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February 25, 2003

Opinion No. 03-022

Licensure Requirements and Powers of Private Security Officers Who Work for a Security Company Contracting With Federal, State or Local Governments.

## QUESTIONS

1. Is a private security officer who is employed by a contract security company, paid by the company, and under the direct supervision of the company, but who is providing services to fulfill a contract between the company and the local, state, or federal government for the provision of security services, exempt from the licensing requirements of Tennessee Code Title 62, Chapter 35?

2. Is it legal for a Tennessee licensed security officer to direct traffic in the public streets if he uses the proper safety devices?

## OPINIONS

1. No. Private security officers who are employed by a contract security company are not exempt from Title 62, Chapter 35, even if they are assigned by the contract security company to provide services for the local, state, or federal government.

2. No. The Private Protective Services Licensing and Regulatory Act authorizes licensed security officers to direct traffic on private property, but not in the public streets. In other parts of the Code, "police officers" are identified as the persons who can enforce the traffic laws and whose orders must be obeyed. The various statutes considered *in toto* make it clear that private security officers, regardless of what they may be called, are not police officers with power to enforce the traffic laws and direct traffic on public streets.

## ANALYSIS

### (1)

This request consists of two questions regarding private security officers or "security guards." Title 62, Chapter 35 of the Tennessee Code, the Private Protective Services Licensing and Regulatory Act, specifies the licensing and registration requirements for private security companies

and private security guards. Tenn. Code Ann. § 62-35-104 provides "[e]xcept as otherwise provided in this chapter, it is unlawful for any person to act as a contract security company without having first obtained a license from the commissioner."[1] Tenn. Code Ann. § 62-35-115(a) provides "[e]xcept as otherwise provided in this chapter, it is unlawful for any individual to act as an armed or unarmed security guard/officer without having first obtained the appropriate registration card from the commissioner." However, the Act declares that "the provisions of this chapter do not apply to . . . [a] government officer or employee performing official duties . . . ." Tenn. Code Ann. § 62-35-103(a)(1).

Thus, to answer the first question, it must be determined whether the contemplated security officers are government officers or employees. The question as submitted states that the security officers are ones who are "working for a contract security company, paid by the contract security company, and . . . under the supervision of the contract security company and who [are] not paid by the local government, state government or federal government [that] has contracted the . . . security work . . ."

Based upon the description of the security officers as persons "working for" private security companies, this Office assumes that they are employees of private security companies and not employees of the local, state, or federal government. Yet, it is instructive to consider the common law analysis used to distinguish between employees and independent contractors. As previously noted by this Office, Tennessee case law utilizes the common law definition of employee in a variety of contexts, including liability for employment taxes. *See* Op. Tenn. Atty. Gen. 99-186 (Sept. 17, 1999). Under the common law analysis, the trier of fact considers several different factors in determining an independent contractor, as opposed to employer-employee, relationship. *Beare Company v. State of Tennessee*, 814 S.W.2d 715, 718 (Tenn. 1991). These factors include the right to control the conduct of the work, the right of termination, the sources and means of payment, the freedom to select and hire helpers, the furnishing of tools and equipment, the self-scheduling of hours, and freedom to offer services to other persons or entities. *Id.*

The Tennessee legislature has emphasized the source of payment in its definition of "state employee" in Tenn. Code Ann. § 8-42-101(3)(A):

> Any person who is a state official, including members of the general assembly, or any person who is employed in the service of and whose compensation is payable by the state, or any person who is employed by the state whose compensation is paid in whole or in part from federal funds, but does not include any person employed on a contractual or percentage basis. (emphasis added)

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[1]The "commissioner" in this statute and all other parts of the Act is the Commissioner of Commerce and Insurance.

Under the common law, however, the issue of who pays an employee is not conclusive, and the Tennessee courts appear to put greater emphasis on who has the right of control over the employee's work. *See Youngblood v. Wall*, 815 S.W.2d 512 (Tenn. Ct. App. 1991), *perm. app. denied* (Tenn. 1991). Under the facts presented, these security officers are under the supervision of the contract security company, are paid by that company, and thus are clearly its employees. Thus, based upon the facts presented, these security officers are not employees of any government or government agency. Consequently, they are not exempted by Tenn. Code Ann. § 62-35-103(a)(1). This analysis does not change merely because the security officer is assigned by his employer to work on the premises of a government agency, or otherwise to help fulfill a contract for services between a local, state, or federal agency and a contract security company. The law focuses on the security officer's employment relationship, not on the location of a work assignment.

In *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. App. 1978), *citing* 67 C.J.S. Officers § 2, the Tennessee Court of Appeals defined a "public officer" as "an incumbent of a public office; an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises the functions concerning the public assigned to him by law." Thus, the security officers that are the topic of this opinion request are not "officers" of any government, just as they are not employees of any government, since they are neither appointed nor elected to their positions pursuant to an applicable law. Accordingly, they are not exempt from licensure as government officers.

**(2)**

This request also inquires whether a private security officer may direct traffic in the public streets so long as he uses the proper equipment. There are several relevant statutory definitions that aid in answering this question. A security guard or security officer is a person employed by a contract security company who performs any of the functions of a "security guard and patrol service." Tenn. Code Ann. § 62-35-102(15). This term is further defined in Tenn. Code Ann. § 62-35-102:

> (16) "Security guard and patrol service" means protection of persons and/or property from criminal activities, including, but not limited to:
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> (A) Prevention and/or detection of intrusion, unauthorized entry, larceny, vandalism, abuse, fire or trespass on private property;
>
> (B) Prevention, observation or detection of any unauthorized activity on private property;
>
> (C) Enforce rules, regulations or local or state laws on private property;

> (D) Control, regulation or direction of the flow or movements of the public, whether by vehicle or otherwise on private property; or
>
> (E) Street patrol service . . . .

All of these activities take place on **private** property with the exception of street patrol service, which is defined in Tenn. Code Ann. § 62-35-102(17) as

> the utilization of foot patrols, motor patrols, or any other means of transportation in public areas or on public thoroughfares in order to serve multiple customers or facilities. "Street patrol service" does not apply to:
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> (A) A management supervisor moving from one (1) customer or facility to another to inspect personnel; or
>
> (B) A security guard/officer traveling from one (1) facility to another to serve the same customer with multiple facilities.

"Street patrol service" obviously contemplates the use of the public streets for transportation and courier service, not for directing traffic. Thus, the legislature has included the directing of traffic on private property in the description of a security officer's activities, but has not authorized security officers to direct traffic on public streets.

Pursuant to Tenn. Code Ann. § 55-8-104, "[n]o person shall willfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control or regulate traffic." A police officer is "every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations." Tenn. Code Ann. § 55-8-101(42). Private security officers are not authorized to direct traffic in the public streets by the Private Protective Services Licensing and Regulatory Act or any other law known to this office.

This office is mindful of the legislature's attempts to eliminate any confusion the public might have as to whether or not a person is a police officer. Security officers are prohibited from wearing or displaying any badges or insignia that would indicate they are a police officer or that contain the words "police," "law enforcement officer," or similar terms. Tenn. Code Ann. § 62-35-127. Additionally, security officers are prohibited from wearing "military or police-style uniforms" unless steps are taken to distinguish the uniform. Tenn. Code Ann. § 62-35-128. A police officer and private security officer operate in different realms. The right and obligation to direct traffic is one that is given to police officers. Private security officers can not add to their list of activities a power not granted to them by the legislature.

The directing of traffic on Tennessee's public streets and roads is the duty and prerogative of police officers who have been invested with that power by law. Private security officers may only

direct traffic on private streets and private property.

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