STATE OF TENNESSEE
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Opinion No. 09-190

Authority of District Attorneys General to Appoint Volunteer Investigators and Utilize Experts

QUESTION

1. May a district attorney general appoint a retired law enforcement officer, or any other person, as a volunteer criminal investigator with the powers of a peace officer?

2. May a district attorney general accept the services of a volunteer fraud examiner, forensic accountant, auditor, or a person with specialized knowledge for use in an advisory capacity or as an expert witness?

OPINION

1. District attorney general criminal investigator positions are created by statute for each judicial district and such statute further defines the duties of and sets the compensation for such position. A district attorney general does not have the authority to create additional criminal investigator positions, whether paid or unpaid.

2. A district attorney general may accept the services of an expert consultant or analyst.

ANALYSIS

1. Agencies of state government are creatures of statute and may exercise only such power and authority as the legislature, by statute, expressly delegates to them or that can be fairly implied from the statutory language. Sanifill, Inc. v. Tenn. Solid Waste Disposal Ctrl. Bd., 907 S.W.2d 807, 810 (Tenn. 1995). Although statutes that grant agencies with the authority to act are regarded as remedial in nature, and, therefore, receive the benefit of a more liberal construction, any implied authority must still be fairly derived from the express language of the statute. Id.

The position of district attorney's criminal investigator is a statutory creation.[1] Tenn. Code Ann. §§ 16-2-506 and 16-2-508. The compensation is set forth in a statutory table. Tenn.

[1] Peace officers positions are created by statute. Tenn. Code Ann. § 38-8-101 to § 38-8-122 governs the certification and training requirements for county and municipal law enforcement officers, which also apply to some state law enforcement officers. Additionally, other designated employees of specific state agencies are statutorily granted law enforcement powers. Tenn. Code Ann. § 4-3-609 (Dep't of Correction); Tenn. Code Ann. § 4-7-107 (Tennessee

Code Ann. § 8-7-201(a). Tenn. Code Ann. §§ 16-2-506 and 16-2-508 fix the number of positions that are available to each district attorney general. Some criminal investigators are authorized to exercise the power of peace officers.

Tenn. Code Ann. § 16-2-508(f) states:

> (1) The district attorney general for the first, fifth, fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, twenty-fifth and twenty-sixth districts shall appoint a suitable person to the position of criminal investigator. The person so appointed shall perform the duties that the district attorney general directs, and shall serve at the pleasure of the district attorney general. (2) In carrying out the duties of the criminal investigator's office, *each of the criminal investigators created by Acts 1986, ch. 813*,[2] shall possess the same power and authority as deputies of the county sheriffs. The compensation of the investigators shall be as provided by general law.[3]

(emphasis added). Other district attorney general criminal investigator positions do not possess peace officer authority.[4]

The foregoing statutes are comprehensive and specific with respect to the number of district attorney general investigator positions created, the powers and duties of such positions, and the compensation to be paid. In view of the comprehensive nature of the statutory scheme, no additional authority to appoint volunteer investigators can be fairly implied.[5]

Highway Patrol); Tenn. Code Ann. § 8-7-110 (judicial district drug task forces); Tenn. Code Ann. § 11-3-107 (State Parks); Tenn. Code Ann. § 38-3-114 (Homeland Security); Tenn. Code Ann. § 38-6-102 (Tennessee Bureau of Investigation); Tenn. Code Ann. § 49-7-118 (state college and university campus police); Tenn. Code Ann. §§ 57-1-208 and 57-1-210 (Alcoholic Beverage Commission); Tenn. Code Ann. § 67-1-1441 (Dep't of Revenue); Tenn. Code Ann. § 68-102-127 (Dep't of Commerce & Insurance Division of Fire Prevention); Tenn. Code Ann. § 70-1-305 (Tennessee Wildlife Resources Agency); Tenn. Code Ann. § 71-5-2507 (TennCare Inspector General).

[2] 1984 Pub. Acts Ch. 813 created criminal investigator positions in the 1st, 5th, 15th, 17th, 19th, 23rd, 24th, 25th, and 26th judicial districts.

[3] The General Assembly has subsequently enacted legislation creating new criminal investigator positions in specific judicial districts and established that the appointees to those positions have the power of a deputy sheriff. 1988 Tenn. Pub. Acts 773 (10th judicial district); 1991 Pub. Acts Ch. 27 (6th judicial district – two positions); 1991 Pub. Acts Ch. 375 (8th judicial district, but this provision did not become operative because no funding was appropriated for the new position).

[4] The following public acts created new district attorney criminal investigator positions but did not give the appointees peace officer powers: 1984 Pub. Acts Ch. 931; 1989 Pub. Acts Ch. 118; 1990 Pub. Acts Ch. 998; 1992 Pub. Acts Ch. 593; 1992 Pub. Acts Ch. 961; 1994 Pub. Acts Ch. 937; 1994 Pub. Acts Ch. 949; 1998 Pub. Acts Ch. 771; 2001 Pub. Acts Ch. 361; 2005 Pub. Acts Ch. 31.

[5] Under the rules of statutory construction, "the expression of one thing implies the exclusion of all things not mentioned." *State v. Adler*, 92 S.W.3d 397, 400. (Tenn. 2002). That rule also supports the conclusion that district attorneys general do not have the authority to appoint criminal investigators on a volunteer basis.

2. You have also asked whether a district attorney general could accept the services of a volunteer expert, analyst, or consultant to assist in the prosecution of a case. There is no statutory impediment which would prohibit a district attorney general from retaining the services of an expert, analyst or consultant who agrees to provide his services on a voluntary basis.

Tenn. Code Ann. § 8-7-103(1) states that the district attorney general "shall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto . . . ." Tenn. Code Ann. § 8-7-103(6) further states that the district attorney "shall have discretion in the performance of duties and responsibilities in the allocation of resources available to such district attorney general, any other provision of law notwithstanding." If statutory language is clear and unambiguous, the intent of the legislature is to be found in the natural and ordinary meaning of the language. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000). The plain and ordinary meaning of the word "resources" would encompass any resource, whether it is in the form of an expert who volunteers his services or an appropriation of funds made to the district attorney general by the General Assembly.

Tenn. Code Ann. § 8-7-103(6) grants the district attorney general discretion in the performance of his duties. We have found no statutory restrictions which would prohibit the retention of volunteer experts or analysts.[6] No statute or rule establishes any set fee or payment schedule that a district attorney general is required to pay for the services of a non-state employee expert or consultant. An inherent prosecutorial duty of a district attorney general is to prepare for grand jury and trial proceedings. Such preparation would include the retention of expert consultants and witnesses. Therefore, a district attorney general could utilize the resources of volunteer experts or analysts available to him to carry out his duties.

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[6] Such a volunteer could be considered an independent contractor. Tenn. Code Ann. § 8-42-101(3)(A) establishes that independent contractors are not eligible for any benefits under state law, including representation by the Attorney General & Reporter under Tenn. Code Ann. § 8-42-103 if they are sued in connection with work done for the state. State law also establishes a procedure where department or agency heads can create a volunteer program. Tenn. Code Ann. § 8-42-101(3)(B). Volunteers under this procedure must be approved as participants in a volunteer program by their department or agency head and reported to the Board of Claims. Tenn. Code Ann. § 8-42-101(3)(B) authorizes the Department of Finance & Administration to promulgate rules to determine who is qualified to be a volunteer. To date, no such rules have been promulgated. *See* Tenn. Comp. R. & R. 0620-3-3-.01(9) (gifts to the state are not subject to Department of Finance & Administration rules governing personal, professional, and consulting contracts with the state). Determining whether an individual would qualify as a volunteer under Tenn. Code Ann. § 8-42-101(3)(A) and be eligible for any benefits thereunto appertaining would depend on the circumstances of the individual case. In any event, Tenn. Code Ann. § 8-42-101 only covers the potential benefits that may be available to a state volunteer and would not restrict the ability of the district attorney general from utilizing volunteer resources freely offered.

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