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Opinion No. 08-52

Confidentiality of Information Related to the City of Murfreesboro's Drug and Alcohol Testing Obtained Under the Drug-Free Workplace Programs Statutes

QUESTIONS

1. Is the City of Murfreesboro's Disciplinary Review Board ("Board") deemed to be "management" under Tenn. Code Ann. § 50-9-109(d) so as to allow disclosure to the Board of information relating to a drug and alcohol testing program obtained under the Drug-Free Workplace Program?

2. Does Tenn. Code Ann. § 50-9-109(d) authorize the City of Murfreesboro ("City") to disclose to the Board information relating to a drug and alcohol testing program in defending the City Manager's decision to discipline an employee in an administrative hearing before the Board?

3. Do materials presented to the Board during administrative proceedings relative to employee discipline based on alleged violations of the Drug-Free Workplace Program become public records?

OPINIONS

1. Yes. Because the Board has the authority to sustain, modify, or overrule an employment decision by the City Manager, the Board is deemed to be "management" under Tenn. Code Ann. § 50-9-109(d) so as to allow disclosure to the Board of information relating to a drug and alcohol testing program obtained under the Drug-Free Workplace Program.

2. Yes. Because the Board is deemed "management" under Tenn. Code Ann. § 50-9-109(d), the City may disclose to the Board information relating to a drug and alcohol testing program in defending the City Manager's decision to discipline an employee in an administrative hearing before the Board.

3. No. Because the Board is required to maintain the confidentiality of information that is confidential by law, any materials presented to the Board during administrative proceedings relative to employee discipline based on alleged violations of the Drug-Free Workplace Program do not become public records.

ANALYSIS

1.

The Legislature enacted the Drug-Free Workplace Programs law in 1996, intending "to promote drug-free workplaces in order to maximize the productivity of employers in the state and to avoid the 'costs, delays and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees.'" *Interstate Mechanical Contractors, Inc. v. McIntosh*, 229 S.W.3d 674, 679 (Tenn. 2007) (quoting Tenn. Code Ann. § 50-9-101(a)); Op. Tenn. Att'y Gen. No. 99-126 (June 29, 1999). The Drug-Free Workplace Programs law embodies a public policy that favors dismissal of employees for alcohol or drug use. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997).

The Drug-Free Workplace Programs provisions "apply to a drug-free workplace program implemented pursuant to rules adopted by the commissioner of labor and workforce development" and is "subject to the provisions of any applicable collective bargaining agreement." Tenn. Code Ann. § 50-9-102. The law provides that a "covered employer who establishes a drug-free workplace is required to conduct" drug and alcohol tests in the following circumstances: job applicant testing; reasonable-suspicion testing; routine fitness-for-duty testing; follow-up testing; and post-accident testing. Tenn. Code Ann. § 50-9-106(a).

The statute defines the term "covered employer" as

> a person or entity that employs a person, is covered by the Workers' Compensation Law, compiled in chapter 6 of this title, maintains a drug-free workplace pursuant to this chapter and includes on the posting required by § 50-9-105 a specific statement that the policy is being implemented pursuant to the provisions of this chapter. This chapter shall have no effect on employers who do not meet this definition[.]

Tenn. Code Ann. § 50-9-103(3).[1]

An employee or job applicant whose drug or alcohol test is confirmed as positive will be subject to varying degrees of discipline by the covered employer, who may properly discharge, discipline, or refuse to hire an individual for such a transgression. The statute provides that a "covered employer who discharges or disciplines an employee or refuses to hire a job applicant in

[1]The "Workers' Compensation Law does not apply to the state of Tennessee, counties and municipal corporations unless the State, county or municipal corporation elects to accept the provisions of the Workers' Compensation Act by filing written notice with the commissioner of labor." Op. Tenn. Att'y Gen. No. 99-126 (June 29, 1999) (citing Tenn. Code Ann. § 50-6-105(5)). For purposes of this Opinion, it is assumed that the City has elected to accept the provisions of the Workers' Compensation Law, and that it is also a "covered employer" under the Drug-Free Workplace Programs.

compliance with this section is considered to have discharged, disciplined or refused to hire for cause." Tenn. Code Ann. § 50-9-108(b).

Given the sensitive nature of the Drug-Free Workplace Programs, the General Assembly deemed confidential all information *received by* a covered employer as part of a drug or alcohol testing program, except in limited circumstances:

> All information, interviews, reports, statements, memoranda and drug or alcohol test results, written or otherwise, received by the covered employer through a drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery or disclosed in any public or private proceedings, *except in accordance with this section or in determining compensability under this chapter*.

Tenn. Code Ann. § 50-9-109(a) (emphasis added).

The requirement to keep all such information confidential applies not only to covered employers but to other organizations and individuals who receive or who have access to drug or alcohol test results:

> Covered employers, laboratories, medical review officers, employee assistance programs, drug or alcohol rehabilitation programs and their agents who receive or have access to information concerning drug or alcohol test results shall keep all information confidential.

Tenn. Code Ann. § 50-9-109(b). Further, "even if records kept pursuant to the Drug-Free Workplace Program are maintained in a public employee's personnel file, they are still confidential and are not subject to disclosure under the Tennessee Public Records Act." Op. Tenn. Att'y Gen. No. 99-126 (June 29, 1999).

The statute does make provision for the release, access to, or use of drug or alcohol test information under limited circumstances. In relevant part, the statute provides as follows:

> This section does not prohibit a covered employer, agent of such employer or laboratory conducting a drug or alcohol test *from having access to employee drug or alcohol test information or using such information when consulting with legal counsel in connection with actions brought under or related to this section, or when the information is relevant to its defense in a civil or administrative matter.*

Tenn. Code Ann. § 50-9-109(d) (emphasis added).[2] Further, this subsection does not "prohibit disclosure among management as is reasonably necessary for making disciplinary decisions relating to violations of drug or alcohol standards of conduct adopted by an employer." *Id.*

The question posed is one of statutory interpretation — whether Tenn. Code Ann. § 50-9-109(d) allows disclosure to the Board of information relating to a drug and alcohol testing program obtained under the Drug-Free Workplace Programs law. In construing statutes, we must "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 statute is unambiguous, legislative intent is determined from the plain and ordinary meaning of the language used. *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 Distribs. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991). Statutes that are related to the same subject matter are supposed to be read in *pari materia*. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). We must "construe the statute so that no part will be inoperative, superfluous, void or insignificant." *State v. Northcutt*, 568 S.W.2d 636, 637-38 (Tenn. 1978). Further, we are "constrained against adopting an interpretation of any statute that would lead to absurd results." *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 313 (Tenn. 2005).

Applying the above principles of statutory interpretation, this Office concludes that, because the Board has the authority to sustain, modify, or overrule an employment decision by the City Manager, the Board is deemed to be "management" under Tenn. Code Ann. § 50-9-109(d) so as to allow disclosure of information relating to a drug and alcohol testing program under the Drug-Free Workplace Programs. Because the relevant statutory language in § 50-9-109(d) is unambiguous, we determine legislative intent from the plain meaning of the statute's language. *Freeman*, 27 S.W.3d at 911. By its plain terms, Tenn. Code Ann. § 50-9-109(d) does not "prohibit disclosure *among management as is reasonably necessary* for making disciplinary decisions relating to violations of drug or alcohol standards of conduct adopted by an employer." (Emphasis added). "Management" is defined, in relevant part, as "the person or persons controlling or directing a business, institution, etc." *Webster's New Universal Unabridged Dictionary* 1166 (2003). Persons within a business or a government entity who possess the authority to fire, or reinstate, employees would certainly control or direct its affairs, as far as that aspect of the organization is concerned. These persons must make sensible employment decisions with regard to an employee or applicant who has tested positive for the presence of alcohol or drugs. The General Assembly considered it necessary to create an exception to the confidentiality requirement to the extent that the disclosure "is reasonably necessary for making disciplinary decisions relating to violations of drug or alcohol standards of conduct adopted by an employer." Tenn. Code Ann. § 50-9-109(d).

While the definition of management is unambiguous, every covered employer's management structure will vary, requiring a case-by-case determination of whether disclosure of confidential information will be permitted under the Drug-Free Workplace Programs statutes. As applied to the

[2]Similarly, a covered employer must notify "the parents or legal guardians of a minor of the results of any drug or alcohol testing program conducted pursuant to this chapter." Tenn. Code Ann. § 50-9-109(e).

City, we must look to the functions of the Board, which was created by Section 36 of the City's Charter. The Board members are appointed by the mayor and approved by the City Council for a term of six years. Murfreesboro, Tenn., Charter § 36(a)(2). The Board's principal function is to conduct hearings for City employees who have been dismissed, suspended, or whose rank has been reduced by the City Manager.[3] Murfreesboro, Tenn., Charter § 36(d)(1). After conducting a hearing, the Board may

> sustain, modify or overrule the action of the City Manager, may order the employee reinstated, with or without pay, or may order such other disciplinary action as deemed appropriate from the facts and evidence adduced at the hearing.

Murfreesboro, Tenn., Charter § 36(d)(1).

Given the powers afforded to the Board under the City's Charter, this Office concludes that the Board is deemed to be "management" under Tenn. Code Ann. § 50-9-109(d) and that, as such, disclosure to it of information relating to a drug and alcohol testing program, "as is reasonably necessary for making disciplinary decisions relating to violations of drug or alcohol standards of conduct" the City has adopted, is not prohibited.

2.

The answer to this question depends on the proper application of that part of Tenn. Code Ann. § 50-9-109(d) that provides that a covered employer, or its agent, may have *access to or use* confidential information when consulting with legal counsel "in connection with actions brought or related to this section, or when the information is relevant to the covered employer's defense in a civil or administrative matter." Tenn. Code Ann. § 50-9-109(d). Under the City's Charter, an employee who has been disciplined for violating the provisions of the Drug-Free Workplace Program[4] must take the affirmative step of requesting a hearing before the Board. Murfreesboro, Tenn., Charter § 36(d)(1). The first step then to be taken by the City consists of filing with the Board a "written specification of charges." Murfreesboro, Tenn., Charter § 36(d)(1). At the hearing, the City bears the burden to prove the infraction(s) alleged in the statement of charges. Since the City is therefore prosecuting the charges against the employee, it would not be using confidential

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[3]The City Manager has "exclusive power to dismiss, suspend, reduce in rank or otherwise discipline" all City employees, "*subject to the employee's constitutional rights*." Murfreesboro, Tenn., Charter § 36(d)(1) (emphasis added). The Supreme Court has held that a previous version of § 36 of the City's Charter that allowed an employee to appeal to the City Council created a property interest in his employment. *Huddleston v. City of Murfreesboro*, 635 S.W.2d 694, 695-96 (Tenn. 1982), *superseded by* Tenn. Code Ann. § 27-9-114(b)(1).

[4]The law requires a covered employer to notify a job applicant or an employee of its decision not to hire or to discharge him because of a confirmed positive alcohol or drug test result, and may describe the results in such a notice. Tenn. Code Ann. § 50-9-109(a)(7) ("an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within five (5) working days after receiving written notification of the test result").

information in its "defense" in an administrative matter before the Board. Accordingly, this Office concludes that such information may not be disclosed to the Board on the theory that it is relevant to the City's "defense" at a disciplinary proceeding before the Board. Because the Board is deemed "management," as discussed above, this Office also concludes that Tenn. Code Ann. § 50-9-109(d) authorizes the City to disclose confidential information relating to a drug and alcohol testing program to the Board during disciplinary proceedings.

3.

While the City, a governmental covered employer, may disclose otherwise confidential information among "management" and thus may file such information with the Board in a written specification of charges against an employee who allegedly violated the Drug-Free Workplace Programs, an issue still remains of whether the confidential information becomes a public record when used during proceedings relative to employee discipline based on alleged violations of the Drug-Free Workplace Program. Under the City's Charter, the Board's hearings are conducted pursuant to the Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. §§ 4-5-301 through 4-5-319, with minor, non-relevant deviations therefrom. Murfreesboro, Tenn., Charter § 36(d)(2)(B). In relevant part, the UAPA requires that the agency conducting a contested case hearing recognize the rules of privilege and that it give effect to statutes protecting the confidentiality of records:

> The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality of certain records, and shall exclude evidence which in its judgment is irrelevant, immaterial or unduly repetitious[.]

Tenn. Code Ann. § 4-5-313(1).

Under the Public Records Act, all state, county and municipal records are open to inspection by the public during business hours, "*unless otherwise provided by state law*." Tenn. Code Ann. § 10-7-503(a) (emphasis added). The Public Records Act "creates a presumption of openness to records of governmental entities." *Memphis Pub. Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).

The unambiguous language of Tenn. Code Ann. § 50-9-109(a) makes "all information," including "interviews, reports, statements, memoranda and drug or alcohol test results" that is *received by* a covered employer confidential, and it may not be used in evidence, obtained in discovery, or disclosed in any public or private proceedings. Tenn. Code Ann. § 50-9-109(a). Thus, a covered employer who *receives* such information must maintain its confidentiality.[5] Moreover,

[5]To the extent that a covered employer generates information, interviews, reports, statements, or memoranda related to an employee's drug or alcohol test result that refer to, cite, or quote such confidential information, such portion of the interview, report, statement or memoranda also will be confidential. *Cf.* Op. Tenn. Att'y Gen. No. 99-126 (June 29, 1999). Thus, for example, a statement of charges filed with the Board containing such information will be confidential and should be redacted from the record in the event of a public records request. *See Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007).

covered employers, laboratories, medical review officers, employee assistance programs, drug or alcohol rehabilitation programs and their agents also must maintain the confidentiality of drug or alcohol test results. Tenn. Code Ann. § 50-9-109(b). This Office has previously opined that "records kept pursuant to the Drug-Free Workplace Program," even if maintained in an employee's personnel file, "are still confidential and are not subject to disclosure under the" Public Records Act. Op. Tenn. Att'y Gen. No. 99-126 (June 29, 1999).

In light of Tenn. Code Ann. §§ 4-5-313(1) and 50-9-109(a), this Office concludes that any materials presented to the Board during administrative proceedings relative to employee discipline based on alleged violations of the Drug-Free Workplace Programs do not become public records. Because the Board is required to "give effect" to statutes that protect the confidentiality of information under the Drug-Free Workplace Programs, Tenn. Code Ann. § 4-5-313(1), these records do not become public records when presented to the Board during such proceedings. Thus, the City and the Board must ensure that any confidential information under § 50-9-109(a) retain such status during disciplinary proceedings conducted by the Board.[6]

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[6]We note that the UAPA also requires that any hearing conducted under its provisions "be open to public observation pursuant to the provisions of title 8, chapter 44, unless otherwise provided by state or federal law." Tenn. Code Ann. § 4-5-312(d). Accordingly, because the Board's disciplinary hearings are covered by the UAPA, such hearings must comply with the Open Meetings Act. When confidential information is presented to the Board during such proceedings, because the UAPA requires that the Board maintain its confidential nature, the information must be introduced under seal or in such manner as to insure its continued confidentiality.

Requested by:

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