S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

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Opinion No. 07-92

Detention of Mentally Ill Patients

QUESTIONS

1. Can hospital personnel (security and/or nursing) use force to detain a person presenting to an emergency department or a patient on a nursing unit who is reasonably believed to be either suicidal and/or homicidal when there has been no physician examination and no signed "Form 6-404?" If yes, how much force/what type of force may be used?

2. Once a "Form 6-404" has been signed, do hospital personnel automatically have greater authority to use force to detain a psychiatric patient who threatens to leave the hospital prior to referral to a psychiatric facility? Or, is the physician who signs the Form 6-404 required to order the use of restraints before hospital personnel have greater authority to use force to detain?

3. Does the signing of a "Form 6-404" create a duty on the hospital to detain the psychiatric patient (including through the use of force), such that the hospital's failure to detain would result in liability for the hospital in the event that the psychiatric patient were to leave the facility and harm himself and/or others?

OPINIONS

1. Tenn. Code Ann. § 33-6-402 clearly contemplates that the use of force might be necessary to detain a person for evaluation. Whatever force or restraint that might be applied must be reasonable, in good faith, justified by the circumstances of the particular case and, as with the entire process of evaluating a person's mental status, subject to review under the standards of acceptable professional practice and/or false imprisonment standards.

2. The authority to use force to detain a person is not automatic but is derived from the use of professional judgment as applied to the circumstances, whether exercised by a physician who determines that it is necessary to restrain the person or initiated by a nurse in response to an emergency situation.

3. Tenn. Code Ann. § 33-6-404(3)(B)(iii), which requires the physician, psychologist, or designated professional, upon completing the first certificate of need for emergency diagnosis,

evaluation, and treatment ("Form 6-404"), to also assess the person's clinical needs and need for physical restraint, would appear to create a duty on the hospital to detain the person pending transportation to a psychiatric facility, using force, if necessary, to accomplish the detention. However, Tenn. Code Ann. § 33-3-901(d) exempts from civil or criminal liability "persons acting in good faith, reasonably and without negligence in connection with . . . the apprehension, detention, discharge, examination, transportation or treatment of a person" under Title 33.

ANALYSIS

Tenn. Code Ann. § 33-6-402 permits "an officer authorized to make arrests in the state, a licensed physician, a psychologist authorized under [Tenn. Code Ann.] § 33-6-427(a), or a professional designated by the [Commissioner of Mental Health and Developmental Disabilities] under [Tenn. Code Ann.] § 33-6-427(b)" to take a person into custody without a civil order or warrant and to detain the person "for immediate examination under [Tenn. Code Ann.] § 33-6-404 for certification of need for care and treatment." A professional designated by the Commissioner is a "qualified mental health professional" such as a psychiatrist, physician with expertise in psychiatry, psychologist with health service provider designation, psychological examiner, marital and family therapist, professional counselor, psychiatric nurse with a master's degree, and certain social workers. Tenn. Code Ann. § 33-1-101(18). The officer, physician, psychologist, or designated professional must have reason to believe that the person to be detained has a mental illness or serious emotional disturbance and poses an immediate substantial likelihood of serious harm to self or others due to the mental illness or serious emotional disturbance. Tenn. Code Ann. § 33-6-402. An "immediate substantial likelihood of serious harm" exists only when a person has threatened or attempted suicide or serious self harm, threatened or attempted homicide or other violent behavior, placed others in reasonable fear of violent behavior and serious physical harm, or is unable to avoid severe impairment or injury from specific risks, and "there is a substantial likelihood that such harm will occur unless the person is placed under involuntary treatment." Tenn. Code Ann. § 33-6-501.

You have asked whether hospital personnel, such as security and/or nursing personnel, can use force to detain a person presenting to a hospital emergency department or a patient on a nursing unit who is reasonably believed to be either suicidal and/or homicidal when there has been no physician examination and no signed "Form 6-404." It is unlikely that all hospital security and nursing personnel would fit within the limited categories of persons authorized by Tenn. Code Ann. § 33-6-402 to detain a person, although a court might consider them to be operating subject to the authority of such a person, such as when following a physician's order. In any event, the statute does not specifically address whether force may be used to detain a person believed to be within its purview, and the Tennessee courts that have reviewed Tenn. Code Ann. § 33-6-402 and its statutory precedents have not specifically discussed this issue. *See Mercer v. HCA Health Services of Tennessee*, 87 S.W.3d 500 (Tenn. Ct. App. 2002); *Vickroy v. Pathways, Inc.*, No. W2003-02620-COA-R3-CV, 2004 WL 3048972 (Tenn. Ct. App. Dec. 30, 2004); *Boaz v. Taylor*, 1986 WL 1154 (Tenn. Ct. App. Jan. 27, 1986). However, the term "detention" clearly contemplates the use of force; detention, by definition, is "the act or fact of holding a person in custody; confinement or

compulsory delay." *Black's Law Dictionary* 480 (8th ed. 2004). Whatever force or restraint that might be applied must be reasonable, in good faith, justified by the circumstances of the particular case and, as with the entire process of evaluating a person's mental status, subject to review under the standards of acceptable professional practice and/or false imprisonment standards. *Mercer*, 87 S.W.3d at 500; *Vickroy*, 2004 WL 3048972; *Boaz*, 1986 WL 1154. Particularly instructive are the cases related to the use of force by police officers in making an arrest, such as when a police officer detains a person under Tenn. Code Ann. § 33-6-402. In *Graham v. Connor*, the United States Supreme Court articulated an "objective reasonableness" standard which judged the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene, taking into account the facts and circumstances, including the need to make split-second judgments. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). To the extent that the use of force might include the use of isolation or restraints, Tenn. Code Ann. § 33-3-120(b) limits their use to "emergency situations when necessary to assure the physical safety of the person or another person nearby or to prevent significant destruction of property" and requires the person initiating the isolation or restraint to immediately contact a qualified mental health professional for authorization.

2. Whenever a physician, psychologist, or designated professional takes a person into custody or a person is brought to them for examination under Tenn. Code Ann. § 33-6-402, the physician, psychologist, or designated professional must immediately examine the person and determine whether the person meets the statutory criteria for admission to a hospital or treatment resource under Tenn. Code Ann. § 33-6-403. Tenn. Code Ann. § 33-6-404(1)-(2). If the person is not subject to admission, the person must be released. Tenn. Code Ann. § 33-6-404(3). If the person is subject to admission, the physician, psychologist, or designated professional must complete a certificate of need for emergency diagnosis, evaluation, and treatment, commonly referred to as a "Form 6-404," showing the factual foundation for his conclusions. Tenn. Code Ann. § 33-6-404(3)(B).

You asked whether, once a "Form 6-404" has been signed, hospital personnel automatically have greater authority to use force to detain a psychiatric patient who threatens to leave the hospital prior to referral to a psychiatric facility or whether the physician who signs the Form 6-404 is required to order the use of restraints before hospital personnel have greater authority to use force to detain. When a "Form 6-404" is completed, the physician, psychologist, or designated professional must also assess the person's clinical needs and need for physical restraint or vehicle security and determine the mode of transportation to the hospital in consultation with the mandatory pre-screening agent, other mental health professional familiar with the person, or a knowledgeable family member. Tenn. Code Ann. § 33-6-404(3)(B)(iii). Thus, as indicated previously, the authority to use force to detain a person is not automatic, but is derived from the use of professional judgment as applied to the circumstances, whether exercised by a physician who determines that it is necessary to restrain the person or initiated by a nurse in response to an emergency situation.

3. Finally, you asked whether the signing of a "Form 6-404" creates a duty on the hospital to detain the psychiatric patient (including through the use of force), such that the hospital's failure to detain would result in liability for the hospital in the event that the psychiatric patient were

to leave the facility and harm himself or others. As noted above, upon completing the first certificate of need for emergency diagnosis, evaluation, and treatment ("Form 6-404"), the physician, psychologist, or designated professional must also assess the person's clinical needs and need for physical restraint. Tenn. Code Ann. § 33-6-404(3)(B)(iii). This statutory requirement would appear to create a duty on the hospital to detain the person pending transportation to a psychiatric facility, using force, if necessary, to accomplish the detention. Once a person has been certified for admission pursuant to Tenn. Code Ann. § 33-6-404, if the person is not already at the hospital or treatment resource where the person is to be admitted, the physician, psychologist, or designated professional who completed the certificate of need "shall give the sheriff or the transportation agent designated under chapter 6, part 9 of this title, the original of the certificate and turn the person immediately over to the custody of the sheriff or the transportation agent." Tenn. Code Ann. § 33-6-406. The sheriff or transportation agent must then transport the person to the hospital or treatment resource. Tenn. Code Ann. § 33-6-406.

However, Tenn. Code Ann. § 33-3-901(d) provides that:

> All persons acting in good faith, reasonably and without negligence in connection with a preparation of petitions, applications, certificates or other documents or the apprehension, detention, discharge, examination, transportation or treatment of a person under this title shall be free from all liability, civil or criminal, by reason of such acts.

Therefore, while the statute appears to create a duty on the hospital to detain the person pending transportation to a psychiatric facility, using force, if necessary, to accomplish the detention, liability will be imposed only for the failure to act in good faith, reasonably, or without negligence.

ROBERT E. COOPER, JR.
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

PAMELA A. HAYDEN-WOOD
Senior Counsel

Requested by:

Honorable Mike Bottoms
District Attorney General
Twenty Second Judicial District
252 N. Military, Suite 202
P.O. Box 459
Lawrenceburg, TN 38464