

STATE OF TENNESSEE
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Opinion No. 09-107

Providing Fire and Other Services under an Interlocal Agreement

QUESTIONS

1. May the City of Cleveland and Bradley County lawfully provide in an interlocal agreement that the emergency services board, and not the county mayor, will have the power to appoint the emergency services director, notwithstanding the statutory language contained in Tenn. Code Ann. § 5-17-103?

2. Are Tenn. Code Ann. §§ 5-17-101, *et seq.*, applicable to the provision of emergency, rescue, and fire services pursuant to an interlocal agreement between the city and the county?

3. If Tenn. Code Ann. §§ 5-17-101, *et seq.*, are not applicable to the provision of emergency, rescue, and fire services provided under an interlocal agreement, is it lawful to fund these services, in whole or in part, by a city fire tax imposed by the city on properties located within the city and a separate county fire tax imposed by the county on properties within the county but outside the city?

OPINIONS

1. If the interlocal agreement concerns a county-wide fire department created under Tenn. Code Ann. §§ 5-17-101, *et seq.*, then the fire chief must be appointed by the county mayor, subject to confirmation by the county commission. If the interlocal agreement concerns a county board of public utilities created under Tenn. Code Ann. § 5-16-103, then the board appoints the superintendent. If the agreement concerns an agency other than such a board providing services under Tenn. Code Ann. §§ 5-16-101, *et seq.*, then the county mayor must appoint the superintendent, subject to confirmation by the county commission.

Since the request refers to an interlocal agreement between a county and a city, it is possible that the planned emergency services board is intended to be a joint agency created by the city and the county under Tenn. Code Ann. § 12-9-104 of the Interlocal Cooperation Act. In light of the broad authority under Tenn. Code Ann. § 5-16-107 and the Interlocal Cooperation Act, we think it can be argued that a city and a county may create a separate, joint entity to provide fire and emergency medical services under this statute. Appointment of the director of the joint entity would be governed by the interlocal agreement between the two governments.

2. Assuming that the county is providing the services as an urban type public facility under Tenn. Code Ann. §§ 5-16-101, *et seq.*, Tenn. Code Ann. §§ 5-17-101, *et seq.*, would not apply to the arrangement. At the same time, an argument can be made that, in light of the authority under Tenn. Code Ann. § 5-17-101(d)(3) and the Interlocal Cooperation Act, the county may exercise the powers under Tenn. Code Ann. §§ 5-17-101, *et seq.*, to operate and support any joint agency created by an agreement with a city to provide fire service.

3. Of course, the City of Cleveland may provide city fire service and pay for it out of its property taxes. Further, an argument can be made that the fire tax levied by the county under Tenn. Code Ann. § 5-17-105(c) might be used to support an interlocal agency created by the city and the county to provide fire service under Tenn. Code Ann. § 12-9-104. The city could agree to be included in the district. It can be also argued that the county fire service tax under Tenn. Code Ann. § 5-17-105(c) could be used to support the board's provision of fire services, but not to support other services.

ANALYSIS

This opinion addresses a planned interlocal agreement between Bradley County and the City of Cleveland regarding the provision of emergency, rescue, and fire services. The legality of that agreement depends on its specific terms. The request does not state the statutory authority for the agreement. Tenn. Code Ann. §§ 12-9-101, *et seq.*, provide broad authority for local governments to exercise jointly statutory powers conferred on each of them. At the same time, both parties to the agreement -- the county and the city -- must be authorized to enter into the agreement. Since the request asks only about county statutes, we do not address the city's authority to enter into the agreement. The only statutes authorizing counties to provide fire service directly appear to be Tenn. Code Ann. §§ 5-17-101, *et seq.*, regarding county-wide fire departments, and Tenn. Code Ann. §§ 5-16-101, *et seq.*, regarding urban type public facilities. Each of these statutory schemes defines the entity through which the county may exercise its authority. Further, each of these statutory schemes expressly authorizes interlocal agreements with other governmental entities. A definitive answer to the questions posed in the request depends on the extent to which a county may exercise its powers under either of these statutory schemes when the county has entered into an interlocal agreement, whether under the statutory scheme itself or under the broader authority of Tenn. Code Ann. §§ 12-9-101, *et seq.* Neither the statutes nor Tennessee cases provide a clear answer to this issue.

The first question is whether the county mayor must appoint the superintendent of an emergency services board under an interlocal agreement. Tenn. Code Ann. §§ 5-17-101, *et seq.*, provide for the creation of a county-wide fire department. Section 5-17-101(d)(3) states:

Nothing in this section shall be construed as limiting the ability of local governments to provide for fire protection services through an interlocal agreement as authorized by title 12, chapter 9, or any other provision of the Tennessee Code[.]

Under Tenn. Code Ann. § 5-17-102(a)(7), a county-wide fire department may:

Enter into and perform all necessary contracts, including but not limited to:

* * * *

(B) Contracts to have existing fire departments and others provide fire protection services in any area of the county, including, but not limited to:

(i) Contracts with incorporated towns and utility districts to provide such service within or without their corporate limits;

(ii) Contracts to provide fire protection services for any city, town, district, or any part thereof of the county;

Tenn. Code Ann. § 5-17-108 provides:

Nothing in this chapter shall be construed to limit in any way the fire departments of any municipality or utility district providing fire service, but merely authorizes such county fire protection service to contract with municipalities or utility districts in order to coordinate fire service county-wide.

A county-wide fire department created under this statutory scheme must be headed by a county fire chief appointed by the county mayor, subject to confirmation by the county commission. Tenn. Code Ann. § 5-17-103. Thus, if the interlocal agreement concerns a county-wide fire department created under Tenn. Code Ann. §§ 5-17-101, *et seq.*, the fire chief must be appointed by the county mayor, subject to confirmation by the county commission.

But a county may also provide fire and emergency medical services directly under Tenn. Code Ann. §§ 5-16-101, *et seq.* This statute was recently amended to authorize all counties to provide fire protection services. Tenn. Code Ann. § 5-16-101(b)(2); 2008 Tenn. Pub. Acts ch. 1034, § 1. Under Tenn. Code Ann. § 5-16-102, a county must provide for the exercise of its authority to provide urban type public facilities by an agency of the county already in existence; a public works department to be created; or a board established in accordance with Tenn. Code Ann. § 5-16-103. Under § 5-16-103, the county may create a county board of public utilities, whose members are appointed by the county mayor, subject to confirmation by the county commission. Under Tenn. Code Ann. § 5-16-104(b), if the powers under the act are exercised by a county board of public utilities created under Tenn. Code Ann. § 5-16-103, then that board must appoint a superintendent. If the powers of the act are exercised by an agency other than a board of public utilities created under that statute, then the county mayor must appoint the superintendent.

Since the request refers to an interlocal agreement between a county and a city, it is possible that the planned emergency services board is intended to be a joint agency created by the city and the county. Tenn. Code Ann. § 5-16-107 provides:

(a) In connection with the operation of any urban type public facility as provided in this chapter, the board or other administrative agency, with the approval of the county legislative body or other governing body, is hereby authorized to enter into contracts with other governmental units or agencies, federal, state, or local, including municipalities, towns, utility districts and improvement districts within the county, for the furnishing of services and facilities within the purview of this

chapter, and to enter into cooperative arrangements and agreements for providing such services and facilities, upon terms deemed advantageous by the board or other administrative agency.

(b) With the approval of the county legislative body or other governing body, the board or other administrative agency is authorized to enter into contracts with any of such governmental units or entities to provide or share in the provision of any urban type facility and for the joint operation thereof, and to make or pay charges in connection therewith by written agreement with such unit or entity.

(c) All governmental units subject to the jurisdiction of the state of Tennessee are hereby authorized to enter into contracts with the board or other administrative agency for providing any urban type public facility within the purview of this chapter, and to otherwise cooperate in furnishing such facilities, upon any terms deemed to be mutually advantageous.

(d) In any cooperative undertaking by the board or other administrative agency with any other governmental unit or entity as described in this section for furnishing any of the facilities contemplated in this chapter, the county's share of the costs may be financed in the same manner as is provided for in § 5-16-106.

Thus, this statutory scheme broadly authorizes cooperative arrangements between a city and a county to provide urban type public services, but does not explicitly authorize a city and a county to create a separate, joint entity to provide the service. As noted above, the Interlocal Cooperation Act, Tenn. Code Ann. §§ 12-9-101, *et seq.*, provides broad authority for cities and counties to contract with one another to exercise their powers jointly. In light of the broad authority under Tenn. Code Ann. § 5-16-107 and the Interlocal Cooperation Act, we think it can be argued that a city and a county may create a separate, joint entity to provide fire and emergency medical services under this statute. Appointment of the director of the joint entity would be governed by the interlocal agreement between the two governments.

The second question is whether Tenn. Code Ann. §§ 5-17-101, *et seq.*, apply to an interlocal agreement to provide emergency, rescue, and fire services. Assuming that the county is providing the services as an urban type public facility under Tenn. Code Ann. §§ 5-16-101, *et seq.*, then the restrictions contained in Tenn. Code Ann. §§ 5-17-101, *et seq.*, would not apply. At the same time, we think it can be argued that, in light of the authority under Tenn. Code Ann. § 5-17-101(d)(3) and the Interlocal Cooperation Act, the county may exercise the powers under the act to operate and support a joint agency created by an agreement with a city to provide fire service.

Finally, the request asks whether, assuming that Tenn. Code Ann. §§ 5-17-101, *et seq.*, do not apply to the agreement, it is lawful to fund services under the agreement by a city fire tax imposed by the city on properties located within the city and a separate county fire tax imposed by the county on properties within the county but outside the city. Of course, the City of Cleveland may provide city fire service and pay for the service out of its property taxes. *See, e.g.*, Cleveland City Charter, Article II, § 1 (general powers). In addition, Tenn. Code Ann. § 5-17-105 authorizes the county commission to establish the boundaries of a fire tax district to be

taxed to support a county-wide fire department operated under this statute. Subsection (c) of the statute provides:

In the case of county-wide fire districts as authorized by § 5-17-101, the fire tax district shall comprise the entire county outside of any and all incorporated municipalities within the county, but each and every such incorporated municipality within the county may elect to contract with the county for inclusion in such fire tax district as authorized by § 5-17-108.

Under Tenn. Code Ann. § 5-17-106, the county commission must levy an annual fire tax upon the property owners of each district. The tax of each fire tax district shall be set at a rate sufficient to pay that district's share of the total budget of the county-wide fire department. Under Tenn. Code Ann. § 5-17-107, the fire tax is to be assessed in the same manner as the county property tax and collected as an addition to that tax. The statute provides that "[t]he fire tax shall in all ways be treated as a part of the county property tax."

Under the statute, the fire tax must be levied by the county. Under Tenn. Code Ann. § 5-17-105(c), a county may levy a fire tax on property owners in a city if the city has contracted with the county to be included in the district. An argument can be made that the fire tax levied under this statute might be used to support an interlocal agency created by the city and the county to provide fire service under Tenn. Code Ann. § 12-9-104. The city could agree to be included in the district. Subsection (e)(2) of § 12-9-104 provides:

(A) Notwithstanding the provisions of title 9, chapter 21, including § 9-21-105 and § 9-21-107 to the contrary, a separate legal or administrative entity, created by interlocal agreement between two (2) or more political subdivisions of the state acting pursuant to this chapter, is not empowered to:

(i) Assess, levy or collect ad valorem taxes;

* * * *

(B) However, to the extent that the participating political subdivisions possess such powers, the political subdivisions may exercise such powers on behalf and for the benefit of the separate legal or administrative entity.

(Emphasis added).

The request indicates that the planned emergency services board would provide emergency medical services in addition to fire service. It can be argued that the county fire service tax under Tenn. Code Ann. § 5-17-105(c) could be used to support the board's provision of fire services, but not to support other services.

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