STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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May 19, 2011

Opinion No. 11-47

Executive Director of Board of Pharmacy

QUESTION

1) Did the Department of Health's Division of Health Related Boards act inappropriately and illegally when it failed to offer the position of Executive Director of the Board of Pharmacy to the applicant who was the first choice of the Board and instead offered the position to another applicant without the consent of the Board?

2) If the answer to the first question is yes, then should the hiring process begin anew?

OPINIONS

In our opinion, the Division of Health Related Boards' employment of an executive director for the Board of Pharmacy is governed by the specific provisions of Tenn. Code Ann. § 63-10-303(c), rather than by the more general provisions of later-enacted Tenn. Code Ann. § 63-1-132(a)(3). Therefore, the Division is authorized to employ an executive director for the Board of Pharmacy after considering the Board's recommendation upon the question; the Board's explicit consent is not required for such employment. Furthermore, based upon our understanding that, in the scenario about which you have inquired, the Division of Health Related Board's offer of employment to an applicant for the position of executive director of the Board of Pharmacy was made after consideration of the Board's recommendation upon the question, it is our opinion that the employment offer complied with applicable legal requirements.

ANALYSIS

1-2. Answering your questions requires construction of the meaning of, and relationship between, two statutes that contain somewhat differing provisions with respect to the hiring of an executive director, Tenn. Code Ann. §§ 63-1-132(a)(3) and 63-10-303(c). Tenn. Code Ann. § 63-10-303(c), a statutory provision contained in the Pharmacy Practice Act[1] and last amended in 2007, provides as follows:

> (c) The division shall employ on behalf of and in consideration of the recommendation of the board an executive director who shall be a pharmacist

[1] The Pharmacy Practice Act is codified at Tenn. Code Ann. §§ 63-10-101 through 63-10-602.

> who has been licensed in Tennessee for a period of at least five (5) years. The executive director's duties shall be those specified by the board and by the director and may include, but not be limited to, recording and compiling the minutes of the board, supervising the employees assigned by the division to support the board, performing such studies and research as the board or division directs, representing the board at such functions as authorized by the board and the division and acting as consultant to the division in its enforcement duties on behalf of the board.

As amended in 2010, Tenn. Code Ann. § 63-1-132(a)(3), a provision contained in the "General Provisions" of Title 63 that are applicable to the Division of Health Related Boards, provides that:

> (a) The director of the division of health related boards has the power, duty, and responsibility to:
>
> . . .
>
> (3) Employ, with the consent of the regulatory board concerned, all executive directors and consultants; the director may employ all other personnel necessary to carry out the function of all of the agencies attached to the division.

With respect to the issue of the Board of Pharmacy's input into the Division of Health Related Boards' hiring of the former's executive director, the two statutes contain differing requirements. While Tenn. Code Ann. § 63-10-303(c) provides that the Division shall employ an Executive Director "on behalf of and in consideration of the recommendation of the board," Tenn. Code Ann. § 63-1-132(a)(3) provides that the Division shall employ executive directors "with the consent of the regulatory board concerned."

It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.*, citing *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). *See also Rodgers v. United States*, 185 U.S. 83, 87-89 (1902) ("It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute.") "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." *Radzanower, supra*, quoting T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874). *See also Hayes v. Gibson County*, 288 S.W.3d 334, 339 (Tenn. 2009) (noting that implied repeals are not favored and that a subsequent act treating a subject in general terms is not to be considered as intended to affect a

more particular and specific provision of an earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all).

When the General Assembly enacted the provisions of Tenn. Code Ann. § 63-10-303(c) - provisions that are specifically and narrowly applicable only to the executive director of the Board of Pharmacy - it is evident that it did so in consideration of its intention that this executive director perform duties and have responsibilities that run to both the Division of Health Related Boards and to the Board of Pharmacy. The statutory provision thus specifically acknowledges and states that the duties of the executive director will be those specified by the Board *and* by the Division Director, and enumerates several of these duties, including supervision of the employees assigned by the Division to support the Board and acting as consultant to the Division in its enforcement duties on behalf of the Board. The provision specifies a particular qualification of the executive director; *i.e.*, that he or she must be a pharmacist who has been licensed in Tennessee for a period of at least five years.

In contrast, the provisions of Tenn. Code Ann. § 63-1-132(a)(3), which are enabling provisions generally applicable to the Division of Health Related Boards and the numerous health-related boards that are attached to the division, are much less specific and precisely drawn. With respect to the issue of employment of executive directors, the provisions merely recite that, as a general proposition, it is the power, duty and responsibility of the Director of the Division of Health Related Boards to employ such executive directors with the consent of the regulatory board concerned.

In our judgment and in accordance with the legal authorities cited above, Tenn. Code Ann. § 63-10-303(c)'s specific provisions with respect to employment of an executive director for the Board of Pharmacy have been neither nullified nor repealed by the Legislature's later enactment of Tenn. Code Ann. § 63-1-132(a)(3)'s general enabling provisions. Because the statutes were enacted for different purposes, there is no "absolute necessity" to construe Tenn. Code Ann. § 63-1-132(a)(3) as impliedly repealing Tenn. Code Ann. § 63-10-303(c) "in order to give its words any meaning at all." *See Hayes v. Gibson County*, *supra*, 288 S.W.3d at 339. Therefore, it is our opinion that the Division of Health Related Boards is authorized to employ an executive director for the Board of Pharmacy after considering the Board's recommendation upon the question; the Board's explicit consent is not required for such employment. Furthermore, based upon our understanding that, in the scenario about which you have inquired, the Division of Health Related Board's offer of employment to an applicant for the position of executive director of the Board of Pharmacy was made after consideration of the Board's recommendation upon the question, it is our opinion that the employment offer complied with applicable legal requirements.

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