The Governor's Commission for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Kenny W. Armstrong

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INTRODUCTION

The State of Tennessee Executive Order No. 34 hereby charges the Governor's Commission for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and eight (8) copies of the form and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Chancellor, Part III, Shelby County Chancery Court, 30th Judicial District, State of Tennessee

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1973, BPR # 6900

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee (BPR # 6900)

Date of Licensure: September 22, 1973 (Active)

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

a. United States Department of Justice, Assistant United States Attorney, Criminal Division (August 1973- June 1974)

b. United States Air Force, Legal Officer (June 1974- June 1978)

c. Private Practice (June 1978- December 1996)

d. Shelby County Chancery Court, Clerk and Master (January 1997- August 2006)

e. Shelby County Chancery Court, Chancellor, Part III (September 2006- present)

f. My spouse owns and operates a for-profit daycare center located in Memphis. The real estate involved is jointly owned by us. Ten years ago, we owned another daycare center for four years, which I assisted her in operating but was not involved in the day-to-day operation of the center.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Not applicable

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

As an Assistant United States Attorney with the Department of Justice, Criminal Division, my section supervised all federal prosecution of youth offenders and offenses committed in federal penal institutions. Experienced trial attorneys in my section also conducted grand jury investigations and prosecuted federal prison officials who were involved in various offenses in our federal prison system.

During my first three year in the Air Force, I worked in the base legal office. In addition to reviewing procurement contracts and providing legal advice to commanders regarding personnel matters, I prosecuted Air Force members charged with courts-martial offenses. My final year in

the Air Force, I was assigned to Headquarters USAF, Washington, D.C. and located at Blytheville, Air Force Base in Blytheville, Arkansas where I served as an area defense counsel. In that position, I represented Air Force members in courts-martial and before administrative discharge boards convened at Blytheville Air Force Base and at other bases as assigned by Headquarters USAF.

After completing my four year military obligation, I entered private practice in Memphis and handled a variety of cases. I represented defendants in criminal matters in state courts in Tennessee and Arkansas and in federal court in the Western District of Tennessee. As plaintiff's counsel, I represented clients in personal injury cases, workers' compensation claims, social security disability claims and insurance loss claims. Very early in my practice I handled Title VII claims against the Army Depot and the Federal Reserve Bank here in Memphis. Like most attorneys in a general practice, I drafted wills, admitted wills to probate, and handled uncontested and contested divorce cases.

In my position as Clerk and Master of Shelby County Chancery Court, I managed an office staff of approximately 20 employees and frequently served as a Special Chancellor. At the request of one of the Circuit Court judges, I also served as a Special Judge in Circuit Court hearing his Friday motion calendar when he had a scheduling conflict.

Since my election as Chancellor, Part III, I have handled hundreds of complex cases, some of which involved issues of first impression.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

At a time when a number of small churches in the Christian Methodist Episcopal (CME) Church connection were considering withdrawing from the connection, I successfully represented the CME Church against a local congregation that withdrew from the connection and then attempted to control the local church property. Although the church property was titled in the name of the local church, we were able to establish that their connection with the general church denomination resulted in the general church denomination as owner of the church property rather than the local congregation.

This outcome effectively neutralized the movement of small churches withdrawing from the CME connection.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was appointed Clerk and Master of Shelby County Chancery Court on January 1, 1997 and served in that position until August 31, 2006. I was elected Chancellor, Part III of Shelby County Chancery Court in a countywide general election in August 2006. My eight year terms started on September 1, 2006 and ends August 31, 2014.

Examples of noteworthy cases decided are as follows:

Kenneth T. Whalum, Jr. v. Richard L. Holden, in his official capacity as Shelby County Administrator of Elections, Shelby County Election Commission, and their official capacities all members of the Shelby County Election Commission, including Robert D. Meyers, Norma Lester, George C. Monger, III, Dee Nollner and Steve Stamson; and Kevin Woods (entered August 13, 2013, Shelby County Chancery Court, Part III)

- This was an election case arising out of the race for the Shelby County School Board District 4 position in which Plaintiff Whalum was defeated by Intervenor Woods by 106 votes. Plaintiff Whalum sought to set aside the election because the Election Commission erroneously assigned voters who resided in District 4 to other district races and also assigned voters who did not live in District 4 to vote in the District 4 race. Finding that there was clear uncertainty about the election outcome because of inadvertent mistakes by the Election Commission, I held that without a new election there would always be legitimate questions about the actual winner of the race and ordered a new election. The decision to overturn an election is noteworthy because of the public policy preference to not disturb election results.

Morgan Keegan & Company, Inc. v. Christian Brothers University Endowment Fund (entered March 27, 2013, Shelby County Chancery Court, Part III)

- This case was a Petition for Application for Vacatur of a FINRA arbitration award in favor of Respondent Christian Brothers for losses it incurred on its investment in the RMK family of bond funds managed and marketed by Petitioner Morgan Keegan. Under my narrow scope of judicial review, I found there was insufficient proof in the record to support a vacatur under the relevant state and federal arbitration statutes. This case was significant because it required me to implement my decision within statutory confines which limit the role of the Court in reviewing arbitration awards.

Walgreens Mail Service, Inc., f/k/a Walgreens Healthcare Plus, Inc. v. BlueCross BlueShield of Tennessee, Inc. and Caremark Rx, Inc. (entered June 18, 2009, Shelby County Chancery Court, Part III)

- The sole issue in this case was whether the provision in Defendant BlueCross BlueShield's mail order contract with Plaintiff Walgreens requiring its mail order facility to be located in Tennessee or within 200 miles of Defendant's headquarters violated the Any Willing Provider Act. Finding that the proximity requirement was a pretext for the purpose of maintaining Defendant's exclusive mail order arrangement with Intervenor Caremark Rx, I enjoined Defendant BlueCross BlueShield from imposing the

requirement against Plaintiff Walgreens. This case was important because it was an issue of first impression in Tennessee.

The State of Tennessee, ex rel The Board of Education of The Memphis City Schools, and Memphis Education Association v. The City Council of Memphis, City Council of the City of Memphis (entered February 17, 2008, Shelby County Chancery Court, Part III)

- This action was brought by Memphis City Schools against the Memphis City Council for violating the "maintenance of effort" provisions in Tennessee's public education statutes by reducing funding to the school district to an amount below the funding level provided the previous school year. After reviewing the legislative history of our education statutes, relevant Attorney General opinions and case authorities, I found that the Memphis City Council was obligated to fund the school district as required by the "maintenance of effort" provisions. This case was significant because it was an issue of first impression and was subsequently affirmed by the Court of Appeals.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I served as the executor of a relative's estate in Probate Court in Shelby County.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

In 2008, I attended judicial settlement conference training at Lipscomb University. This mediation training was attended by a number of trial judges from across the state and by three of our state Supreme Court Justices. Since completion of the class, I have successfully settled a number of cases for the other two Chancellors. I also successfully settled one of my own cases where the parties requested I mediate their case because of my familiarity with their dispute.

The case involved two brothers who owned five multi-screen movie theaters in Memphis, Munford, and Jackson, Tennessee. The debt on these theaters was substantial and the brothers for personal reasons could no longer agree to operate these theaters together. They each had competing claims against the other for unaccounted monies. With my help over multiple mediation sessions they were able to reach a settlement. The settlement was one I could not have ordered if the case was tried.

The settlement required the older brother to assume a substantial amount of debt in return for receiving three of the theaters and relinquishing his interest in the other two theaters in Memphis. After the formal agreement was signed and the order of dismissal was entered, both brothers requested to see me in chambers. They thanked me for spending countless hours helping them work through their legal dispute and in the process mending their personal relationship.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Commission for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Tennessee State University, 1965-1970, Bachelor of Science

- Electrical Engineering with Distinction
- Distinguished Air Force ROTC Cadet
- Society of American Engineers Award

Duke University School of Law, 1970-1973, Doctor of Jurisprudence

- Elected to Moot Court Board

PERSONAL INFORMATION

15. State your age and date of birth.

65; February 11, 1948

16. How long have you lived continuously in the State of Tennessee?

38 years

17. How long have you lived continuously in the county where you are now living?

38 years

18. State the county in which you are registered to vote.

Shelby County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

United States Air Force (June 1974- June 1978), Captain

Certificate of Competency as Trial and Defense Counsel (December 1974)

Honorable Discharge

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes; *Leonard and Mary Hilty v. Kenny and Verline Armstrong*, No. 90757-3

This was an action for specific performance of a real estate sales agreement my wife and I entered into to purchase a home. Our sales agreement did not include a provision making the closing contingent upon the sale of our existing home. Our home did not close as anticipated and we were unable to close on the closing date included in the sales agreement. The Plaintiffs obtained a judgment for specific performance and we closed on their property shortly after our home sold.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Greenwood CME Church, member, 1978-present

Lane College, Board of Trustees, 2004-2010

Baptist College of Health Science, Board of Trustees, 2010-present

Sigma Pi Phi Fraternity, member, 1993-present

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Judicial Conference, 2006-present

Continuing Legal Education and Specialization Commission, member, 1994-2000

Memphis Bar Association, Board Member

Shelby County Law Library Committee, member, 2000-2006

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Chancellor Charles A. Rond, Judge of the Year Award (2012)

30. List the citations of any legal articles or books you have published.

Not applicable

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Bridge the Gap seminar for newly licensed attorneys

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

August 2006: Chancellor, Part III, Shelby County Chancery Court (Elected in the countywide general election)

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See attached Memorandum Opinions.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I believe that my range of experience in the legal profession makes me well suited to serve on the Court of Appeals. Prior to my appointment as Clerk and Master, I handled a variety of legal matters while in private practice. As Clerk and Master, I answered inquiries and assisted lawyers in filing many complex matters in Chancery Court. Chancery handles more case types than any other court in our court system in Tennessee. During my nine years as Clerk and Master, I reviewed every appellate decision involving cases appealed from Chancery Court in Shelby County. This experience served to build on my perspective of the role of appellate courts in our legal system. As a trial judge in Chancery Court, I have tried many complex legal matters in various areas of the law. The resolution of these cases required extensive legal research to determine the law on the issues involved. From these experiences, I fully understand the importance of our appellate courts rendering clear and concise rulings. I look forward to the opportunity and privilege of serving our state in this capacity if selected by the Governor.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I regularly contribute to Memphis Area Legal Services (MALS) during its annual campaign to raise monies to fund its operation so that it can continue to represent the disadvantaged in our community who without MALS would not have representation in our legal system. Last year I volunteered to send letters to members of the local judiciary in an effort to raise funds for MALS.

While in private practice, I accepted appointments on criminal cases where defendants were indigent and the Public Defender's Office had a conflict. In most instances, I never billed the State for my services. Until my appointment as Clerk and Master, I conducted a free legal clinic almost annually at the church where I grew up in Tipton County. I frequently drafted wills and other documents for elderly members at the church at no charge.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking the upcoming vacancy on the Tennessee Court of Appeals, Western Section. There are, of course, three sections of the Tennessee Court of Appeals: Western, Middle, and Eastern. Each section has four appellate judges. The position I have applied for hears civil appeals from the Western Section but may for various reasons hear civil appeals from the other two sections. The Western section is comprised of twenty-one counties in the western part of the state.

I believe my background as a former Assistant United States Attorney, Air Force Legal Officer, 18 years of private practice, nine years as Clerk and Master, and seven years as a trial judge in Chancery Court would bring a uniquely broad range of experience to the Court of Appeals.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

Member, Sigma Pi Phi Fraternity (1993 to present)

- Through the fraternity's foundation, we provide scholarships to underprivileged students attending Lemoyne Owen College. We also mentor students from inner city schools in Memphis.

Board of Trustees, Lane College (2004-2010)

- In 2004, the Chairman of the Board of Trustees asked me to serve on the Board. I served two terms and rotated off the Board in 2010. During my tenure, enrollment increased substantially. It was encouraging to see the growth of the college since it is a vital part of the Jackson community.

Board of Trustees, Baptist College of Health Sciences (2010-present)

- BCHS is a faith-based college focused on undergraduate education in the health sciences, a field in which I am particularly interested. My daughter is a physician and serves as the Chief Medical Officer for a non-profit health organization in New York City and my son is a cornea surgeon for Kaiser Permanente in Washington, D.C. In 2010, Dr. Betty Sue McGarvey, President of BCHS, asked me to serve on the college's Board.

- I would like to continue to serve on the college's Board. My service is without pay and board members understand that I do not engage in any board fundraising activities. I believe that strong educational institutions add value to a community and my service on the Board is just another way of providing service to my community.

This past summer, I invited two first-year law students from the University of Memphis to intern in my court. Following their summer internship, I received thank you notes from each expressing how valuable their experience was. I hope to continue these internships in the future. It strengthens our profession for law students to get an early look at the inner workings of the judiciary.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

My path to law school and a legal career is probably very different from most lawyers. I grew up on a working farm in west Tennessee. None of my relatives or family friends were lawyers. As a child, I did not dream about attending law school or being a trial lawyer. I was always interested in science and math and majored in electrical engineering. It was not until my junior year after taking a business law class that I started considering law school. The class was taught by Attorney Carlton Petway who was a prominent trial attorney in Nashville. Due to his encouragement, I applied to law school. In law school, I excelled in moot court and trial advocacy and this was perhaps the beginning of my interest in becoming a trial lawyer.

My first assignment in the Air Force was Lackland Air Force Base, a large technical training base in Texas. One of the senior prosecutors at the base had me assist him on several court-martial cases before I even attended the mandatory JAG school. At a large training base, young airmen are prosecuted for almost every criminal charge you would see in civilian life. Later, as defense counsel in the military, I defended Air Force members in courts-martial and discharge boards.

My private practice focused on civil and criminal trial practice. I understand the importance of preparation and how preparation or the lack of it can affect the outcome of a trial. As a trial judge now, I make a point of thoroughly reviewing for every case on my calendar. Over the past seven years, every trial I have conducted has been without a jury. To properly fulfill my obligation to these litigants, I need to be prepared at the outset because at the close of these proceedings, I have no one else to rely on in rendering decisions. I take my obligation in this regard seriously now and if selected for the appellate position my approach will not change.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes.

I frequently advise attorneys and litigants in my court that I do not make the rules and that as a trial court judge, I follow them whether or not I agree with the outcome the rules or law dictates. In Chancery Court, it is rather common for attorneys who are losing their case on the law to argue that Chancery is a court of equity and that the court can simply disregard the law and do what is equitable. When faced with this argument, I simply remind the attorney that the first rule of equity is that "equity follows the law."

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Bishop William Graves, Senior Bishop, Retired, CME Church

B. Mary McDaniels, Chairperson, Tennessee Alcohol Beverages Commission

C. Cato Johnson, Senior Vice President of Corporate Affairs, Methodist Healthcare

D. Attorney Nicole Grida, Field Counsel, Liberty Mutual Insurance Group

E. Jack Sammons, Chairman, Memphis and Shelby County Airport Authority

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court of Appeals, Western Section of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: 30 October, 2013.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COMMISSION FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Commission for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Commission for Judicial Appointments and to the Office of the Governor.

KENNY ARMSTRONG
Type or Print Name

Kenny Armstrong
Signature

October 30, 2013
Date

6900
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

KENNETH T. WHALUM, JR.

Plaintiff,

v.

Docket No.: CH-12-1326
Part III

RICHARD L. HOLDEN, in his official capacity as Shelby County Administrator of Elections, SHELBY COUNTY ELECTION COMMISSION, and their official capacities all members of the Shelby County Election Commission, including Robert D. Meyers, Norma Lester, George C. Monger, III; Dee Nollner and Steve Stamson,

Defendants,

KEVIN WOODS,

Intervening Defendant.

MEMORANDUM OPINION

This is an election contest case arising out of the August 2, 2012 race between the Plaintiff, Kenneth T. Whalum, Jr. ("Whalum") and Intervenor, Kevin Woods ("Woods") for the Shelby County School Board District 4 position. Whalum was defeated by Woods by 106 votes in the election. As required by Tenn. Code Ann. § 2-17-105, Whalum timely filed the instant complaint within ten (10) days of certification of the election by the Shelby County Election Commission ("Election Commission").

In this action, Whalum seeks to set aside the election for the School Board District 4 position because the Election Commission erroneously assigned voters who resided in District 4 to other district races and also assigned voters who did not live in District 4 to vote in the District

4 school board race. At the trial of this matter, the parties stipulated that 556 voters who were erroneously assigned to District 4 by the Election Commission cast votes in the District 4 school board race. Additionally, 281 voters who resided in District 4 were erroneously assigned ballots by the Election Commission for races other than District 4. From its records, the Election Commission was able to determine how 370 of the 556 ineligible voters voted in the District 4 race. Ninety-three (93) of the 370 voted for Woods and 277 voted for Whalum. Adjusting the election result by these 370 votes, Woods' margin of victory increased from 106 votes to 290 votes. The Election Commission was unable to determine how the remaining 186 ineligible voters voted in the District 4 race. And, of course, no proof was presented to show how the 281 voters who were erroneously assigned ballots in other districts would have voted since this proof is not normally considered in these matters.

Whalum contends that the two groups of voters together (186 and 281) exceed Woods' margin of victory of 290 and that, as such, the election for the District 4 school board seat should be set aside due to the mistakes made by the Election Commission. Defendants on the other hand argue that under Tennessee law the 281 votes should not be considered and that the number of illegal votes cast which could not be determined was only 186, which is less than Woods' margin of victory of 290 votes.

In an election contest case, a court in this state should be appropriately reluctant to declare an election invalid. *Forbes v. Bell*, 816 S.W.2d 716, 724 (Tenn. 1991). Public policy in Tennessee for many reasons favors upholding the validity of an election whenever possible unless there is clear evidence the result should be voided. *Taylor v. Armentrout*, 632 S.W.2d 107, 113 (Tenn. 1981).

Tennessee courts have authority to set aside an election on one of two grounds. *Forbes v. Bell*, 816 S.W.2d 716, 719-720 (Tenn. 1991) (citing *Emery v. Robertson County Election Comm'n* 586 S.W.2d 103, 109 (Tenn. 1979)). Under the first ground, an election can be set aside where ballots are found to be illegal and the number of illegal votes cast equals or exceeds the margin by which the certified candidate won the election. *Id.* This is referred to as an Emery Prong I challenge. Under the second ground, which is referred to as an Emery Prong II challenge, the losing candidate must establish that fraud or illegality so permeated the election as to render the election incurably uncertain. *Emery v. Robertson County Election Comm'n*, 586 S.W.2d 103, 109 (Tenn. 1979). The losing candidate is not required to show a mathematical certainty that the result might have been different to prevail on an Emery Prong II challenge. *Id.* Historically, most Emery Prong II challenges are based on claims of fraud, but statutory violations alone may be sufficient to render an election void. *Forbes*, 816 S.W.2d at 720. The issue of whether the number of illegal votes cast equals or exceeds the winning candidate's margin of victory is not an inquiry made under an Emery Prong II challenge, only under an Emery Prong I challenge. *Newman v. Shelby County Election Comm'n*, 2012 WL 432853, at *4 (Tenn. Ct. App. Feb. 13, 2012). The inquiry under Emery Prong II is whether the fraud or illegalities complained of compel the conclusion that the election did not express the free and fair will of the qualified voters. *Emery*, 586 S.W.2d at 109. To establish this, a plaintiff must show a causal connection between the illegalities or irregularities complained of and the uncertainty of the election outcome. *Newman*, 2012 WL 432853 at *5.

In his complaint in this action, Whalum challenges the election outcome on both Emery Prong I and Emery Prong II grounds. The central issue particularly with respect to the Emery Prong I challenge is whether the 281 legally qualified voters of District 4 who were erroneously

given ballots for other districts should be considered in determining the number of illegal votes. In *Skidmore v. McDougal*, the Tennessee Court of Appeals, citing *Taylor v. Armentrout*, defined an "illegal vote" as a vote cast in a precinct where the voter does not reside. 2008 WL 886266, at *1 (Tenn. Ct. App. 2008) (citing 632 S.W.2d 107, 118 (Tenn. 1981)). Arguably, with this definition of an illegal vote, votes cast by District 4 voters in other school board areas should be disregarded by this Court. This, of course, is the position advanced by the Election Commission and Woods. Whalum, however, aptly points out that *Skidmore v. McDougal* and *Taylor v. Armentrout* are factually distinguishable from his case.

In *Taylor*, which was a "liquor by the drink" referendum for city voters only, election officials, in addition to publishing the precinct boundaries in the local newspaper, mailed personal notices to every voter affected by the recent city annexation along with a new registration card which informed them of their entitlement to vote in city elections in Johnson City, TN. 632 S.W.2d at 109. *Skidmore* involved an alderman race in Hendersonville, Tennessee for Ward 3. 2008 WL 886266, at *1. Fourteen (14) residents of Ward 3 were erroneously assigned by the Sumner County Election Commission to vote in wards other than Ward 3 where they were residents. *Id.* While not clearly stated in the opinion, there had been no recent boundary changes in Ward 3 which would have caused voter confusion. Those 14 voters who elected to vote in an alderman race other than Ward 3 had every reason to know that was a mistake prior to voting, and yet did nothing to call the mistake to the attention of election officials before casting their ballots. Under the facts of these cases, it is understandable that the court found in each that the voters had some responsibility for pointing out the error and that their votes willingly cast elsewhere should have no bearing on the election and accordingly should not be considered in determining the number of illegal votes.

Unlike the voters in *Skidmore* and *Taylor*, no fault can be attributed here to District 4 residents who voted in the wrong school board race. Richard Holden, Administrator of the Election Commission, testified during his deposition which was made an exhibit at trial that no District 4 voter who was improperly assigned by the Election Commission had any knowledge of the erroneous assignment. This was the first Shelby County School Board election for the unified school district. Prior to this election, city residents had never voted in Shelby County School Board races, and the Shelby County School Board districts in this race were changed from prior elections. All voters in the Shelby County School Board races were voting in new districts. Also, unlike election officials in *Taylor*, the Election Commission here did not mail notices to voters advising them of district changes, nor did the Election Commission send notices to voters identifying the school board race associated with their address.

It is against this background, the Court must decide whether the holding in *Skidmore* and *Taylor* is applicable here and serves as a basis to prevent the Court from considering, for Emery Prong I purposes, the 281 voters who were wrongfully denied the opportunity to vote in the District 4 school board race. In this Court's opinion, there are ample reasons to not apply the holding in *Skidmore* and *Taylor* to the Emery Prong I challenge in this case. The Election Commission here made no concerted effort to avoid the problems that occurred in this election for school board positions. With the changes in the alignment of the school board districts due to the new unified school system, the problems that occurred here should have been anticipated and measures taken to insure all data was properly inputted to minimize any adverse impact on school board races.

Nonetheless, based upon a careful review of all relevant appellant decisions involving Tennessee election contest cases, this Court is constrained to find that the 281 voters who were

effectively disenfranchised because of election officials' mistakes should not be considered along with the 186 votes in determining, under Emery Prong I, the number of illegal votes. All the cases reviewed suggest that courts in this state narrowly define the term "illegal vote" and limit its application to voters casting a ballot in a race in which they are not qualified to vote.

Now, with regard to Whalum's challenge under Emery Prong II, there is no proof in the record that the Election Commission or others involved in the election committed any fraud in conducting the election. Proof of fraud, however, is not required in all cases to void an election. An election may be voided if enough persons were unlawfully deprived of the opportunity to vote. *Taylor v. Armentrout*, 632 S.W.2d 107, 120 (1981) (Brock, J., dissenting). Therefore, the inquiry left to be decided is whether the irregularities regarding the assignment of voters was of such magnitude that it calls into question whether the election outcome represents the free and fair will of the legally qualified voters of District 4 who, in fact, exercised their right to vote. In examining this remaining issue, the Court is of the opinion that it has to consider the 186 illegal votes which could not be assigned to a particular candidate along with the 281 votes that were excluded. The combination of these two groups far exceeds Woods' margin of victory. Moreover, the number of legally qualified voters who were prevented from voting in District 4 is so large that this number of voters might have easily changed the result of the election had they been allowed to cast their vote in the District 4 race. Unfortunately, due to no fault of their own, and due solely to mistakes of election officials, they were denied the opportunity to express their will in the school board position representing their district.

The combination of illegal votes cast that cannot be assigned and legal votes excluded creates clear uncertainty about the election outcome in the District 4 race if the election had been conducted properly. Under Tennessee law, Whalum is not required to show to a mathematical

certainty that the result would have would have been different if mistakes had not been made by the Election Commission. *Forbes*, 816 S.W.2d at 720. Admittedly, the mistakes here were honest mistakes and not intentional, they, however, bear a direct relationship to the uncertainty of the election outcome if all voters had been allowed to participate and vote in the District 4 race. These mistakes in assigning so many voters to incorrect school board districts cannot be simply ignored in an effort by the Court to not take the step of declaring an election invalid. Without a new election conducted properly, there will always be legitimate questions about the actual winner in the District 4 county school board race. The District 4 election under the facts here is incurably uncertain when all voters are considered, and leaves the Court no alternative except to order a new election in this race.

Kenny Armstrong

Kenny Armstrong, Chancellor

13 August 2013

Date

Certificate of Service

I hereby certify the foregoing has been delivered by personal delivery of the U.S. Mail to all parties to this action.

Tracy Askew

Tracy Askew, Courtroom Clerk

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

MORGAN KEEGAN & COMPANY, INC.,

Petitioner,

v. No. CH-11-1734-3

CHRISTIAN BROTHERS UNIVERSITY ENDOWNMENT FUND,

Respondent.

MEMORANDUM OPINION

This cause came to be heard on the 6th of September 2012, upon the Petition and Application for Vacatur by Morgan Keegan & Company, Inc. ("Morgan Keegan") in connection with a Financial Industry Regulatory Authority ("FINRA") award in favor of Christian Brothers University Endowment Fund ("CBU"). CBU initiated its arbitration claim in this case for losses incurred on its investment in the RMK family of bond funds managed and marketed by Morgan Keegan ("RMK Funds"). CBU's claim was arbitrated before a three member panel assembled by FINRA (the "Panel"). On September 22, 2011, FINRA issued an award for CBU in the amount of $432,061 plus interest. Morgan Keegan then timely filed this petition for vacatur with the Court on October 24, 2011.

In its application for vacatur, Morgan Keegan sought vacatur on all grounds available to it under the Federal Arbitration Act ("FAA") and the Tennessee Uniform Arbitration Act ("TUAA"). Morgan Keegan also specifically cited the following grounds:

1. Evident partiality by the arbitrators;

2. The arbitrators were guilty of misbehavior by which the rights of Morgan Keegan were prejudiced;
3. The arbitrators exceeded their authority by hearing derivative claims; and
4. The arbitrators were guilty of misconduct in refusing to postpone the hearing schedule to resume on August 23, 2011.[1]

Considering the arguments raised by Morgan Keegan regarding the Panel's consideration of the regulatory settlements and its refusal to postpone the hearing after deciding to admit this material, the Court entered an order on October 10, 2012 remanding this matter to the Panel. The order requested clarification of the Panel's reasoning in refusing the postponement request and the weight given the regulatory settlements by the Panel in reaching its decision in favor of CBU.

On January 18, 2013, the Panel responded to the Court's request for clarification by first stressing that the law accords to arbitrators certain privileges to preserve the confidentiality of their deliberations. With this understanding of their privilege, the Panel explained that it did not consider postponement to be justified under the circumstances here since it never reversed its decision regarding admission of the regulatory settlements. The regulatory filings were admitted earlier by the Panel and during a telephonic conference on June 24th, CBU sought admission of the settlement which was reached by Morgan Keegan with the Securities and Exchange Commission and the State of Alabama on June 22nd. The Panel allowed the parties to submit briefs and held a telephonic conference regarding this matter on August 16th and on August 18th entered an order stating it would read the negotiated settlements and assign them their due weight.

[1] The Panel heard this matter for five days in June and continued the matter to August 23rd for three additional days of hearing for Morgan Keegan to complete its defense. During the intervening period, the Panel decided to admit certain regulatory settlements entered into by Morgan Keegan.

The Panel further stated that its ruling would not prevent the parties from arguing for or against such exhibits in closing argument when the hearings resumed. It was not until the start of the hearings in August that the Panel became aware that the parties did not receive a copy of its August 18th ruling on this issue. Throughout the remainder of the three days of hearings in August, the parties were allowed by the Panel to argue about the significance of the regulatory settlements and Morgan Keegan had two experts available. In its response to the Court's inquiry, the Panel noted that in reaching its decision to make an award to CBU it considered all of the evidence including the pleadings and the testimony of witnesses who appeared during eight days of hearing and not just the regulatory settlements.

The scope of judicial review of arbitration awards is very narrow with courts playing only a limited role in reviewing the decisions of arbitrators. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 (Tenn. 1996) citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987). The FAA and the TUAA both outline specific statutory grounds under which an arbitration award can be vacated. *See* 9 U.S.C. § 10 and Tenn. Code Ann. § 29-5-313.

Morgan Keegan asserts that the award in this case must be vacated pursuant to Tenn. Code Ann. § 29-5-313(a)(3) and 9 U.S.C. § 10(a)(4) because the arbitrators exceed their powers in ignoring both FINRA rules and the parties' arbitration agreement. Because arbitration is a matter of contract, parties can structure their arbitration agreement to suit their needs, including limiting the issues they choose to arbitrate. *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010). The parties in this case agreed that the arbitration would be conducted in accordance with FINRA Rules.

FINRA Rule 12205 states "[s]hareholder derivative actions may not be arbitrated under the Code." Morgan Keegan asserts that a significant portion of CBU's proof pertained to the alleged mismanagement of the RMK Funds, a classic shareholder derivative claim, and therefore was prohibited under FINRA Rule 12205 requiring vacatur of the award.

While it appears CBU presented some proof at the arbitration hearing regarding the mismanagement of the RMK fund, its claim against Morgan Keegan focused on Morgan Keegan's failure to properly advise it about the risk associated with the fund and misrepresenting the fund's suitability for the college's endowment reserves. Contrary to the advice it was given, the RMK fund was a highly speculative investment fund and was not suitable for a college seeking to preserve its endowment funds. But for the omissions and misrepresentations by Morgan Keegan, CBU contended that it would not have invested in the RMK fund. As framed in this matter, CBU's claim is a direct claim and not a derivative shareholder claim. There is a distinct duty owed to an individual investor by its investment advisor and the breach of that duty gives rise to a different cause of action than from a breach of duties owed to the fund itself. The introduction of evidence of mismanagement of the fund did not transform CBU's claim into a derivative claim. As such, the Court finds that the Panel acted within its powers and authority in hearing the claim brought by CBU against Morgan Keegan.

Morgan Keegan also asserts that the award must be vacated pursuant to Tenn. Code Ann. § 29-5-313(a)(2) and 9 U.S.C. § 10(a)(2) due to the evident partiality of the arbitrators. To vacate an arbitration award on the basis of evident partiality, the party seeking vacatur must prove that "a reasonable person would have to conclude that an arbitrator was partial" to the other party to the arbitration. *Apperson v. Fleet Carrier*

Corp., 879 F.2d 1344, 1358 (6th Cir. 1989) quoting *Morelite Const. Corp. v. New York City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2d Cir. 1984). All the case law suggests that this objective standard is not easily met and requires more than the mere appearance of bias. *Apperson*, 879 F.2d at 1358. As evidence of evident partiality, Morgan Keegan points to the refusal of one of the arbitrators, Ian. S. Greig, to recuse himself. Morgan Keegan sought Mr. Greig's removal after learning he was serving on two other arbitration panels involving claims against Morgan Keegan for losses incurred in the RMK funds.

A review of the record reveals insufficient proof to support Morgan Keegan's claim of evident partiality for the arbitrator's refusal to recuse himself. There is no proof of the outcome in the other cases where Mr. Greig served. Simply because Mr. Greig was serving on other panels, absent some showing he decided every case against Morgan Keegan, the claim of evident partiality on his part fails.

Morgan Keegan lastly argues that the award must be vacated pursuant to Tenn. Code Ann. § 29-5-313(a)(4) and 9 U.S.C. § 10(a)(3) due to the misconduct of the arbitrators in refusing to postpone the hearing after admitting the regulatory settlements. Because this section requires substantial prejudice to the rights of a party, the standard of review is whether a party to arbitration has been denied a fundamentally fair hearing, which requires only notice, an opportunity to present relevant and material evidence and arguments, and an absence of bias on the part of the arbitrators. *Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, 205 F.3d 1340, at *6 (6th Cir. 2000) quoting *National Post Office v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985). Morgan Keegan cites FINRA Rule 12601 in its assertion that it was denied a fundamentally fair

hearing because the rule requires postponement upon agreement between the parties. A careful review of the record reveals there was no agreement between Morgan Keegan and CBU to postpone the hearing. While CBU did not object to the postponement requested by Morgan Keegan, it did not enter into a mutual agreement for postponement as contemplated by FINRA Rule 12601(a)(1), which would have required the Panel to grant the postponement.

In order to support vacatur based on the Panel's decision to deny postponement, where there was no mutual agreement for postponement, Morgan Keegan has the burden of demonstrating that the Panel's decision denying postponement substantially prejudiced its rights and denied it a fundamentally fair hearing. It is well settled law that the decision to grant or deny postponement in an arbitration proceeding falls within the broad discretion of the appointed arbitrators. *Storey v. Searle Blatt Ltd.*, 685 F. Supp. 80, 82 (S.D.N.Y. 1988). Arbitrators must have the discretion to determine whether a party needs a postponement to attempt to submit additional evidence or whether a party is simply attempting to prolong the proceeding.

The record in this case does not demonstrate that Morgan Keegan was denied a fundamentally fair hearing by the denial of its postponement request after the Panel decided to admit the regulatory settlements. The regulatory materials were admitted by the Panel in late June 2011 and Morgan Keegan was aware at that time that CBU was seeking admission of the settlements that Morgan Keegan entered into on June 22, 2011. Although Morgan Keegan was not aware until August 23, 2011, the date the hearing was scheduled to resume, that the regulatory settlements were admitted, it knew as early as late June 2011 that admission of these settlements was a possibility and could have

planned its August presentation accordingly.[2] At the hearing in this matter in September 2012, Morgan Keegan offered no details to the Court regarding what additional proof or witnesses it would have presented if granted the postponement. On this record, there is simply insufficient proof that postponement would have resulted in a different presentation by Morgan Keegan or altered the outcome of the arbitration. It should also be noted that admission of the regulatory settlements in the RMK cases do not automatically result in an unfavorable ruling against Morgan Keegan.

Based on the findings above, the Court grants CBU's Petition and Application to Confirm FINRA Arbitration Award. The Petition and Application for Vacatur is denied.

Kenny Armstrong, Chancellor

27 MARCH 2013

Date

[2] Admission of the regulatory settlements has not been cited as error by Morgan Keegan.

Certificate of Service

I hereby certify that a copy of this Memorandum Opinion is being mailed to counsel for all parties.

Tracy Askew, Courtroom Clerk

March 27, 2013
Date

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IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

WALGREENS MAIL SERVICE, INC., f/k/a WALGREENS HEALTHCARE PLUS, INC.

Plaintiff,

v.

BLUECROSS BLUESHIELD OF TENNESSEE, INC.,

CH-05-1865-3

Defendant,

and

CAREMARK RX, INC.

Intervenor.

MEMORANDUM OPINION

This court conducted an evidentiary hearing on the Plaintiff Walgreens Mail Service Inc.'s Petition for Contempt and Motion for Supplemental Injunctive Relief. The sole issue considered by the Court at this hearing was whether the 200 mile restriction included in Defendant BlueCross BlueShield of Tennessee, Inc.'s mail order contract is violative of the Any Willing Provider Act in that this provision has the effect of maintaining BCBST's exclusive mail order network with Intervenor CaremarkRX, Inc.

BACKGROUND

Plaintiff Walgreens Mail Service Inc, is a licensed mail order pharmacy that provides prescription medication to patients throughout the United States using its mail

order facilities in Orlando, Florida and Tempe, Arizona. Walgreens Mail Service Inc, is a fully owned subsidiary of Walgreens Co. which owns retail pharmacies throughout the United States. Defendant BlueCross BlueShield of Tennessee, Inc. (BCBST) is an independent, not for profit, health plan company heaquartered in Chattanooga, Tennessee. BCBST offers mail order pharmacy services to its members, allowing them to purchase and receive through the mail up to a three (3) month supply of certain prescription drugs. Intervenor Caremark, Inc. is a pharmacy benefit management company that, among other things, provides pharmacy benefit management services to BCBST. Pursuant to its agreement with BCBST, Caremark also provides mail order pharmacy services to BCBST insureds, primarily utilizing its facility in Birmingham, Alabama.

This lawsuit arose in 2005 as a result of this exclusive mail order relationship between BCBST and Caremark. Caremark has served as the sole mail order pharmacy provider in BCBST's network since the inception of its mail order pharmacy network in 2002. Prior to filing the instant action, Walgreens requested to participate in BCBST's mail order network but its request was denied. Citing a violation of Tennessee's Any Willing Provider Act, TCA § 56-7-2359(a)(1), Walgreens filed this action against BCBST, alleging that the Act prohibited the exclusive arrangement between BCBST and Caremark.

After conducting extensive discovery, the parties filed competing motions for summary judgment, which the Court heard in 2008. It ruled that the exclusive mail order arrangement between BCBST and Caremark was not legally permissible pursuant to the Any Willing Provider Act. The Court further enjoined BCBST from maintaining its

exclusive arrangement with Caremark and ordered BCBST to admit Walgreens on the same terms and conditions offered other providers.

Acting on the Court's ruling in this matter, BCBST offered Walgreens a contract to participate in its mail order network. The terms of the agreement, however, included the condition that Walgreens' mail order facility must be located in the state of Tennessee or within 200 miles of BCBST's headquarters in Chattanooga, Tennessee. Walgreens agreed to all of the other terms outlined by BCBST, but took exception to the proximity requirement for its mail order facility. When BCBST refused to waive the proximity requirement, Walgreens filed the instant petitions challenging the legal propriety of the 200 mile proximity requirement. On March 3-4, 2009, the Court held an evidentiary hearing in this matter to determine whether there was any business justification or necessity for inclusion of the proximity requirement, and ultimately to determine whether under the facts here, inclusion of this requirement was a violation of the Any Willing Provider Act.

ANALYSIS

The Any Willing Provider Act, TCA § 56-7-2359(a)(1) provides in pertinent part as follows:

> No health insurance issuer and no managed health insurance issuer may . . . deny any licensed pharmacy or licensed pharmacist the right to participate as a participating provider in any policy, contract or plan on the same terms and conditions as are offered to any other provider of pharmacy services under the policy, contract or plan; provided, that nothing in this subdivision (a)(1) shall prohibit a managed health insurance issuer or health insurance issuer from establishing rates or fees that may be higher in non-urban areas, or in specific instances where a managed health insurance issuer or health insurance issuer determines it necessary to contract with a particular provider in order to meet network adequacy standards or patient care needs...

As decided earlier by this Court, the Any Willing Provider Act precludes a health insurance issuer from maintaining an exclusive mail order pharmacy network. The Act further requires health insurance issuers to allow pharmacy providers to participate in their contract, plan, or network on the same terms and conditions as offered to any other provider. The Court is compelled to determine here whether the terms and conditions offered must bear some rational relationship to the provision of a mail order network. This is particularly true here when the terms and conditions imposed have the very practical effect of excluding all mail order providers expect one. Such result, frankly, is contrary to the purpose of the Any Willing Provider Act which was enacted by the legislature to increase patient access to pharmacies of choice. While the Court is reluctant to interfere with BCBST's prerogative to set the terms and conditions of its mail order pharmacy network, the Court has no choice but to enforce the Act when conditions are imposed that defeat legislative intent.

In deciding this case, the Court examined the evidence proffered by the parties to determine whether the proximity requirement was necessary or whether it was merely a pretext to avoid a multi-provider network. The evidence shows that at this time, no mail order provider other than Caremark can comply with the proximity requirement. There are no other mail order pharmacy facilities in the state of Tennessee or within 200 miles of Chattanooga capable of meeting the performance requirement contained in BCBST's mail order network contract. The cost to build such a mail order facility is estimated at approximately thirty (30) million dollars. Additionally, a proximity requirement for a mail order pharmacy is unheard of in the mail order pharmacy industry. Currently, Walgreens and Caremark are parties to numerous mail order contracts and none of these

mail order contracts contain geographic restrictions like the one BCBST seeks to enforce here. Walgreens' pharmacy industry expert, Dr. Stephen Shondelmeyer, testified at the hearing that geographic restrictions do not exist in the mail order pharmacy industry and run counter to the business models for this industry. Similarly, BCBST's industry expert, Lisa Zeitel, testified that she has never seen a geographic restriction similar to the 200 mile restriction here in any mail order pharmacy contract. BCBST also uses multiple providers all over the United State to service its Medicare Part D mail order pharmacy network and does not impose a proximity requirement on those mail order pharmacy providers. The proof here also established that numerous other BlueCross BlueShield companies across the United States use mail order facilities that are located well more than 200 miles away from their headquarters. Indeed, in its initial request for proposals in 2001 to contract with a mail order provider, BCBST did not include any geographic restriction in its requirements.

BCBST's argument that the proximity requirement included in its mail order terms is crafted to meet its business goal of a safe, cost-efficient mail order program that serves the needs of its members is simply not supported by the proof. Contrary to BCBST's claim, there is no proof that the proximity requirement allows faster delivery of prescriptions to customers. BCBST offered no proof that prescriptions delivered via first class mail from Birmingham into Tennessee arrive any faster than prescriptions sent via first class mail from Orlando or Tempe into Tennessee. Furthermore, the Postal Service estimates first class mail delivery time as 2-3 days from anywhere in the United States and this time frame is well within the 10-14 days delivery time that BCBST promises its insureds. Ten (10) to fourteen (14) days is also the industry standard for delivery time of

mail order prescription drugs. Further, it is not disputed that Walgreens can meet the 10-14 day industry delivery standard from either of its two mail order facilities.

BCBST's attempt to justify its proximity requirement to meet emergencies is also not convincing. BCBST's representative testified that in the event of an emergency, a company representative could drive from Chattanooga to Birmingham, pick up prescriptions from Caremark, and then deliver them to insureds across the state of Tennessee. This emergency procedure has never been utilized by BCBST and the Court is of the opinion that such emergency procedure is impractical and is not likely to ever be used by BCBST in any emergency.

Finally, BCBST attempts to justify its proximity requirement by arguing that it advances BCBST's marketing plan for its mail order facility. The close location allows customers and employees to drive to visit the Birmingham facility and return home in a single day. However, this claimed marketing plan is not found in any of BCBST's printed marketing materials. In addition, BCBST's representative at trial testified that only four or five customers have actually visited Caremark's Birmingham facility since Caremark became BCBST's mail order provider in 2002.

CONCLUSION

After a thorough consideration of the record in this case, the evidence presented at the March hearing, and the briefs submitted by the parties, the Court finds that the proximity requirement imposed here by BCBST is nothing more than a pretext to maintain its exclusive mail order pharmacy relationship with Caremark and, as such, is a violation of the Any Willing Provider Act. The Court further finds that on this record,

there is absolutely no business justification or necessity for the proximity requirement in BCBST's mail order contract.

IT IS THEREFORE ORDERED ADJUDED AND DECREED that BCBST is enjoined from imposing the proximity requirement against Walgreens to participate in its mail order pharmacy network.

IT IS SO ORDERED THIS THE 18TH DAY OF JUNE 2009.

Kenny Armstrong
Chancellor, Part III

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served this the 18th day of June, 2009, via first class U.S. Mail upon the following:

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IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

THE STATE OF TENNESSEE, ex rel
THE BOARD OF EDUCATION OF
THE MEMPHIS CITY SCHOOLS,

Plaintiff

and

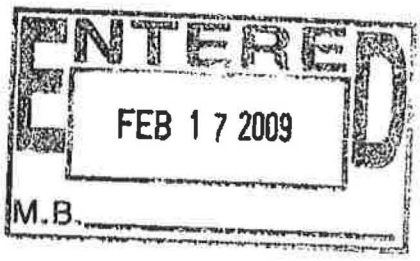
MEMPHIS EDUCATION ASSOCIATION

Intervening Plaintiff,

v.

THE CITY OF MEMPHIS, CITY
COUNCIL OF THE CITY OF MEMPHIS

Defendant.



CH-08-1139-3

MEMORANDUM OPINION

This lawsuit arises from the decision by the Memphis City Council in June 2008 to reduce funding to the Memphis City Schools for the 2008-2009 school year below the funding level provided by the City of Memphis in the previous school year. The Board of Education of the Memphis City Schools subsequently brought this action challenging such reduction by the Council as a violation of the "maintenance of effort" provisions contained in our state's statutes governing funding of public education.

The legislative history of the "maintenance of effort" provisions leaves much to be desired in terms of interpreting the General Assembly's legislative intent in enacting these statutory provisions. There are numerous instances of conflicting statements by legislators regarding the obligations imposed on local legislative bodies by the "maintenance of effort"

provisions. Unfortunately, there is also no legal precedent specifically addressing the issue currently before the Court. There are, however, relevant Attorney General opinions addressing this issue which provide support for the Board of Education's legal position in this case. However, as pointed out by counsel for the City of Memphis, the Court is not bound by such opinions and must make its own independent decision in this matter.

The issue before the Court is clearly one of first impression, requiring the Court to interpret the statutory provisions in question and to rule on the City's obligation under our state's education statutes with respect to funding for the City school system. While the Memphis City School System is a special school district created by a Private Act of the General Assembly operating under its own charter and not the City's charter, the City's charter does require the City to approve the annual budget of the Board of Education of the Memphis City Schools. Further, the proof presented at trial clearly establishes that funding provided by the City of Memphis is a critical component of total funding for the Memphis City School System, and has been since the school system was established. Admittedly, current funding for the school system this year—without any contribution from the City—far exceeds the minimum funding mandated by the State BEP formula. Such a finding, however, is not dispositive of the "maintenance of effort" issue before the Court.

In reaching a decision in this matter, the Court carefully reviewed the legislative history of Tennessee's education statutes, the relevant Attorney General opinions, and all case authorities cited by the parties. More importantly, as required of the Court in such matters, the Court examined the entire comprehensive statutory scheme of our public education statutes with particular emphasis on T.C.A. provisions §49-3-314(c)(1) and §49-2-203(a)(10)(A)(ii), which impose the "maintenance of effort" requirement.

Tenn. Code Ann. §49-3-314(c)(1) provides in pertinent part:

> No LEA shall use state funds to supplant total local operating funds, excluding capital outlay and debt service.

Similarly, Tenn. Code Ann. §49-2-203(a)(10)(A)(ii) provides:

> No LEA shall submit a budget to the local legislative body that directly or indirectly supplants or proposes to use state funds to supplant any local current operating funds, excluding capital outlay and debt service.

Based on the Court's review of the state's education statutes, and considering the City's long history of funding the Memphis City School System, it is the opinion of this Court that the "maintenance of effort" provisions of our state's education statutes impose a statutory duty on the City of Memphis to continue to provide funding to the Memphis City School System in an amount at least equal to the funding level provided in the previous year. This construction of the "maintenance of effort" provisions is consistent with the General Assembly's overall goal of prohibiting local governments from reducing their annual funding effort in support of public education in their district. To allow the City Council to drastically reduce its support now, after many years of funding the City school system, violates both the goal of our public funding statutes and the express language of Tenn. Code Ann. §49-3-314(c)(1) and Tenn. Code Ann. §49-2-203(a)(10)(A)(ii).

The Court finds from the proof that the City was obligated to provide the Memphis City School System funding at a minimum of $84,731,347 for the 2008-2009 school year, rather than the $27,270,400 awarded last June. Accordingly, the Court issues the writ of mandamus requested by the Plaintiffs and orders the City to provide the Memphis City School System additional funding for the 2008-2009 school year in the amount of $57,460,947 to meet its statutory obligation as required by the "maintenance of effort" provisions of our state's education statutes.

IT IS SO ORDERED THIS THE 17TH DAY OF FEBRUARY 2006 KAA

Kenny Armstrong
Chancellor, Part III

A TRUE COPY-ATTEST
Dewun R. Settle, Clerk & Master
By _____ D.C. & M

CERTIFICATE
I hereby certify that on this date
I am mailing a copy of this decree
to the opposing party.

J. Gibson

~~attorney for the~~ D.C.&M