STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 11-82

Tennessee State Guard Entitlement to Unpaid Leave of Absence

QUESTIONS

1. Under what circumstances would a volunteer member of the Tennessee State Guard be considered "under competent orders" so as to be entitled to an unpaid leave of absence from a public or private sector employer pursuant to Tennessee Code Annotated § 8-33-110?

2. Does the senior volunteer commander of the Tennessee State Guard have authority to issue "competent orders" under which volunteer members of the Tennessee State Guard would be entitled to an unpaid leave of absence from a public or private sector employer as provided in Tennessee Code Annotated § 8-33-110?

OPINIONS

1. In order to be entitled to an unpaid leave of absence from a public or private sector employer, a member of the Tennessee State Guard must be engaged in the performance of duty or training in the service of the State of Tennessee under competent orders issued by a person with the legal authority to do so.

2. No, the senior volunteer commander of the Tennessee State Guard does not have legal authority to issue "competent orders" as contemplated by Tennessee Code Annotated § 8-33-110.

ANALYSIS

1. Under the provisions of Tennessee Code Annotated § 8-33-110, members of the Tennessee State Guard are entitled to an unpaid leave of absence from a public or private sector employer when engaged in the performance of duty or training in the service of the State of Tennessee under competent orders. This statute specifically states:

> All officers and employees of this state, or any department or agency thereof, or of any county, municipality, school district, or other political subdivision, all other public employees of this state

> and all private sector employees who are, or may become, members of the Tennessee State Guard and Civil Air Patrol shall be entitled to an unpaid leave of absence from their respective duties, without loss of time, pay, regular leave or vacation, or impairment of efficiency rating, for all periods of service during which they are engaged in the performance of duty or training in the service of this state, under competent orders.

Tenn. Code Ann. § 8-33-110.

You have asked what criteria must be met in order for a volunteer member of the Tennessee State Guard to be considered "under competent orders" as provided in Tennessee Code Annotated § 8-33-110. In construing statutes, courts must "ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Wilson v. Johnson County*, 879 S.W.2d 807, 809 (Tenn. 1994). When the statute is unambiguous, legislative intent is determined from the plain and ordinary meaning of the language used in the statute. *Freeman v. Marco Transp. Co.*, 27 S.W.3d 909, 911 (Tenn. 2000). Statutes that are related to the same subject matter should be read *in pari materia*. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). Thus, in construing the term "under competent orders" as used in § 8-33-110, words must be given their natural and ordinary meaning when read in the context of other state statutes related to the performance of duties or training by Tennessee State Guard members in the service of the State of Tennessee.

The Tennessee State Guard is part of the military forces of the State. Tenn. Code Ann. § 58-1-104. It is in addition to and distinct from the national guard organized under existing law. Tenn. Code Ann. § 58-1-402. The Tennessee State Guard is composed of volunteers between the ages of sixteen and seventy-five. *Id.* The governor is the commander in chief of the Tennessee State Guard. Tenn. Const. art. III, § 5. *See also* Tenn. Code Ann. § 58-1-105. As the commander in chief, the governor is statutorily granted certain powers and duties, including the authority to activate, control, and supervise the Tennessee State Guard. Tenn. Code Ann. §§ 58-1-105, 58-1-106, 58-1-401, 58-1-408. As this Office has previously opined, the governor is authorized to delegate his authority to activate, control, and supervise the Tennessee State Guard to the adjutant general. Op. Tenn. Att'y Gen. 05-112 (July 18, 2005). In addition, during the time when the Tennessee State Guard is not activated, the adjutant general is authorized and empowered, on the approval of the governor, "to set up and maintain a reserve organization of the state guard upon a voluntary basis under such system as to the adjutant general may seem most feasible." Tenn. Code Ann. § 58-1-410.

The term "competent" is ordinarily defined as "[l]egally qualified or fit." *See The American Heritage Dictionary* 301 (2d College ed. 1985). For military purposes, the term "orders" is ordinarily defined as "[f]ormal written instructions to report for military duty at a specified time and place." *Id.* at 875. Accordingly, in order to be considered "competent orders" so as to require the participation of members of the Tennessee State Guard in the service of the State of Tennessee, the orders must be issued by a person with the legal authority to do so.

2. You have asked whether Command Policy Letter Number 18, written by the senior volunteer commander of the Tennessee State Guard, has the effect of authorizing the volunteer commander to issue "competent orders" within the meaning of Tennessee Code Annotated § 8-33-110. This policy letter states that competent orders for purposes of § 8-33-110 are those signed by the "Commander of the Tennessee State Guard." As provided in Tennessee Code Annotated § 58-1-114, the adjutant general is the commanding general of the military forces of the State of Tennessee, which includes the Tennessee State Guard. Tenn. Code Ann. § 58-1-104. The governor as commander-in-chief is authorized to appoint and commission necessary officers for the Tennessee State Guard and to prescribe rules and regulations "governing the enlistment, organization, administration, pay, equipment, discipline and discharge of the personnel of the state guard." Tenn. Code Ann. § 58-1-405. To our knowledge there is no specific legal authority, either statutory or regulatory, allowing the senior volunteer commander of the Tennessee State Guard to issue orders requiring members of the Tennessee State Guard to engage in "the performance of duty or training in the service of this state" as provided in § 8-33-110.[1] *See* Tenn. Comp. R. & Regs. 0930 (2011). Nor to our knowledge has the governor or adjutant general appropriately delegated their authority to issue "competent orders" to the senior volunteer commander, or any other person. As noted above, Tennessee law authorizes the governor or adjutant general to order members of the Tennessee State Guard to engage in the performance of duty or training in the service of the State. Thus, it is our opinion that the volunteer commander does not have requisite authority to issue competent orders to require Tennessee State Guard members to engage in the performance of duties or training in the service of the State within the meaning of § 8-33-110 and under which they would be entitled to an unpaid leave of absence.

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[1] A member of the Tennessee State Guard may be eligible for workers' compensation and immune from suit only when activated by the governor or adjutant general to active state duty. *See* Op. Tenn. Att'y Gen. 02-011 (Jan. 10, 2002). Members of the Tennessee State Guard may also be registered as volunteers under Tennessee Code Annotated § 8-42-101(3)(B) by the adjutant general, as head of the Military Department, for purposes of eligibility for immunity from suit. *See* Op. Tenn. Att'y Gen. 05-112 (July 18, 2005).

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