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Opinion No. 07-133

Community Enhancement Grant Program: Eligibility and Administration

QUESTIONS

1. The Community Enhancement Grant Program was created under 2007 Tenn. Pub. Acts Ch. 603, § 68 (the "Grant Act"). Does the Secretary of State have discretion to waive any provision of the Act?

2. The Grant Act provides as follows: "Organizations shall apply for grants to the Secretary of State no later than August 15, 2007, and shall include such information as the Secretary of State deems appropriate." The act also provides that, "The Secretary of State shall make grants to applicants as the secretary deems appropriate and in such amounts as the secretary deems appropriate."

- a. Is the Secretary of State authorized to waive the August 15 deadline?
- b. Must an original grant application be filed by August 15, 2007, at 4:30 p.m.?
- c. If a fax copy of the grant application is received before the 4:30 deadline and the original is received later, is the grant application properly filed?
- d. Is an application valid if a fax copy is sent, but no original grant application is received?
- e. Is an application received after the application deadline but postmarked on or before August 15, 2007, eligible for grant funds?

3. Is a sales and use certificate issued by the Department of Revenue proof of nonprofit status?

4. a. Is the General Assembly authorized to amend the Appropriations Act to reopen the grant application period to allow an applicant to cure defects in the application?

b. If the answer to a. is yes, may the Secretary extend the deadline for filing an accounting of the use of the grant funds?

c. If the answer to a. is no, may the General Assembly retroactively extend the deadline for filing an accounting of the use of the grant funds?

5. Is the General Assembly authorized retroactively to extend the grant application process to allow any of the following to be awarded grant funds:

- a. Applications that were filed untimely;
- b. Applications that had inadequate proof of non-profit or governmental status;
- c. Applications that had missing information; or
- d. Applications that did not have signatures.

6. If the answer to 5.a. through d. is yes, may the Secretary refrain from funding applications that meet the technical requirements of the Act in order to give the General Assembly time to pass legislation allowing applicants who filed incomplete applications within the August 15 deadline to complete their applications?

7. May grant funds be used for projects that were completed before the date:

- a. The Grant Act became effective?
- b. The grant funds were awarded?
- c. The applicant receives the funds?

8. a. If an applicant received state grant funds under another provision of the Appropriations Act, may that applicant receive a Community Enhancement Grant?

b. If the answer to a. is yes, is the applicant eligible for grant funds for the same purpose stated in the other appropriation under which the applicant received funds?

9. Is the Secretary of State authorized to require that applicants meet other requirements of state law, for example, the Solicitations of Charitable Funds Act, in order to receive a grant?

OPINIONS

1. The Secretary of State may not waive explicit requirements of the Grant Act. At the same time, the Secretary of State is authorized to interpret the Act in order to administer it. Interpretations should be consistently applied and fall within the Act.

2. a. The Secretary of State may not waive the August 15 deadline.

b. The Secretary may reasonably interpret how an applicant may meet the August 15 deadline. The requirement that original grant applications must be filed by August 15, 2007, at 4:30 p.m., the close of business, is reasonable. Thus, provided the Secretary of State has made this requirement clear, he is free to reject applications that did not meet this deadline.

c. The Secretary of State may, in his discretion, consider applications received by fax before the 4:30 deadline and confirmed by an original application received later.

d. If the Secretary receives only a faxed copy, and no original application, he may conclude that he does not have sufficient verifiable information from the applicant to consider the application. He may also conclude that a faxed copy, by itself, is sufficient.

e. As noted above, the Secretary may require that an original application be physically received in his office by the close of business on August 15. He may also accept an application that is postmarked on or before August 15, but not physically received in his office until after August 15.

Any of these decisions must be consistently applied to all applications.

3. The Secretary of State must accept any one of several specific documents as evidence that the applicant is a nonprofit organization. This list, however, is not exclusive. The Secretary of State, therefore, is authorized to accept other types of evidence he deems acceptable to determine whether an applicant is a nonprofit organization. Evidence that the applicant has been granted exemption from state sales taxes in accordance with Tenn. Code Ann. § 67-6-322 could reasonably be accepted to demonstrate nonprofit status.

4. a. The General Assembly created the program and included the original August 15 deadline in the Grant Act. The General Assembly could extend the application deadline, or it could explicitly authorize the Secretary of State to allow grant applicants who filed an incomplete application to cure defects in the application. Until such legislation is passed, of course, it would not affect the Secretary of State's authority to award grants under the Grant Act. Retroactive legislation could not impair the rights of any grantees who had already received grants when the amending legislation became effective. Further, any legislation amending the Grant Act should reflect a policy decision and may not encroach on the executive authority accorded the Secretary of State to administer the program.

b. We cannot predict the effect of any future legislation on the Secretary of State's current authority to administer the program. Under the Grant Act, an applicant must file the report within ninety days of the end of the fiscal year in which grant funds are received. The Secretary of State may not extend this deadline.

c. In light of the answer to Question a., Question c. is moot.

5. a. As discussed in the answer to Question 4 above, the General Assembly may amend the Grant Act to extend the application deadline, or to allow the Secretary of State to consider applications that were filed after the original August 15 deadline. Until such legislation is passed, of course, it would not affect the Secretary of State's authority to award grants under the Grant Act. Retroactive legislation could not impair the rights of any grantees who had already received grants when the amending legislation became effective. In addition, any legislation amending the Grant Act may not encroach on the executive authority accorded the Secretary of State to administer the program.

b., c., and d. The General Assembly may amend the Grant Act to provide the Secretary of State with this express authority. Until such legislation is passed, of course, it would not affect the Secretary of State's authority to award grants under the Grant Act. Retroactive legislation could not impair the rights of any grantees who had already received grants when the amending legislation became effective. In addition, any legislation amending the Grant Act may not encroach on the executive authority accorded the Secretary of State to administer the program.

6. The Grant Act does not require the Secretary to fund grant applications at any particular time. Thus, the Secretary may withhold some grant monies if he anticipates that the General Assembly may amend the Grant Act. Unless the General Assembly re-appropriates the funds appropriated under the Grant Act, the Secretary of State may not award grant funds after June 30, 2008, the end of the current fiscal year.

7. The Secretary of State may only award funds to an applicant for a project completed before the date of the Grant Act, the date of the award, or the date the applicant receives the funds, if documentation demonstrates that the proceeds will be used for one of the purposes that are permissible under subsection (c) of the Grant Act.

8. a. Nothing in the Grant Act requires the Secretary to withhold grants from an applicant that has received funds under another provision of the Appropriations Act. At the same time, the Secretary is free to consider whether a particular applicant has received other state grant funds during this fiscal year. So long as he acts reasonably and consistently, the Secretary could give priority to applicants who have not received other funds.

b. Nothing in the Grant Act would prohibit the Secretary from withholding grants from an applicant that has received funds under another provision of the Appropriations Act for the same general purpose. But the Secretary should not award grant funds for a specific project that has already been fully funded under another provision of the Appropriations Act.

9. So long as the Secretary applies the requirement consistently to all applicants, we think the Grant Act authorizes the Secretary to require an applicant to comply with other provisions of state law before awarding a grant.

ANALYSIS

This opinion addresses administration of the Community Enhancement Grant Program. This program was created under the Appropriations Act, 2007 Tenn. Pub. Acts Ch. 603, § 68, pp. 128-130 (the “Grant Act”). Subsections (a) through (d) of the Grant Act provide as follows:

(a) In addition to any other funds appropriated by the provisions of this act, there is appropriated the sum of twenty million dollars (\$20,000,000) to the Secretary of State for the sole purpose of implementing the community enhancement grant program in accordance with the provisions of this section.

(b) Community enhancement grants shall only be available to support:

(1) Public safety activities, including, but not limited to, those related to local law enforcement, fire and life safety, programs designed to address local drug programs, advocacy for children and other vulnerable populations, and other criminal justice programs;

(2) Educational initiatives, including, but not limited to, those related to local schools and school support organizations, efforts to address significant local education issues such as summer reading programs, and other initiatives that address educational needs;

(3) Cultural activities, including, but not limited to, those related to enhancing opportunities provided by museums, libraries, and historic sites, and activities supporting other local cultural endeavors; or

(4) Community development activities, including, but not limited to, those related to serving the unique needs of various segments of the population, such as the elderly and youth, through supporting program offerings provided through local recreational and community facilities, senior citizens centers, boys and girls clubs, and the like as well as county and municipal infrastructure improvements such as road and bridge planning, construction and maintenance.

(c) Grant proceeds must be used for one (1) or more of the following purposes: programs, services, operating costs, equipment, construction, renovation and maintenance.

(d) Notwithstanding any provision of this act to the contrary, a community enhancement grant to a governmental or non-governmental agency or entity shall not be disbursed until the recipient has filed with the Secretary of State a plan specifying the proposed use of such funds in accordance with the purposes enumerated in subsection (c) of this section and the benefits anticipated to be derived therefrom. As a prerequisite to the receipt of such grant, the recipient shall agree to provide to

the Secretary of State, within ninety (90) days of the close of the fiscal year within which such grant was received, an accounting of the actual expenditure of such funds, including a notarized statement that the report is true and correct in all material respects; provided, however, that the secretary may require, in lieu of the accounting as provided above, an audited financial statement of the governmental or non-governmental agency or entity. A copy of such accounting or audit, as the case may be, shall be filed with the Office of the Comptroller of the Treasury.

* * * *

(f) Notwithstanding any provision of this act to the contrary, if multiple grants are allocated to the same recipient, then such recipient shall be awarded the sum total of such multiple grants.

1. Waiving Requirements under the Grant Act

The first question is whether the Secretary of State may waive any provisions of the Grant Act. The Grant Act does not authorize the Secretary of State to promulgate rules to administer the program, nor does any other statute give the Secretary of State general rulemaking authority. But the Secretary of State does have broad authority to interpret the Grant Act in order to administer it. Subsection (a) of the Grant Act appropriates funds to the Secretary of State to “implement” the program. Further, subsection (g) of the Grant Act provides:

(g) Grants shall be awarded in accordance with the following procedure:

(1) Organizations shall apply for grants to the Secretary of State no later than August 15, 2007, *and shall include such information as the Secretary of State deems appropriate.*

(2) The Secretary of State shall make grants to applicants *as the secretary deems appropriate and in such amounts as the secretary determines appropriate. In making determinations relative to grant awards, the Secretary of State is authorized to take into account factors the secretary deems relevant, including the benefits of making the grant.*

(Emphasis added). Interpretations should be consistently applied and fall within the Act.

2. Application Deadline

The second question raises several issues about implementation of the August 15 application deadline. Subsection (g) of the Grant Act provides that, “[o]rganizations *shall* apply for grants to the Secretary of State no later than August 15, 2007, *and shall include such information as the Secretary of State deems appropriate.*” (Emphasis added). The verb “include” indicates that the application must be complete by the August 15 deadline. Thus, the Secretary of State may not waive the August 15 deadline and may not allow applicants further time to complete an application he deems incomplete after the deadline. At the same time, the Act provides that the organization must

include “such information *as the Secretary of State deems appropriate.*” (Emphasis added). This language represents a broad grant of authority to the Secretary of State to determine whether an application is complete. Further, the Secretary of State has the responsibility to “implement” the Grant Act. We think this power includes the authority to reasonably interpret how an applicant may meet the August 15 deadline.

The issues raised in questions 2.b. through e. all involve interpretations of whether an applicant has applied for a grant within the August 15 deadline. The requirement that original grant applications must be filed by August 15, 2007, at 4:30 p.m., the close of business, is reasonable. Thus, provided the Secretary of State has made this requirement clear, he is free to reject applications that did not meet this deadline. At the same time, the Secretary of State may, in his discretion, consider applications received by fax before the 4:30 deadline and confirmed by an original application received later. If the Secretary receives only a faxed copy, and no original application, he may conclude that he does not have sufficient verifiable information from the applicant to consider the application. He may also conclude that a faxed copy, by itself, is sufficient. Finally, the Secretary may also require that an original application be physically received in his office by the close of business on August 15. He may also accept an application that is postmarked on or before August 15, but not physically received in his office until after August 15. Any of these decisions must be consistently applied to all applications.

3. Evidence of Tax-Exempt Status

The next question is whether a sales and use certificate issued by the Department of Revenue is sufficient proof of an applicant’s nonprofit status under the Grant Act. The Grant Act specifies documentation that the Secretary of State may accept to determine a private applicant’s nonprofit status and, therefore, its eligibility for a grant. Subsection (e) of the Grant Act provides:

(e) No community enhancement grant shall be disbursed to a non-governmental agency or entity until the recipient of such grant has presented evidence to the secretary that such recipient is a not-for-profit corporation, nonprofit association, or similar nonprofit organization. For purposes of this subsection (e), any one (1) of the following shall constitute evidence that a recipient is a not-for-profit corporation, nonprofit association, or similar non-profit organization:

(1) Documentation from the Internal Revenue Service recognizing the grant recipient as holding a determination of exemption as a 501(c) organization; such documentation shall be supported by an affidavit from the 501(c) organization’s chair, president or chief administrative officer affirming that the organization’s 501(c) status has not been revoked;

(2) A copy of the charter of a not-for-profit corporation;

(3) Documentation that a grant recipient holds property tax exempt status;

(4) A copy of organizational documents and any other documents that prove to the satisfaction of the secretary that a grant recipient has been in continuous and active existence as a nonprofit organization located in Tennessee for at least two (2) calendar years immediately preceding the fiscal year in which such grant shall be made; such documentation shall be supported by an affidavit signed by the organization's chair, president or chief administrative officer affirming that the organization has been in continuous and active existence in Tennessee for at least two (2) calendar years immediately preceding the fiscal year in which such grant shall be made; or

(5) An affidavit signed by the county mayor, or county executive, from the county where the grant recipient is located affirming that the grant recipient is a not-for-profit corporation, nonprofit association, or similar nonprofit organization.

(Emphasis added). Thus, the Secretary of State must accept any one of the listed documents as evidence that the applicant is a nonprofit organization. This list, however, is not exclusive. The Secretary of State, therefore, is authorized to accept other types of evidence he deems acceptable to determine whether an applicant is a nonprofit organization.

The General Assembly has authorized the Commissioner of the Department of Revenue to issue exemption from sales or use tax certificates to "institutions and organizations and historical properties which, in the commissioner's judgment, are entitled thereto." Tenn. Code Ann. § 67-6-322(f). The types of organizations eligible for the exemption are set forth in subsections (a) and (b) of the statute and include hospitals, which might be operated by a corporation for profit. But subsection (c) of the statute limits the exemption to nonprofit organizations: "Any exemption granted under subsection (a) or (b) shall be limited to such institutions, organizations or historical properties which are not organized or operated for profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual." Tenn. Code Ann. § 67-6-322(c). Accordingly, evidence that the applicant has been granted exemption from state sales taxes under Tenn. Code Ann. § 67-6-322 could reasonably be accepted by the Secretary of State to demonstrate nonprofit status.

4. Legislation Extending the Grant Application Period to Allow Applicants to Cure Defects

The next question is whether the General Assembly is authorized to amend the Appropriations Act to re-open the grant application period to allow an applicant to cure defects in the application. Of course, the constitutionality of any particular legislation would depend on its terms. The General Assembly created the program and included the original August 15 deadline in the Grant Act. The General Assembly could also extend the application deadline, or it could explicitly authorize the Secretary of State to give applicants who filed an incomplete application the opportunity to cure defects in the application. Until such legislation is passed, of course, it would not affect the Secretary of State's authority to award grants under the Grant Act. Retroactive legislation could not impair the rights of any grantees who had already received grants when the

amending legislation became effective. Tenn. Const. art. I, § 20; *Collier v. Memphis Light, Gas & Water Division*, 657 S.W.2d 771, 775 (Tenn. Ct. App.1983) (a statute may not retroactively take away a vested right or impair existing contractual obligations).

In addition, any legislation amending the Grant Act may not encroach on the executive authority accorded the Secretary of State to administer the program. Article II, Section 1, of the Tennessee Constitution provides that, “[t]he powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.” Article II, Section 2, of the Tennessee Constitution provides:

No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted.

The legislative power is the authority to make, order, and repeal laws, while the executive power is the authority to administer and enforce the laws. *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664, 668 (1909). While appointed by the General Assembly, the Secretary of State does not have the authority to make, order, and repeal laws. The Secretary of State is authorized to administer and enforce the Grant Act. The Secretary of State, therefore, is a member of the executive department of government for purposes of a separation of powers analysis. *See* Op. Tenn. Att’y Gen. 95-034 (April 17, 1995) (Public Service Commission as part of the executive branch of government). With regard to expending appropriated funds, this Office has noted that the executive branch is the organ of government charged with the responsibility of, and is normally the only branch capable of, having detailed and contemporaneous knowledge regarding spending decisions. Op. Tenn. Att’y Gen. 93-06 (January 14, 1993) (citing *Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1222-23 (Mass.1978)). While the General Assembly may make laws that reflect policy decisions regarding the Grant Program, it may not, by amending the Appropriations Act, interfere with the Secretary of State’s authority to administer the program. Thus, the General Assembly may not direct the Secretary of State to award a grant to a particular applicant or an arbitrarily selected group of applicants. Similarly, it should not arbitrarily single out particular defects that may be cured while omitting others, unless it can articulate a sound policy basis for the decision.

The next question is, assuming that the General Assembly may so amend the Grant Act, whether the Secretary of State is authorized to extend the deadline for filing an accounting of the use of the grant funds. Of course, we cannot predict the effect of any future legislation on the Secretary of State’s current authority to administer the program. Subsection (d) of the Grant Act provides:

(d) Notwithstanding any provision of this act to the contrary, a community enhancement grant to a governmental or non-governmental agency or entity shall not be disbursed until the recipient has filed with the Secretary of State a plan specifying the proposed use of such funds in accordance with the purposes enumerated in subsection (c) of this section and the benefits anticipated to be derived therefrom.

As a prerequisite to the receipt of such grant, the recipient shall agree to provide to the Secretary of State, within ninety (90) days of the close of the fiscal year within which such grant was received, an accounting of the actual expenditure of such funds, including a notarized statement that the report is true and correct in all material respects; provided, however, that the secretary may require, in lieu of the accounting as provided above, an audited financial statement of the governmental or non-governmental agency or entity. A copy of such accounting or audit, as the case may be, shall be filed with the Office of the Comptroller of the Treasury.

(Emphasis added). The applicable deadline, therefore, is within ninety days of the end of the fiscal year in which grant funds are received. The Secretary of State may not extend this deadline.

The next question is, assuming the answer to 4.a. is no, whether the General Assembly may retroactively extend the deadline for filing an accounting of the use of the grant funds. In light of the answer to Question 4.a., this question is moot.

5. Amendments to the Grant Act

The next question is whether the General Assembly may retroactively extend the grant application period to allow applications that were filed untimely to be awarded grant funds. As discussed above, the General Assembly may amend the Grant Act to extend the application deadline, or to allow the Secretary of State to consider applications that were filed after the original August 15 deadline. Until such legislation is passed, of course, it would not affect the Secretary of State's authority to award grants under the Grant Act. Retroactive legislation could not impair the rights of any grantees who had already received grants when the amending legislation became effective.

The next question is whether the General Assembly may retroactively amend the Grant Act to authorize the Secretary of State to award grants to applicants that filed inadequate proof of non-profit or governmental status; to applicants whose applications had missing information; or to applicants who did not file applications with the required signatures. The General Assembly may amend the Grant Act to provide the Secretary of State with this express authority. Until such legislation is passed, of course, it would not affect the Secretary of State's authority to award grants under the Grant Act. Retroactive legislation could not impair the rights of any grantees who had already received grants when the amending legislation became effective. In addition, any legislation amending the Grant Act may not encroach on the executive authority accorded the Secretary of State to administer the program. Thus, the General Assembly may not direct the Secretary of State to award a grant to a particular applicant or an arbitrarily selected group of applicants. Similarly, it should not arbitrarily single out particular defects that may be waived, while omitting others unless it can articulate a sound policy basis for the decision.

6. Secretary of State's Authority to Withhold Grant Funds

The next question is whether the Secretary of State is authorized to refrain from funding some grant applications that meet the technical requirements of the Grant Act in order to give the General Assembly time to pass legislation allowing applicants who filed incomplete applications within the August 15 deadline to complete their applications. The Grant Act gives the Secretary of State broad authority to make grants to applicants. The Grant Act does not require the Secretary to fund grant applications at any particular time. Thus, the Secretary may withhold some grant monies if he anticipates that the General Assembly may amend the Grant Act. Tenn. Code Ann. § 9-4-5114 provides in part that, “[n]o appropriation shall confer authority to incur an obligation after the termination of the fiscal year to which it relates.” Unless the General Assembly re-appropriates the funds appropriated under the Grant Act, therefore, the Secretary of State may not award grant funds after June 30, 2008.

7. Grant Funds for Projects That Have Already Been Completed

The next question is whether the Secretary of State may award a grant to an applicant to fund a project that has been completed before the Grant Act became effective, before the grant is awarded, or before the applicant has received the grant funds. We assume your question contemplates that, in each of these cases, the grant funds would reimburse a governmental or nonprofit applicant for expenses the applicant has already incurred. The Grant Act is very specific as to permissible uses of grant money. First, as set forth above, Section 68(b) provides that community enhancement grants shall only be available to support public safety activities, educational initiatives, cultural activities, or community development activities. Then, in supporting those activities, subsection (c) provides that, “[g]rant proceeds must be used for one (1) or more of the following purposes: programs, services, operating costs, equipment, construction, renovation and maintenance.” Thus, the Secretary of State may only award funds to an applicant for a project completed before the date of the Grant Act, the date of the award, or the date the applicant receives the funds, if documentation demonstrates that the proceeds will be used for one of the purposes that are permissible under subsection (c) of the Grant Act.

8. Multiple Awards under the Appropriations Act

The next question addresses an application under the Grant Act by an applicant explicitly granted state funds under another provision of the Appropriations Act. The question is whether the Secretary of State may also award that applicant a Community Enhancement Grant. Nothing in the Grant Act requires the Secretary to withhold grants from an applicant that has received funds under another provision of the Appropriations Act, if documentation in support of the grant application demonstrates that the proceeds will be used for one of the purposes that are permissible under subsections (b) and (c) of the Grant Act. Further, subsection (f) of the Grant Act states:

(f) Notwithstanding any provision of this act to the contrary, if multiple grants are allocated to the same recipient, then such recipient shall be awarded the sum total of such multiple grants.

This language assumes, therefore, that an applicant may receive more than one grant under the Grant Act. At the same time, subsection (g)(2) of the Grant Act states:

The Secretary of State shall make grants to applicants as the secretary deems appropriate and in such amounts as the secretary determines appropriate. In making determinations relative to grant awards, the Secretary of State is authorized to take into account factors the secretary deems relevant, including the benefits of making the grant.

(Emphasis added). Under this provision, in awarding grants, the Secretary is free to consider whether a particular applicant has received other state grant funds during this fiscal year. So long as he acts reasonably and consistently, the Secretary could give priority to applicants who have not received other funds. The next question is, assuming the answer to 8.a. is yes, whether an applicant is eligible for grant funds for the same purpose stated in the other appropriation under which the applicant received funds. Nothing in the Grant Act would require the Secretary to withhold grant money from an applicant that has received funds under another provision of the Appropriations Act for the same general purpose. But the Secretary should not award grant funds for a specific project that has already been fully funded under another provision of the Appropriations Act. As discussed in answering Question 7, the Secretary may only award funds to an applicant for a project if documentation demonstrates that the proceeds will be used for one of the purposes that are permissible under subsection (c) of the Grant Act.

9. Requiring Applicants to Comply with Other Provisions of State Law

The next question is whether the Secretary may require an applicant to comply with other provisions of state law before awarding a grant. As quoted above, the Grant Act gives the Secretary broad authority to make grants “as the secretary deems appropriate and in such amounts as the secretary determines appropriate.” In addition, the Grant Act provides that, in making determinations relative to grants, the Secretary may take into account “factors the secretary deems relevant.” So long as the Secretary applies the requirement consistently to all applicants, we think the Grant Act authorizes the Secretary to require an applicant to comply with other provisions of state law before awarding a grant.

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