

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202

August 11, 2008

Opinion No. 08-131

Authority of Legislative Committee to Suspend Agency Rules

QUESTIONS

1. In conducting its rules review responsibilities under Tenn. Code Ann. § 4-5-226(c), does Tenn. Code Ann. § 4-5-226(k) constitutionally permit legislative committees, acting without legislative enactment, to suspend, delay or otherwise negate the effectiveness of a rule of a state agency?

2. If the legislative committees vote to suspend, delay, or negate the effectiveness of an agency rule, and, as a result of such vote, notify the Secretary of State of such action under Tenn. Code Ann. § 4-5-226(k)(1)(C), and if, under subsection (k)(1)(C), the Secretary of State publishes a notice in the Tennessee Administrative Register (TAR) stating that such rule will not become, or is no longer, effective because of such vote, does the rule still become effective, or remain effective, and can the state agency legally enforce its rule despite the notice published in the TAR?

3. Presuming no court has adjudged provisions of Tenn. Code Ann. § 4-5-226 allowing legislative committees to suspend agency rules unconstitutional, does the failure to provide the fifteen (15) day advance notice to the agency and an opportunity for the agency to be heard on the contemplated suspension of the rule pursuant to Tenn. Code Ann. § 4-5-226(k)(1)(A), nullify the Committees' action suspending the agency rule(s) despite contrary publication in the TAR?

OPINIONS

1. No. A legislative committee acting alone cannot constitutionally suspend, delay or otherwise negate the effectiveness of a rule of a state agency.

2. Yes. The state agency may proceed to enforce its rule despite publication of the notice in the TAR.

3. Yes. Failure to adhere to the statute providing the affected agency notice and opportunity to be heard nullifies the committees' action.

ANALYSIS

1. The issues raised by Question 1 were addressed in Op. Tenn. Att’y Gen. 82-115 (March 11, 1982) and Op. Tenn. Att’y Gen. 01-86 (May 23, 2001) wherein the Attorney General opined, respectively, that “authoriz[ing] the appropriate standing committees of the General Assembly to disallow and/or suspend regulations promulgated by any agency of state government, contravene the Separation of Powers Doctrine as set forth in Article II of the Tennessee Constitution” and “[u]nder the Separation of Powers doctrine as set forth in Article II of the Tennessee Constitution, a legislative committee lacks authority to disallow and/or suspend rules promulgated by a state agency.”

Tennessee Code Annotated § 4-5-226(k) purports to authorize legislative committees to express disapproval of a rule by voting to suspend the effectiveness of such rule or to allow the rule to expire upon its published expiration date. To the extent that any provision in Tenn. Code Ann. § 4-5-226 grants “veto” authority to a legislative committee reviewing rules, or allows a legislative committee without legislative enactment to prevent agency rules from becoming effective, it is our opinion that such provision violates the Separation of Powers doctrine as set forth in Article II of the Tennessee Constitution.

Once the General Assembly delegates rulemaking authority to an agency of the executive branch, it may not interfere with the rulemaking process except through legislation enacted in compliance with Article II, § 18 of the Tennessee Constitution. Op. Tenn. Att’y Gen. 01-86 (under the Separation of Powers doctrine, a legislative committee lacks authority to disallow and/or suspend rules promulgated by a state agency) (citing *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (statute allowing one House of Congress to veto action of executive branch taken pursuant to legislative authority held violative of Separation of Powers doctrine)).

Again, while legislative committees have the authority to review rules promulgated by a state agency, they would lack authority to disallow and/or suspend such rules. Under our previous opinions, applying the Separation of Powers doctrine, the authority of legislative committees would be limited to requesting an agency to repeal, amend or withdraw the rule or recommending action by the General Assembly.

2. Question 2 raises issues regarding the enforceability of a rule “suspended” by the committees and the effect of publication of the suspension. As a general rule, unconstitutional legislative acts are void. *Marbury v. Madison*, 5 U.S. 137 , 180 (1803) (a law repugnant to the constitution is void); *see also Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516, 538 (Tenn. 1977) (an invalid statute is treated as though it never existed). The action of legislative committees acting alone to suspend an agency rule would thus be ineffective. Publication of such action by the Secretary of State in the TAR pursuant to Tenn. Code Ann. § 4-5-226(k)(3) would only serve to provide notice of a legislative committees’ disapproval of the rule or rules in question; publication would not cure the constitutional infirmity.

3. Tennessee Code Annotated § 4-5-226(k)(1)(A) provides that when the standing committees contemplate suspending an agency rule, the chairs of the committees “must” jointly

provide notice to the agency affected. It further provides that notice “shall” be given 15 days prior to the date of the meeting considering such action to allow the agency sufficient time to prepare data to show cause why the committee should not suspend the agency’s rule. Tennessee Code Annotated § 4-5-226 provides the only authority for a legislative committee to suspend an agency rule. Therefore, the question turns on whether the “notice” provisions of Tenn. Code Ann. § 4-5-226 are interpreted to be mandatory or discretionary.

The traditional canons of statutory construction guide the inquiry into a statute's purpose and effect. The courts ascertain a statute's purpose from the plain and ordinary meaning of its language. *See Westland West Community Ass'n v. Knox County*, 948 S.W.2d 281, 283 (Tenn.1997); *Riggs v. Burson*, 941 S.W.2d 44, 54 (Tenn.1997). In determining whether a provision is mandatory or discretionary, the prime objective is to ascertain the legislative intent from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other. *See Baker v. Seal*, 694 S.W.2d 948, 950 (Tenn. Ct. App. 1984)(citing *Stiner v. Powell's Hardware Co.*, 168 Tenn. 99, 75 S.W.2d 406 (1934)). When the word “shall” appears in a statute, it is plainly and ordinarily construed as being mandatory and not discretionary. *State v. Haddon*, 109 S.W.3d 382 (Tenn. Crim. App. 2002). Words or phrases which are generally regarded as making a provision mandatory include “shall” and “must.” *Board of County Com'rs of Shelby County v. Taylor*, 1994 WL 420922 (Tenn. Ct. App. Aug. 12, 1994).

Here, it is clear that the notice provisions of Tenn. Code Ann. § 4-5-226 impose a mandatory obligation upon the committee chairpersons to provide sufficient notice to allow the affected agency an opportunity to respond. To interpret the notice provisions as being merely discretionary or directory would thwart the clear intent of the legislature that the affected agency be heard before its rules are suspended. *See Baker v. Seal*, 694 S.W.2d at 950 (the prime objective is to ascertain the legislative intent from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other). Therefore, should the chairpersons of the legislative committees contemplating suspending an agency rule fail jointly to provide proper statutory notice, the action of the legislative committees in suspending agency rules is a nullity, even assuming such committees are otherwise constitutionally authorized to suspend agency rules on their own.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

Page 4

WARREN A. JASPER
Senior Counsel

Requested by:

Virginia T. Lodge, Commissioner
Department of Human Services
Citizens Plaza Building
400 Deaderick Street
Nashville, TN 37243-1403