private health plans in October, the majority through state-run exchanges. A report showed 992 Tennesseans managed to enroll.

■ Former House Republican Caucus chairman **Debra Maggart** of Hendersonville has joined the lobbying and public affairs unit of Frost Brown Todd.

■ Ever remember a legislator from Clarksville holding a fundraiser in Memphis? House Speaker Pro Tem **Curtis Johnson** (R-Clarksville) has one set for Dec. 9 — \$1,000 per person — at the FedEx Forum, where the Memphis Grizzlies will play the Orlando Magic. Johnson is a basketball fan, but that isn't the explanation. **Charles Hand** of Clarksville and his family own part of the Grizzlies and are hosting the event.

■ The red Ford pickup truck that state Democratic Party Chairman **Roy Herron** has been driving for 15 years, and which he used in a 2010 congressional campaign ad, recently joined the 500,000-mile club. We are reminded of **Dolly Parton's** famous comment: "It costs a lot of money to look this cheap." Herron may soon be saying the same if he doesn't buy another truck.