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Opinion No. 06-155

Interpretation of Tenn. Code Ann. § 71-4-502(4)

QUESTIONS

1. If the building on a college campus which houses a vending facility operated by a Department of Human Services' blind vendor pursuant to Tenn. Code Ann. § 71-4-501 *et seq*. closes and it is necessary to relocate the vending facility, does the institution have an obligation to provide comparable space for vending operations by the blind vendor, in terms of potential patronage and earning potential, to replace the lost space?

2. If the public property subject to the vending priority, specifically in this case, the college institution, requires the relocation of a vending facility and this relocation results in significantly fewer vending machines and/or patronage, and consequently less income for the licensed blind vendor, does the institution have an obligation to make other opportunities on the campus available to the blind vendor to compensate in whole or in part for the lost income - for example, if the institution has other vending operations under contract to private vendors, if such contract can be terminated or expires, must the institution make that space available to provide "comparable" patronage/income for the blind vendor?

OPINIONS

1. Yes. The phrase "at a location comparable in terms of potential patronage" may be reasonably construed, as to vending operations subject to the statutory priority, to require institutions to provide comparable space for vending operations by the blind vendor, in terms of potential patronage and earning potential, to replace the space lost when the building housing the vending facility closes and it is necessary to relocate the vending facility.

2. Yes. Consistent with our analysis of Question One, the institution would have an obligation to make other opportunities on the campus available to the blind vendor. However, the statute does not specify a methodology for making such opportunities available except insofar as it prescribes a dispute resolution process which the parties might utilize if unable to resolve this issue amicably.

ANALYSIS

1. The Tennessee Department of Human Services ("DHS"), through its Rehabilitation Services Division, operates Tennessee Business Enterprises ("TBE"), which offers vocational training and employment opportunities in the food service/food vending industry to individuals who are legally blind. Tenn. Code Ann. § 71-4-501 *et seq*. (2004). Tenn. Code Ann. §§ 71-4-502(3) and 71-4-503 grant blind vendors a priority in the establishment and operation of vending facilities on public property in the state. This priority must be liberally construed to give blind vendors "the greatest possible opportunities to operate such vending facilities." Tenn. Code Ann. § 71-4-501 (2004).

DHS has requested an opinion regarding the interpretation of the language "a location comparable in terms of potential patronage," found within the definition of "pubic property" in Tenn. Code Ann. § 71-4-502(4), and its application to the operation of vending facilities on university campuses by blind vendors in the TBE program. Entities encompassed within the statutory definition of "public property" are subject to the priority found at Tenn. Code Ann. §§ 71-4-502(3) and 71-4-503.

According to the opinion request, DHS established vending facilities at the University of Tennessee at Martin in 1993 as part of an agreement with the University of Tennessee to establish at least one facility on each of its campuses. Pursuant to this agreement, the licensed blind vendor operated vending machines in the UT-Martin dormitories and several other administration or classroom buildings. UT-Martin retained the rights to all other vending on campus. Recently, UT-Martin has been undergoing a major renovation of its campus. This renovation includes the demolition and replacement of some dormitories, which house vending facilities operated by the blind vendor, with residential buildings comprised of apartments instead of traditional dormitory rooms. The new residential buildings have fewer residents and the apartments have kitchens, resulting in less demand for vending products and a decline in sales which is anticipated to be permanent.

DHS has interpreted the phrase "a location comparable in terms of potential patronage" in Tenn. Code Ann. § 71-4-502(4) to require that, if a building which houses a vending facility operated by a blind vendor closes and it is necessary to relocate the vending facility, the institution provide comparable space for vending operations by the blind vendor, in terms of potential patronage and earning potential, to replace the lost space. In essence, then, DHS has requested a determination of whether its interpretation of § 71-4-502(4) is reasonable.

The purpose of statutory construction is to "ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Wilson v. Johnson County*, 879 S.W.2d 807, 809 (Tenn. 1994). When the language of a statute is unambiguous, legislative intent is determined from the "plain and ordinary meaning of the statutory language." *Freeman v. Marco Transp. Co.*, 27 S.W.3d 909, 911 (Tenn. 2000). The statutory language must be "read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning." *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66,

67 (Tenn. 1991). "[I]nterpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts." *Riggs v. Burson*, 941 S.W.2d 44, 50-51 (Tenn. 1997) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)). Generally, a court will not "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 844.

Tenn. Code Ann. § 71-4-502(4) provides as follows:

> "Public property" means all property owned or leased by the state of Tennessee, any county, municipality, or any other entity which is created by act of the general assembly to perform any public function; provided, that primary and secondary schools, and entities created under title 42, and their operations, are specially excluded from this definition; and provided further, that institutions that are governed by the University of Tennessee system or the state university and community college system and their operations are also specifically excluded from this definition, except that the vending facilities presently in operation at such institutions on April 29, 1996, shall continue to operate at their present locations or, if necessary, *at a location comparable in terms of potential patronage*, with the priority established by this part. Moreover, the existing priority shall extend to any new structures on any of the campuses governed by the University of Tennessee or the state university and community college system and the priority shall also extend to the establishment of at least one (1) vending facility on any new campus which is developed either by the University of Tennessee system or the state university and community college system.

(Emphasis added). Tenn. Code Ann. § 71-4-502(4) (2004).

Interpretation of the phrase "a location comparable in terms of potential patronage," turns on the meaning of the terms "comparable," "potential," and "patronage," which are not defined in Tenn. Code Ann. § 71-4-501 *et seq*. (2004). However, *Black's Law Dictionary* defines "patronage" as "a collective term to describe the customers of a business" and "patron" as "one who protects, countenances, or supports some person or thing; . . . a regular customer." *Black's Law Dictionary* (6th ed. 1990). "Patronage" is also defined as "the regular purchasing of goods from a particular store or business; the encouragement, financial support, or influence of a patron." *Microsoft Encarta College Dictionary* (1st ed. 2001). "Comparable" is defined as "similar enough for a fair comparison to be made; as good as another or each other." *Id*. "Potential," in adjective form, means "possible but not yet realized with a possibility or likelihood of occurring, or of doing or becoming something." *Id*. Based on these definitions, DHS' interpretation of the phrase "a location comparable in terms of potential patronage" as including both the number of potential patrons and the location's earning potential would appear to be a reasonable interpretation to which the courts would accord deference.

2. Tenn. Code Ann. § 71-4-502(4) requires that vending facilities operated by blind vendors which are subject to the statutory priority "shall continue to operate at their present locations or, if necessary, at a location comparable in terms of potential patronage, with the priority established by this part." As set forth above, DHS' interpretation of the phrase "a location comparable in terms of potential patronage" as including both the number of potential patrons and the location's earning potential would appear to be a reasonable interpretation to which the courts would accord deference. Consistent with our analysis of Question One, the institution would have an obligation to make other opportunities on the campus available to the blind vendor. However, the statute does not specify a methodology for making such opportunities available except insofar as it prescribes a dispute resolution process which the parties might utilize if unable to resolve this issue amicably. Moreover, inasmuch as the statutory priority includes only vending facilities in operation on April 29, 1996, and "any new structures on any of the campuses governed by the University of Tennessee or the state university and community college system," any other vending operations such institutions might have under contract to private vendors would not appear to be included in the priority. Tenn. Code Ann. § 71-4-502(4). Therefore, whether the institution would make available to the blind vendor any other vending operations it has under contract to private vendors in order to satisfy its obligation to provide "a location comparable in terms of potential patronage" would be subject to negotiation between the parties.

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