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May 1, 2000

Opinion No. 00-079

Zero Tolerance Policy of the Department of Human Services

QUESTION

Whether the Zero Tolerance Policy and Procedures memorandum ("zero tolerance policy") of the Department of Human Services ("Department") regarding enforcement of child care statutes and regulations must be promulgated as a rule under the Uniform Administrative Procedures Act ("UAPA").

OPINION

No. The zero tolerance policy is not required to be promulgated as a rule under the UAPA.

ANALYSIS

The zero tolerance policy describes how the Department will internally manage a violation of the Department's rules applicable to child welfare agencies, including child care centers, which has "seriously jeopardized the health, safety, or welfare of a child(ren)."[1] It states that "[p]otentially, any violation that places children at serious and immediate risk of harm may be subject to the policy, but the specific circumstances of each case will ultimately decide the course of action." The policy sets out various examples where the Department has summarily suspended a child care center's license. The policy directs Department licensing staff to "gather the factual information necessary to make an initial determination" on whether a serious violation has occurred. The policy further directs the staff on how to organize and communicate information to the Department's area attorney. The policy states that the information conveyed to the area attorney should outline exactly what rules have been violated, the factual observations or first hand information which confirm the rule violation and why it is necessary to suspend the license immediately. The policy further describes

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[1]We note that the version of the "Zero Tolerance Policy Procedures" which was attached to your request was amended by the Department on April 17, 2000. This opinion will address whether the "Zero Tolerance Policy Procedures" memorandum, dated April 17, 2000, must be promulgated as a rule under the Uniform Administrative Procedures Act.

what the staff must do after the Order of Summary Suspension is served on the agency, what may happen at the informal hearing following the summary suspension and the responsibilities of licensing staff if the Department files a Notice of Revocation of the agency's license.

You have asked us whether the zero tolerance policy must be promulgated as a rule. The UAPA prescribes the procedures for an agency to adopt "rules." Tenn. Code Ann. § 4-5-201 et seq. Tenn. Code Ann. § 4-5-102(10) defines a "rule" as:

> each agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency. "Rule" includes the amendment or repeal of a prior rule but does not include:
>
> > **(A) Statements concerning only the internal management of state government and not affecting private rights, privileges or procedures available to the public;**
> > (B) Declaratory orders issued pursuant to § 4-5-223;
> > **(C) Intra-agency memoranda;**
> > (D) General policy statements which are substantially repetitious of existing law; or
> > . . .

Tenn. Code Ann. § 4-5-102(10) (emphasis added). Because the "zero tolerance policy" fits within the exceptions described in Tenn. Code Ann. § 4-5-102(10)(A) and (C), it is not required to be adopted as a "rule" under the UAPA.

The Department has promulgated a rule concerning summary suspension of child welfare agency licenses. Tenn. Comp. R. & Regs. ch. 1240-5-11-.05. The rule provides that "[i]f the Department finds that the circumstances existing at the child welfare agency imperatively require emergency action due to their effect on the health, safety, or welfare of the children in care, it may summarily suspend the agency's license." The rule further prescribes the process which will be provided to a licensee once its license is summarily suspended. An agency must have proper statutory authority to promulgate a rule or it will not be approved for legality by the Attorney General and Reporter. Tenn. Code Ann. § 4-5-211.

Tenn. Comp. R. & Regs. ch. 1240-5-11-.05 is authorized by Tenn. Code Ann. § 4-5-320(c) which applies to proceedings affecting licenses and provides, in pertinent part:

> If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.

Tenn. Code Ann. § 4-5-320(c). Tenn. Comp. R. & Regs. ch. 1240-5-11-.05 is also authorized under Tenn. Code Ann. § 71-1-105(12) (the Department's general rulemaking authority) and Tenn. Code Ann. § 71-3-501 et seq. (statutes concerning child welfare agencies.) Besides its summary suspension authority under Tenn. Code Ann. § 4-5-320(c), the Department also has the authority to revoke a child welfare agency's license upon 90 days notice to the licensee. Tenn. Code Ann. § 71-3-506(a); § 71-3-509. A licensing action taken by the Department may be reviewed by the Child Welfare Agency Board of Review, created by Tenn. Code Ann. § 71-3-510, if a licensee timely and properly requests a hearing.

The authority for the Department to summarily suspend a child welfare agency's license is Tenn. Code Ann. § 4-5-320(c), not the zero tolerance policy. The zero tolerance policy is an intra-agency memorandum of the Department which describes how the Department will internally process a violation of the Department's rules which has "seriously jeopardized the health, safety, or welfare of a child(ren)" and thus fits within Tenn. Code Ann. § 4-5-320(c). The zero tolerance policy does not affect private rights, privileges or procedures available to the public. The rights, privileges and procedures available to the public after a summary suspension of a license are set out at Tenn. Code Ann. § 4-5-320(c) and (d). The Department has promulgated rules based on Tenn. Code Ann. § 4-5-320(c) and (d) which are found at Tenn. Comp. R. & Regs. ch. 1240-5-11-.05. Thus, we conclude that the zero tolerance policy is not required to be promulgated as a rule under the UAPA.[2]

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[2] We note that the Davidson Chancery Court has upheld this position in recent litigation stating, "The [zero tolerance] policy is an internal memorandum circulated by the Department to its employees. The document does not have the force of law." Memorandum and Order, entered February 16, 2000, American Child Care, Inc. v. State of Tennessee Department of Human Services and Natasha Metcalf, No. 00-413-III.

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