S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 07-03

Use of National Guard for Emergency Purposes

QUESTIONS

1. Is Tenn. Code Ann. § 58-1-106 the only statutory authority for activation of members of the Tennessee National Guard by the Governor without their consent, for emergency purposes, and must involuntary activation of National Guard troops in state active duty status for emergency purposes be preceded by the declaration of an emergency by the Governor or his authorized designee?

2. Does Tennessee state law require that any Tennessee Army or Air National Guardsmen activated for emergency purposes without their consent, who are also public employees of the State or a local government, continue to receive their full salary and benefits from their state or local position for so long as they should remain on involuntary orders in addition to their military pay?

3. Does the Governor have the authority to order members of the Tennessee National Guard into a state active duty status, without their consent, to serve outside the borders of this state in order to provide emergency assistance to another state, and if so, are the provisions of Tenn. Code Ann. § 58-1-106 applicable to guardsmen who are state and local government employees who are called upon to involuntarily provide emergency services to another state?

4. Are there any circumstances under which Tennessee National Guardsmen, mobilized by the Governor due to an emergency, would have authority to arrest and/or detain citizens under emergency conditions?

5. Are there any circumstances under which Tennessee National Guardsmen, mobilized by the Governor due to an emergency, would have the authority to use deadly force under emergency conditions?

6. Are Tennessee National Guardsmen entitled to absolute immunity from liability for acts or omissions within the scope of their duty if they are activated on state active duty, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain, regardless of which Tennessee Code section is cited as the authority for their mobilization?

OPINIONS

1. Yes, Tenn. Code Ann. § 58-1-106 is the controlling statutory authority for activation of members of the Tennessee National Guard, without their consent, for emergency purposes. There is no requirement that the involuntary activation of National Guard troops in state active duty status under Tenn. Code Ann. § 58-1-106 be preceded by the declaration of an emergency by the Governor or his authorized designee.

2. Yes, Tenn. Code Ann. § 58-1-106(d) requires that any members of the National Guard activated for emergency purposes, without their consent, who are also public employees of the State or a local government, shall continue to receive their full salary and benefits from their state or local position, for so long as they remain on involuntary orders, in addition to their military pay.

3. Yes, the Governor has the authority under Tenn. Code Ann. § 58-1-113 to order members of the Tennessee National Guard into a state active duty status, without their consent, to serve outside the borders of this state in order to provide emergency assistance to another state. Under such circumstances, the provisions of Tenn. Code Ann. § 58-1-106 would be applicable to guardsmen who are state and local government employees.

4. Yes, if the detention of a citizen is necessary to accomplish the mission arising out of the emergency conditions, the Tennessee National Guardsmen would have such authority.

5. Yes, Tennessee National Guardsmen may use deadly force under emergency conditions if it is the minimum amount of force necessary to ensure the accomplishment of their mission.

6. Yes, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain, Tennessee National Guardsmen are entitled to absolute immunity from liability for acts or omissions within the scope of their duty if they are activated on state active duty, regardless of which Tennessee Code section is cited as the authority for their mobilization.

ANALYSIS

1. As provided in Tenn. Code Ann. § 58-1-106, the Governor has the power to order Tennessee National Guard troops, without their consent, into the active service of the State for emergency purposes. In addition to the specific authority provided in Tenn. Code Ann. § 58-1-106, the Governor also has general powers with respect to the Tennessee National Guard as may be necessary to execute the provisions of any statute or constitutional provision affecting the military forces. Tenn. Code Ann. § 58-1-105.

It is a general rule of statutory construction that specific statutory provisions control over general provisions. *Conley v. State*, 141 S.W.3d 591, 597-98 (Tenn. 2004). Thus, as Tenn. Code

Ann. § 58-1-106 specifically addresses the activation of the Tennessee National Guard for emergency purposes, it is the controlling statutory authority for activation of members of the Tennessee National Guard, without their consent, by the Governor for emergency purposes.

Under the provisions of Tenn. Code Ann. § 58-1-106, members of the Tennessee National Guard may be ordered into the active service of the State "in case of invasion, disaster, insurrection, riot, attack, or combination to oppose the enforcement of the law by force and violence, or imminent danger thereof, or other grave emergency . . . for such period, to such extent and in such manner as the governor may deem necessary . . .." There is no requirement in § 58-1-106 that involuntary activation of National Guard troops in state active duty be preceded by the declaration of an emergency by the Governor or his authorized designee.[1]

2. When members of the Tennessee National Guard are ordered into the active service of the State for emergency purposes under the authority provided by Tenn. Code Ann. § 58-1-106, they are compensated for such active duty as provided in § 58-1-109. In addition, any member of the Tennessee National Guard who is an officer or employee of the State or any political subdivision thereof is also entitled to the salary or compensation otherwise payable from their state or local governmental employment. Tenn. Code Ann. § 58-1-106(d). This Office has previously opined that the employee's civilian compensation must be provided without allowance or deduction for military pay. *See* Op. Tenn. Att'y Gen. 88-137 (August 8, 1988). There is no statutory limit under either Tenn. Code Ann. § 58-1-106(d) or § 8-33-109 on the number of days such salary or compensation must be paid when the National Guard member is called to active duty under Tenn. Code Ann. § 58-1-106. Accordingly, members of the Tennessee National Guard ordered into the active service of the State for emergency purposes under Tenn. Code Ann. § 58-1-106 who are also public employees of the State or a local government shall continue to receive their full salary and benefits for their state or local government position in addition to their military pay for so long as they remain on involuntary orders.

3. The Governor's statutory authority to order members of the Tennessee National Guard into a state active duty status includes the authority to order National Guard members to serve outside the borders of this state in order "to perform military duty of every description." Tenn. Code Ann. § 58-1-113(a). In construing a statute, courts must ascertain and give effect to the legislative purpose, as determined by the natural and ordinary meaning of the text. *Wausau Ins. Co. v. Dorsett*, 172 S.W.3d 538, 543 (Tenn. 2005). The legislature has previously recognized that state active duty includes the provision of emergency services. *See* Tenn. Code Ann. § 58-1-106. Thus, the legislative intent appears clear that the provision of emergency assistance by National Guard members under the order of the Governor would constitute "military duty" as provided in Tenn. Code Ann. § 58-1-113(a).

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[1]By definition, "voluntary aid or assistance" is not available to local communities during times of crisis in which a declaration of emergency or disaster has been declared. *See* Tenn. Code Ann. § 58-1-102(18). This does not, however, require that all involuntary activation of National Guard troops be preceded by the declaration of an emergency by the Governor.

If National Guard members are called into active service, without their consent, for the purpose of providing emergency assistance, the provisions of Tenn. Code Ann. § 58-1-106 will be applicable regardless whether such military duty is performed outside the borders of the State. As noted above, Tenn. Code Ann. § 58-1-106 is the controlling statutory authority for activation of members of the Tennessee National Guard, without their consent, for emergency purposes. The provisions of this statute, including the requirements for compensation of state and local government employees, will apply whether such military duty is performed within the State or outside the borders of the State.

4, 5. When Tennessee National Guardsmen are called into active service of the State, they act under the orders of the Governor as Commander in Chief. Tenn. Code Ann. § 58-1-107. National Guardsmen are required to apply military tactics in respect to the manner in which they shall accomplish their missions. *Id*. The United States Supreme Court has recognized that decisions regarding the composition, training, equipping, and control of a military force are "essentially professional military judgments, subject always to civilian control of the legislature and executive branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

The legislature has directed that Tennessee National Guardsmen use the "minimum amount of force necessary to ensure the accomplishment" of their missions. Tenn. Code Ann. § 58-1-107. Accordingly, National Guardsmen, mobilized by the Governor due to an emergency, may detain citizens or use deadly force only if this is consistent with military tactics and would be the minimum amount of force necessary to ensure the accomplishment of their missions.

6. There are two statutory provisions providing immunity to National Guardsmen while in active state service. First, immunity is available for National Guardsmen in state active service under the provisions of Tenn. Code Ann. § 9-8-307. This Office has previously opined that members of the Tennessee State Guard are entitled to immunity under Tenn. Code Ann. § 9-8-307 when on active state duty and in the course of that duty, except for willful, malicious or criminal acts or omissions or for acts or omissions done for personal gain. *See* Op. Tenn. Att'y Gen. 02-011 (January 10, 2002). The same reasoning would apply to Tennessee National Guardsmen on state active duty.

Second, under the provisions of Tenn. Code Ann. § 58-1-227, members of the National Guard are entitled to the same immunity afforded by law to state employees for acts or omissions within the scope of their duties while in the active service of the State, pursuant to provisions of § 58-1-106, or engaged in voluntary aid and assistance. This immunity applies to any action or proceeding of any nature against any member of the National Guard for acts or omissions by the Guard member in the Guard member's official capacity in the discharge of assigned duties under Parts 1, 2 and 4-6 of Title 58, Chapter 1.

As noted above, specific statutory provisions generally control over general provisions. *Conley v. State*, *supra*. There is not, however, an apparent and irreconcilable conflict between the general immunity provisions of Tenn. Code Ann. § 9-8-307 and the specific immunity provisions of § 58-1-227. Rather, these statutes may be construed together so that they operate in harmony.

It is our opinion that the legislature did not intend for Tenn. Code Ann. § 58-1-227 to operate to limit the immunity otherwise available for Tennessee National Guardsmen on state active duty. Accordingly, Tennessee National Guardsmen are entitled to absolute immunity from liability for acts or omissions within the scope of their duty if they are activated on state active duty, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain, regardless of which Tennessee Code section is cited as the authority for their mobilization.

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