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Opinion No. 01-163

Certified Trainers under the Private Protective Services Licensing and Regulatory Act

QUESTIONS

Tenn. Code Ann. § 62-35-126 contains the requirements necessary for an individual to become a certified trainer qualified to administer and certify minimum training requirements for a security guard or officer under Tennessee law. Rule 0780-5-2-.11 lists the requirements necessary for an individual to become a certified trainer under this statute. Among these requirements, under rules promulgated by the Commissioner of Commerce and Insurance (the "Commissioner"), the applicant must submit "[a]ny documentary evidence of qualifications to conduct the training required by the Act, such as . . . [a]n instructor's certificate issued by the National Rifle Association." Rule 0780-5-2-.11(2)(g)(3).

1. Does this rule require the Commissioner to accept any certificate that states "instructor" from the National Rifle Association or any other organization?

2. If the National Rifle Association instructor certificate is issued for firearms safety instructor, but the certification card states that this type of certification is "not valid for law enforcement or security officer training," is the Commissioner authorized to accept this evidence as sufficient documentary evidence of qualification to conduct the training required for security guards and officers under Tennessee law?

3. If the answer to Question 2 is "yes," then who is liable for injuries which relate to instructions that are given by instructors/trainers who are certified on an instructor certificate that is not valid to be used for this type of instruction from the issuing authority?

4. If the answer to Question 2 is "no":

a. Should the Commissioner immediately stop accepting certification by instructors who have submitted such a certificate as part of their application to be licensed as a certified trainer?

b. Should the Commissioner require certified trainers who qualified by submitting such a certificate to submit some other evidence of qualification to continue to provide instruction as a certified trainer?

c. Should the Commissioner require any trainer who submitted such a certificate to reimburse or pay for the proper re-training of the security officers or guards they trained while acting as certified trainers when the Commissioner relied on such a certificate as evidence of the requisite qualification?

d.(i). Has such an instructor violated Tenn. Code Ann. § 62-35-130(a)(2), (3), (6), or (7)?

(ii). Should such an instructor be penalized for submitting an instructor's certificate that he or she knew the National Rifle Association did not recognize as an instructor's certificate, and when he or she knew that the National Rifle Association had a program for instructors to instruct security and law enforcement officers that was far more advanced than the basic firearms safety instructor certificate that they submitted to the Commissioner?

5. Is the Commissioner authorized to accept an instructor/trainer certificate from the National Rifle Association after its expiration date as evidence that an applicant to be a certified trainer is qualified to provide the training?

6. Should the Commissioner require all training certificates submitted as evidence that an applicant to be a certified trainer is qualified to provide the training — whether the certificate is issued by the National Rifle Association or any other issuing authority — to be up to date and not expired?

7. The Department of Safety issues an instructor's certificate to teach the Tennessee Handgun Carry Permit Course. The certificate states "Certified Instructor" on its face. But, in order to obtain an instructor certificate to teach the Handgun Carry Permit Course, an individual need only take a Firearm Safety Instructor Course, which is not valid for law enforcement or security officer purposes. Is the Commissioner authorized to accept the Tennessee Department of Safety Handgun Safety Instructor Certificate as evidence that an applicant is qualified to be a certified trainer for security officers?

8. Has an individual who submitted a certificate that states it is "not valid to instruct law enforcement or security officer training" as evidence that he or she is qualified to provide the training required to be a certified trainer violated Tenn. Code Ann. § 39-16-301 prohibiting impersonation of a licensed professional?

OPINIONS

1. Under the statute and the regulation, the Commissioner is free to consider a National Rifle Association certificate like the one described in her decision whether the applicant is "personally qualified to conduct the training" of security guards as described in the statute. But the certificate is merely one aspect of this decision. The Commissioner may look at all the material included with the individual's application and conclude that, based on all the individual's experience he or she is personally qualified to conduct the training required under the statute. This decision should be reasonable and not arbitrary or capricious.

2. As discussed above, the Commissioner may consider such a certificate in her decision whether the applicant is "personally qualified to conduct the training" of security guards as described in the statutory scheme. This decision should be reasonable and not arbitrary or capricious.

3. Liability for such injury would depend on the facts and circumstances. The statute entrusts a decision that an applicant is "personally qualified" to conduct the training required of a trainer to the Commissioner's discretion. As a general matter, an officer invested with discretion and empowered to exercise his or her judgment in regulatory matters is immune from liability to persons who may be injured as a result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without malice or corruption. The Commissioner would therefore be immune from liability for certifying an individual to act as a trainer based on such a certificate so long as her decision was not malicious or corrupt.

4. Because of our answers to Questions 1 and 2, Question 4 is moot.

5., 6., and 7. With regard to each of these issues, the statutory scheme accords the Commissioner the discretion to determine whether a particular individual is personally qualified to provide the training administered by a certified trainer. Therefore, the Commissioner may look at all the material included with the individual's application — whether it is a certificate with an expiration date that has passed, a certificate that states that it is not valid for instructor training, or a certificate from the Department of Safety qualifying the holder to teach the Handgun Carry Permit Course — and conclude that, based on all the individual's experience he or she is personally qualified to conduct the training required under the statute. This decision should be reasonable and not arbitrary or capricious.

8. No.

ANALYSIS

1. Qualifications for Certified Trainers

This opinion raises several questions regarding the implementation of statutes governing the training of private security officers. The Private Protective Services Licensing and Regulatory Act is codified at Tenn. Code Ann. §§ 62-35-101, *et seq.* This statutory scheme is to be administered by the Commissioner of Commerce and Insurance (the "Commissioner"). Tenn. Code Ann. § 62-35-129. Under Tenn. Code Ann. § 62-35-115, it is generally unlawful for any individual to act as an armed or unarmed security guard without having first obtained the appropriate registration card from the Commissioner. An applicant seeking a registration card as an armed or unarmed security guard must have completed at least four hours of general training administered by a certified trainer, and pass an examination on several subjects. Tenn. Code Ann. § 62-35-118(a). In addition, before being issued a firearm, an applicant seeking a registration card as an armed security guard must complete eight hours of firearms training administered by a certified trainer, pass an examination on several related subjects, complete at least four hours of marksmanship

training administered by a certified trainer, and achieve a minimum of seventy percent on any silhouette target course approved by the Commissioner. Tenn. Code Ann. § 62-35-118(b). The applicant must submit a statement from a certified trainer certifying satisfactory completion of whatever training is required within thirty days of employment. Registrations must be renewed every two years. Tenn. Code Ann. § 62-35-122(a). An armed security guard must complete an additional four hours of firearms training and requalify in the use of a firearm as a prerequisite for renewal. Tenn. Code Ann. § 65-35-122(d).

A "certified trainer" is any individual certified by the Commissioner as qualified to administer and certify to successful completion of the minimum training requirements required under the statute for a security guard/officer. Tenn. Code Ann. § 62-35-102(4). Under Tenn. Code Ann. § 62-35-126(a):

> An individual is eligible to become a certified trainer only if such individual:
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> (1) Is at least twenty-one (21) years of age;
>
> (2) Has at least one (1) year of supervisory experience satisfactory to the commissioner with a contract security company or proprietary security organization, or with any federal, United States military, state, county or municipal law enforcement agency; and
>
> (3) Is personally qualified to conduct the training required by this chapter.

The Commissioner may discipline or refuse to issue or renew a certified trainer's license upon finding that the trainer has engaged in any of the activities listed in Tenn. Code Ann. § 62-35-130(a).

The request refers to subsection (e) of Tenn. Code Ann. § 62-35-126. That provision states:

> The certified trainer shall certify to the successful completion of training required by this chapter and shall submit such certification to the commissioner prior to issuance of a registration card, or renewal thereof, in the case of armed security guards/officers.

The request appears to assume that this provision refers to the application process for a certified trainer, and that, therefore, an applicant for qualification as a certified trainer must certify to the Commissioner that he or she has completed the required training and also submit documentary evidence that he or she has completed the required training. But the statute does not specify any particular training or course that an individual must complete to qualify as a certified trainer. By contrast, the training requirements for an applicant for a registration card as an unarmed or armed security guard are set forth in some detail. In addition, statutes regarding application for a registration card explicitly require certification from a certified trainer that the applicant has completed the required training. In the context of the entire statutory scheme, therefore, we think subparagraph (e) of Tenn. Code Ann. § 62-35-126 refers to the trainer's duty to certify

that an applicant for a registration card as an unarmed or armed security guard has completed the required training. The licensing requirements for a certified trainer are in Tenn. Code Ann. § 62-35-126(a).

Regulations implementing the statutory scheme appear at Chapter 0780-5-2 of the Rules of the Department of Commerce and Insurance. Rule 0780-5-2-.11 applies to certified trainers. An individual who wishes to become a certified trainer must submit an application to the Commissioner. Among other information, the application must include:

> Any documentary evidence of qualifications to conduct the training required by the Act, *such as:*
>
> 1. An instructor's certificate issued by the Tennessee Peace Officer Standards and Training Commission;
>
> 2. An instructor's certificate issued by a federal, United States military, state, county, or municipal law enforcement agency;
>
> 3. An instructor's certificate issued by the National Rifle Association;
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> 4. For each type of nonlethal weapons training which the applicant desires to provide, a certificate showing that the applicant has completed a course in the instruction of persons in the proper use of the nonlethal weapon and the liabilities associated with its use; and/or
>
> 5. For each type of nonlethal weapons training which the applicant desires to provide, a notarized statement by the applicant to the effect that the applicant has, for at least one (1) year prior to November 1, 1996, provided training to security guard/officers or law enforcement officers in the proper use of the nonlethal weapon and the liabilities associated with its use.

Tenn. Rules and Regulations, 0780-5-2-.11(2)(g)(emphasis added).

The first question is whether the Commissioner is required to accept any certificate that states "instructor" issued by the National Rifle Association or any other association. As discussed above, we think this question is based on the assumption that the applicant must certify to a particular level of training and that the Commissioner must then accept or reject that certification. But we think that both the statute and the regulation regarding qualification of a certified trainer accord the Commissioner considerably more discretion than this question suggests. The documentary evidence, such as a National Rifle Association certificate, is just one piece of evidence that an individual may submit to the Commissioner to show that he or she is "personally qualified to conduct the training required by this chapter" within the meaning of Tenn.

Code Ann. § 62-35-126(a)(3). Under the statute and the regulation, the Commissioner is free to consider a National Rifle Association certificate like the one described in her decision whether the applicant is "personally qualified to conduct the training" of security guards as described in the statute. But the certificate is merely one aspect of this decision. The Commissioner may look at all the material included with the individual's application and conclude that, based on all the individual's experience he or she is personally qualified to conduct the training required under the statute. This decision should be reasonable and not arbitrary or capricious. Tenn. Code Ann. § 62-35-135 (Administrative Procedures Act governs review of contested cases under this statute); § 4-5-322 (judicial review of contested cases).

2. Authority to Consider National Rifle Association Certificate

The second question addresses a case where an applicant who wishes to qualify as a certified trainer submits a National Rifle Association instructor certificate that states on its face that it is "not valid for law enforcement or security officer training." The question is whether the Commissioner is authorized to accept this evidence as sufficient documentary evidence of qualification to conduct the training required for security guards and officers under Tennessee law. As discussed above, Tenn. Code Ann. § 62-35-126(a) does not specify any particular type or level of training that an individual must have in order for the Commissioner to decide that he or she is "personally qualified to conduct the training" the trainer will administer to applicants for registration as armed or unarmed guards. Further, as cited above, Rule 0780-5-2-.11(2)(g) lists an instructor's certificate issued by the National Rifle Association as one example of documentary evidence of such qualification. For this reason, we think the Commissioner is free to consider such a certificate in making her determination whether the individual is personally qualified to conduct the training under the statute. The Commissioner may look at all the material included with the individual's application and conclude that, based on all the individual's experience, he or she is personally qualified to conduct the training required under the statute. This decision should be reasonable and not arbitrary or capricious.

3. Liability for Injury

The next question assumes the Commissioner is authorized to consider a certificate issued by the National Rifle Association, even it if is marked "not valid for law enforcement or security officer training." The question is who is liable for injuries that relate to instructions given by a trainer whom the Department has certified based in whole or in part on such a certificate. Of course, liability would in every case depend upon the particular facts and circumstances. But the question appears to be directed at the possibility that the Commissioner might be found liable for certifying a trainer based on such a certificate.

This Office is not in a position to evaluate the level of training appropriate for an individual to become a certified trainer. That decision is entrusted to the Commissioner. As a general matter, an officer invested with discretion and empowered to exercise his or her judgment in regulatory matters is immune from liability to persons who may be injured as a result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without malice or corruption.

Hummel v. Neff, No. 86-137-II (Tenn.Ct.App. M.S. Sept. 19, 1986)[1]. The Commissioner would therefore be immune from liability for licensing an individual as a certified trainer based on such a certificate so long as her decision was not malicious or corrupt.

4. In light of our answers to Questions 1 and 2, Question 4 is moot.

5., 6., and 7. Types of Documentary Evidence to Support an Application to Qualify as a Certified Trainer

Questions 5, 6, and 7 all address the authority of the Department to consider different types of documentation as evidence to show that an applicant is personally qualified to conduct the training administered by a certified trainer. As discussed above, we think that the Commissioner is entrusted with the discretion to consider this evidence in determining whether an individual is so qualified. The determination should be reasonable and not arbitrary or caprious.

8. Criminal Violation

The last question is whether an individual who submitted a certificate issued by the National Rifle Association that is marked "not valid for law enforcement or security officer training," and who is then licensed as a certified trainer has violated Tenn. Code Ann. § 39-16-301. Under that statute, a person commits criminal impersonation who, with intent to injure or defraud another person, assumes a false identity, pretends to be a representative of some person or organization, pretends to be an officer or employee of the government, or pretends to have a handicap or a disability. Submitting such a certificate to the Commissioner does not fall within any of the acts prohibited by the criminal impersonation statute. Assuming the applicant is correctly identified on the certificate, the applicant has not assumed a false identity, pretended to be a representative of a person or organization, pretended to be an officer or employee of the government, or pretended to have a handicap or disability. Further, as discussed above, we think the Commissioner may consider such a certificate in her determination whether an applicant is personally qualified to administer the training required of a certified trainer. In any case, if the applicant has received a license as a certified trainer from the Commissioner, that individual may validly represent himself or herself as

a certified trainer. For this reason, the individual would not violate Tenn. Code Ann. § 39-16-301 under these circumstances.

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[1] The Court of Appeals recognized that caselaw conferred immunity for an action done within the scope of the officer's authority and "without *willfulness*, malice, or corruption." (Emphasis added). The Court rejected the argument that an official could be held liable for a "willful" exercise of authority without a malicious or corrupt motive.

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