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Opinion No. 06-052

Suspension or Refusal to Issue Certificates for Driving

QUESTION

May the Department of Safety suspend the issuance of, or otherwise refuse to issue, certificates for driving pursuant to Tennessee Code Annotated § 55-50-331(g) or (h) without following the rulemaking procedures set forth in Tenn. Code Ann. §§ 4-5-201 through 4-5-227?

OPINION

No. Although Tenn. Code Ann. §§ 55-30-331 (g) and(h) give the Department of Safety discretion over the issuance of certificates for driving, any exercise of discretion that affects rights or privileges that are afforded to members of the public must be exercised in compliance with the requirements for rulemaking that are set forth in Tenn. Code Ann. §§ 4-5-210 through 4-5-227.

ANALYSIS

Tenn. Code Ann. §§ 55-50-331(g) and (h) provide for the issuance of certificates of driving.

Tenn. Code Ann. § 55-50-331(g) states, in pertinent part:

> Notwithstanding any other provision of law to the contrary, the department may issue a certificate for driving to persons whose presence in the United States has been authorized by the federal government for a specific purpose and for a specified period of authorized stay.

Tenn. Code Ann. § 55-50-331(h) states, in pertinent part:

> Notwithstanding any other provision of law to the contrary, the department may issue a certificate for driving to persons who do not satisfy the requirement of subsection (g) or the requirements of § 55-50-321(c)(1)(C).

The primary objective of statutory construction is to ascertain and give effect to the intent

and purpose of the legislature. *Conley v. State,* 141 S.W.3d 591 (Tenn. 2004). When the statutory language is unambiguous, legislative intent is to be derived from the plain and ordinary meaning of the statutory language. *State v. Wilson,* 132 S.W.3d 340 (Tenn. 2004).

The plain language of both statutes indicates that the legislature intended to give the Department of Safety discretion in the issuance of certificates of driving. The use of permissive terms, such as may are usually regarded as evidence of an intent to confer discretion. *Baker v. Seal,* 694 S.W.2d 948 (Tenn. App. 1984).[1] According to the plain meaning of the statute, the Department of Safety may end the issuance of certificates for driving on a temporary or permanent basis.

Any decisions concerning whether to issue certificates for driving, generally, would constitute rulemaking and would thus be subject to the requirements set forth in Tenn. Code Ann. §§ 4-5-201 through 4-5-227. Tenn. Code Ann. § 4-5-102(10) states, in pertinent part:

> "Rule" means each agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency.

Agency decisions that to relate to internal management of state government or repeat existing laws are not rules within the meaning of the Administrative Procedures Act and do not require compliance with the requirements set forth in Tenn. Code Ann. §§ 4-5-201 through 4-5-227. On the other hand, agency decisions that affect the rights, privileges or obligations of the public at large constitute rulemaking and the agency would be required to comply with the rulemaking provisions of the Act. *Mandela v. Campbell,* 978 S.W.2d 531 (Tenn. 1998).

The issuance of certificates of driving was instituted by enactment of 2004 Tenn. Pub. Acts 778. Section 9 of the Act authorized the Department of Safety to promulgate public necessity rules to implement the provisions of the Act. In response, the Department amended its rules. The result is the current Rules of the Tennessee Department of Safety, Division of Driver License Issuance Rules, Chapter 1340-1-13. Thus, a decision to suspend, terminate or modify the issuance of certificates for driving that would affect the rights or privileges afforded to members of the public would subject the Department to the requirements for amendment of its rules set forth in the Uniform Administrative Procedures Act, Tenn Code Ann. §§ 4-5-201 through 4-5-227.

Different legal avenues exist for the Department to amend rules. For example, if there is immediate danger to the public health, safety or welfare, emergency rules may be promulgated. Tenn. Code Ann. § 4-5-208. These rules are effective immediately on the date of filing and remain

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[1]In *Seal,* the court noted that in some cases, the use of may or other permissive terms can be construed as mandatory. Reading Tenn. Code Ann. § 55-50-331 as a whole indicates that the legislature intended the term "may," as used in subsections (g) and (h), to be used as a directory term. In subsection (b)(1), which relates to the issuance of drivers licenses, the legislature used the term "shall." The use of both terms in the same statute indicates that the legislature made a deliberate decision to give the Department of Safety discretion in the issuance of certificates for driving.

in effect thereafter for up to 165 days. Id. Additionally, amendments to rules, or new rules, may be promulgated in compliance with Tenn. Code Ann. § 4-5-209, which sets forth the requirements for public necessity rules. Otherwise, the Department must comply with the remaining provisions of the Uniform Administrative Procedures Act set forth in Tenn. Code Ann. §§ 4-5-201 through 4-5-227.

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