STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 11-14

Hiring Superintendent under Tenn. Code Ann. § 7-52-114(b)

QUESTIONS

Tenn. Code Ann. § 7-52-114(b) authorizes a board created under the Municipal Electric Plant Law of 1935 (the "1935 Law") to appoint a superintendent "who shall be qualified by training and experience for the general superintendence of the acquisition, improvement and operation of the electric plant. The superintendent need not be a resident of the state at the time of appointment."

1. Does this statute provide the exclusive criteria for the qualifications of the superintendent, or may the city governing body, under its charter powers, impose other criteria?

2. Does the 1935 Law exclusively govern the relationship between a board created under that law and the city governing body, specifically, the board's powers, duties, and limitations on the exercise of its powers?

3. Is there any prohibition contained within the 1935 Law that would restrict a city governing body from adopting ethics policies regarding the hiring of the superintendent of a board created under the law?

OPINIONS

1. Absent some law overriding the 1935 Law, a city governing body is not authorized to impose other criteria for the qualifications of the superintendent of a board created under the 1935 Law. This Office is unaware of any general law providing such authority. It is possible a private act, if sufficiently explicit, could provide such authority. A charter provision generally authorizing the city governing body to create departments and provide for their powers, however, is not sufficient.

2. Absent some law overriding the 1935 Law, the board is not generally subject to the authority of the city governing body when the board exercises its powers to manage the electric plant. But this Office has concluded that, under a number of statutory schemes, policies adopted by the city governing body apply to a board created under the 1935 Law. These include reimbursement policies adopted under Tenn. Code Ann. §§ 6-54-901, *et seq.*, and an employee merit system adopted under Tenn. Code Ann. § 6-35-403(b) of the Modified City Manager-

Council Charter. Whether any particular policy applies would depend on the scope of the general law. For example, city personnel policies adopted under Tenn. Code Ann. § 6-54-123 would probably apply to employees of a board created under the 1935 Law. But, because Tenn. Code Ann. § 7-52-114(b) expressly gives the board the authority to hire and remove the superintendent, these policies would not apply to that position.

3. The 1935 Law does not explicitly prohibit a city governing body from adopting ethics policies regarding the hiring of the superintendent of a board created under that law. But the statute, read as a whole, contemplates that the board has the exclusive power to set ethics policies regarding the hiring of a superintendent. Absent some law overriding the 1935 Law, therefore, a city governing body is not authorized to adopt ethics policies regarding the hiring of a superintendent of a board created under that act. This Office is unaware of any other general law that would authorize such policies.

ANALYSIS

This request concerns the authority of a city governing body over the decision of a city electric board to hire a superintendent under Tenn. Code Ann. § 7-52-114 of the Municipal Electric Plant Law of 1935 (the "1935 Law"). The 1935 Law is codified at Tenn. Code Ann. §§ 7-52-101, *et seq.* Under Tenn. Code Ann. § 7-52-103, every municipality is authorized to acquire and operate an electric plant. Tenn. Code Ann. § 7-52-107 provides:

> (a) Any municipality, except those that employ a city-manager or that have a population of less than two thousand (2,000), issuing bonds under the provisions of this part for the acquisition of an electric plant shall, and any municipality now or hereafter owning or operating an electric plant under this part or any other law may, appoint a board of public utilities, referred to as the "board" in this part.
>
> (b) The board shall be created in the following manner: at the time the governing body of a municipality issuing bonds under this part determines that a majority of the qualified voters voting on the election resolution have assented to the bond issue for the acquisition of an electric plant, the chief executive officer of the municipality shall, or if no such bonds are issued, or if the municipality employs a city-manager or has a population of less than two thousand (2,000), then at any time the chief executive officer may, with the consent of the governing body of the municipality, appoint two (2) or four (4) persons from among the property holders of such municipality who are residents of the municipality and have resided therein for not less than one (1) year next preceding the date of appointment to such board. The board of a municipal electric system may consist of two (2) or four (4) persons who have been for not less than one (1) year preceding the appointment both a customer of the municipal electric system and a resident of the county wherein such municipality is located. *No regular compensated officer or employee of a municipality shall be eligible for such appointment until at least one (1) year after the expiration of the term of such person's public office.*

(Emphasis added). The municipality's chief executive officer is also required to designate a member of the governing body or the city manager to serve as a third or fifth member of the board. Tenn. Code Ann. § 7-52-108(c). This designation is subject to the consent of the governing body of the municipality. *Id.*

Tenn. Code Ann. § 7-52-110 addresses organization and meetings of the board, as well as compensation of members and officers. The board must establish its own rules of procedure, *"except as otherwise expressly provided."* Tenn. Code Ann. § 7-52-110(d) (emphasis added). The statute provides that board members are reimbursed for traveling expenses, including an allowance not to exceed two hundred dollars a month for attendance at meetings. Tenn. Code Ann. § 7-52-110(e). Board members are entitled to an additional allowance for attending meetings for any additional utility system over which the board has jurisdiction under Tenn. Code Ann. § 7-52-111. Tenn. Code Ann. § 7-52-110(f). Subsection (g) provides:

> Additionally, the municipality may provide health insurance coverage for each member of the board and may pay the health insurance premiums for such coverage in the same manner *as if the member were a municipal employee*. Payment of such premiums on behalf of such members shall constitute a cost of operation and maintenance of the electric plant.

(Emphasis added).

Tenn. Code Ann. § 7-52-114(a)(1) provides:

> The general supervision and control of the acquisition, improvement, operation and maintenance of the electric plant shall be in charge of the following agency, referred to as the "supervisory body" in this part:
>
> (A) *The board; or if there be no board*, then
>
> (B) The governing body of the municipality.

(Emphasis added).

Subsection (b) of the statute provides:

> *The supervisory body shall appoint an electric plant superintendent, referred to as "superintendent" in this part, who shall be qualified by training and experience for the general superintendence of the acquisition, improvement and operation of the electric plant.* The superintendent need not be a resident of the state at the time of appointment. The superintendent's salary shall be fixed by the person or agency appointing such superintendent. The superintendent shall serve at the pleasure of the supervisory body and may be removed by such body at any time.

(Emphasis added). Subsection (c) provides:

> Within the limits of the funds available, all powers to acquire, improve, operate and maintain, and to furnish electric service, and all powers necessary or convenient to furnishing electric service, conferred by this part shall be exercised on behalf of the municipality *by the supervisory body and the superintendent, respectively.*

(Emphasis added). Tenn. Code Ann. § 7-52-117(a) provides:

> The superintendent shall have charge of all actual construction, the immediate management and operation of the electric plant and the enforcement and execution of *all rules, regulations, programs, plans and decisions made or adopted by the supervisory body*.

(Emphasis added). Under subsection (b) of Tenn. Code Ann. § 7-52-117, the superintendent has the power to hire employees and fix their duties and compensation, with the exception of technical consultants, advisors, and legal assistants. Control of these employees is subject to the approval of the board. This statute also empowers the superintendent to fire employees of a board created under the 1935 Law. Op. Tenn. Att'y Gen. U88-02 (January 4, 1988). The board is required to keep a record of its meetings, receipts, and disbursements, and submit a report to the governing body of the municipality at least once a year. Tenn. Code Ann. § 7-52-113. The board is also required to maintain a copy of its rate schedule and its rules and regulations relating to electric service on file at the main and branch offices of the electric plant and the office of the municipal clerk or recorder. Tenn. Code Ann. § 7-52-115(a).

Tenn. Code Ann. § 7-52-133 provides:

> The powers conferred by this part shall be in addition and supplemental to the powers conferred by any other law. Bonds may be issued under this part for the acquisition or improvement of an electric plant, notwithstanding that any other law may provide for the issuance of bonds for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law.

Tenn. Code Ann. § 7-52-134(b) provides:

> This part is remedial in nature and the powers hereby granted shall be liberally construed to effectuate the purpose of this part, and, to this end, every municipality shall have power to do all things necessary or convenient to carry out the purposes of this part in addition to the powers expressly conferred in this part.

1. City Governing Body's Authority to Add to Criteria for Hiring Superintendent

The first question is whether Tenn. Code Ann. § 7-52-114(b) provides the exclusive criteria for the qualifications of the superintendent of a board created under the 1935 Law, or whether the city governing body may impose other limitations through its authority under its city

charter. Absent any public or private law overriding the 1935 Law, the respective powers of both entities are governed by the 1935 Law. Tenn. Code Ann. § 7-52-133 does provide that the powers conferred by the 1935 Law "shall be in addition and supplemental to the powers conferred by any other law." Thus, a city may finance, own, and create a board to operate an electric plant under any other applicable law. But if it chooses to operate under the 1935 Law, that law is the primary law governing the relationship of the city governing body to the board. The 1935 Law gives a board created under it "general supervision and control of the acquisition, improvement, operation and maintenance of the electric plant[.]" Tenn. Code Ann. § 7-52-114(a)(1)(A). Further, Tenn. Code Ann. § 7-52-114(b) provides that a board may hire a superintendent and remove him or her at its pleasure. Finally, Tenn. Code Ann. § 7-52-107(b) expressly prohibits a regularly compensated municipal officer or employee from serving on a board created under the 1935 Law for one year after leaving his or her position. It imposes no such limit on being employed by the board. For all these reasons, absent some law overriding the 1935 Law, it is the opinion of this Office that the city governing body may not, by ordinance, impose other criteria on a board's authority to hire the superintendent under Tenn. Code Ann. § 7-52-114(b).

The question then becomes whether any other general law authorizes the city governing body to adopt such criteria notwithstanding the 1935 Law. As discussed in the answer to Question 2, this Office has concluded that, under a number of different statutory schemes, policies adopted by the city governing body also apply to a board created under the 1935 Law. But this Office has also concluded that, when a statute directly conflicts with a specific provision in the 1935 Law, that law must control. Op. Tenn. Att'y Gen. 96-043 (March 13, 1996). In that opinion, this Office addressed whether a provision in the Municipal Purchasing Law of 1983, applying to "all purchases by authorized officials in all municipalities using or encumbering municipal funds," applied to a board created under the 1935 Law. The opinion concluded that, while the board was a city department using and encumbering municipal funds within the meaning of the Municipal Purchasing Law, the 1935 Law specifically provided a more lenient purchasing requirement. The specific requirement in the 1935 Act controlled over the same requirement in the Municipal Purchasing Law.

In this case, the 1935 Law explicitly provides that the superintendent is appointed by the board and subject to removal by the board. This Office is unaware of any general law that would override this specific provision. It is possible a private act, if sufficiently explicit, could provide such authority. A charter provision generally authorizing the city governing body to create departments and provide for their powers, however, is not sufficient.

2. Whether the 1935 Law Exclusively Governs the Relationship Between City and Board

The next question is whether the 1935 Law exclusively governs the relationship between a board and the governing body of a city that created it under that law, specifically, the board's powers, duties, and limitations on the exercise of its powers. As discussed above, when a city creates a board under the 1935 Law, that law is the primary law governing the relationship of the city to the board. But courts of this state have concluded that a utility board created and operating under the 1935 Law is a department of the city, and its employees are employees of the

city. *Keeble v. Loudon Utilities,* 212 Tenn. 483, 370 S.W.2d 531 (1963) (city utility board was a city department and, like the city, could not be sued outside the county where the city was located); *Weakley County Municipal Electric Company v. Vick,* 43 Tenn. App. 524, 309 S.W.2d 792 (1957), *p.t.a. denied* (February 6, 1958) (employees of an electric board created under the 1935 Act were employees of the city and could be enjoined from striking).

Based on this authority, this Office has concluded that an employee of a utilities board created under the 1935 Law is an employee of the local government within the meaning of various statutory schemes. Op. Tenn. Att'y Gen. 87-66 (April 13, 1987) (Tenn. Code Ann. § 12-4-101 governing conflicts of interest); Op. Tenn. Att'y Gen. 96-106 (August 20, 1996) (Tenn. Code Ann. § 7-51-1501 regarding right of local employees to run for office). In addition, this Office has concluded that a board created under the 1935 Law is subject to policies adopted by the city governing body under some general laws. Op. Tenn. Att'y Gen. 94-045 (April 4, 1994) (reimbursement policy adopted under Tenn. Code Ann. §§ 6-54-901, *et seq.*, must provide policies for reimbursements to members of a board created under the 1935 Law); Op. Tenn. Att'y Gen. U92-97 (August 6, 1992) (except for the superintendent, employees of a board created under the 1935 Law are subject to the city's merit system adopted under Tenn. Code Ann. § 6-35-403(b) of the Modified City Manager-Council Charter). Under this authority, policies adopted by a city governing body under other general laws apply to a board created under the 1935 Law. Whether any particular policy applies would depend on the scope of the general law. For example, under Tenn. Code Ann. § 6-54-123, a municipality must provide a personnel policy that applies "fairly, impartially, and uniformly, to the extent practicable, to each department of the municipal government." Under the authority discussed above, personnel policies adopted under this statute would probably apply to employees of a board created under the 1935 Law.

We note that this conclusion arguably conflicts with Tenn. Code Ann. § 7-52-114(a)(1), (b), and (c). These statutory provisions give the board all powers necessary to operate and maintain the electric plant and provide electric service. Opinions of this Office do not directly address this argument. But statutes on the same subject matter must be interpreted together. *Graham v. Caples,* 325 S.W.3d 578, 582 (Tenn. 2010). Further, Tenn. Code Ann. § 7-52-110(d) requires the board to establish its rules of procedure "except as otherwise expressly provided." For this reason, personnel policies adopted under Tenn. Code Ann. § 6-54-123 would probably apply to employees of a board created under the 1935 Law. But, because Tenn. Code Ann. § 7-52-114(b) expressly gives the board the authority to hire and remove the superintendent, these policies would not apply to that position. Whether any other particular policy adopted by the city governing body applies to a board created under the 1935 Law depends on the scope of the general law authorizing the policy.

3. City's Authority to Adopt Ethics Policies Regarding Appointment of Superintendent

The last question is whether the 1935 Law contains any prohibition that would restrict a city governing body from adopting ethics policies regarding the hiring of the superintendent of a board created under that law. The 1935 Law contains no such explicit prohibition. But it confers on the board authority to hire the superintendent, as well as general supervision and control of the acquisition, improvement, operation, and maintenance of the electric plant. Further, it requires

the board to report to the municipal governing body only periodically. The statute contemplates, therefore, that the board has the exclusive power to set ethics policies regarding the hiring of a superintendent.

Again, the question then becomes whether, under any general law, the board might be subject to ethics policies adopted by the city governing body. In 2006, the General Assembly enacted a statute requiring the governing body of each local government to adopt ethical standards for all officials and employees of the entity. Tenn. Code Ann. §§ 8-17-101, *et seq.* As used in the statute, the term "officials and employees" includes "any official, whether elected or appointed, officer, employee or servant, or any member of any board, agency, commission, authority or corporation, whether compensated or not, or any officer, employee or servant thereof, of a county or municipality." Tenn. Code Ann. § 8-17-102(5). But the statute defines the term "ethical standards" as follows:

> "Ethical standards" includes rules and regulations regarding limits on, and/or reasonable and systematic disclosure of, gifts or other things of value received by officials and employees that impact or appear to impact their discretion, and shall include rules and regulations regarding reasonable and systematic disclosure by officials and employees of their personal interests that impact or appear to impact their discretion**.** *The term "ethical standards" does not include personnel or employment policies or procedures related to operational aspects of governmental entities[.]*

Tenn. Code Ann. § 8-17-102(3) (emphasis added). Thus, officers and employees of a board created under the 1935 Law would probably be subject to the ethical standards regarding disclosure that a city governing body adopts under this statute. But the statute expressly excludes personnel or employment policies or procedures related to the operational aspects of governmental entities from the type of ethics standards a local governing body may adopt. This Office is unaware of any other general law authorizing a city council to adopt ethics policies regarding the hiring of the superintendent of a board created under the 1935 Law.

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