

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

July 28, 2015

Opinion No. 15-61

Rural Electric and Community Services Cooperatives – Charitable Contributions

Question

If a cooperative establishes a program to accept voluntary contributions pursuant to Tenn. Code Ann. § 65-25-205(d), may the cooperative establish an “opt out” program where a member of the cooperative is enrolled automatically unless the member takes action to be removed, or does the statute require the program to be an “opt in” program where a member of the cooperative must take action prior to participating in the program?

Opinion

A cooperative may not enroll a member into a charitable contribution program under Tenn. Code Ann. § 65-25-205(d) before it provides the essential facts of the program to the member. These facts must be provided in order for the member to be able to voluntarily choose to contribute to the program. Accordingly, the cooperative must establish an “opt in” program. Once the member voluntarily enrolls in the program, the cooperative may make removal from the program an “opt out” process.

ANALYSIS

In 1998, the Tennessee General Assembly enacted the Rural Electric and Community Services Cooperative Act, codified at Tenn. Code Ann. §§ 65-25-201 – 235. Cooperatives organized under this Act are non-profit cooperative membership corporations. *See* Tenn. Code Ann. §§ 65-25-202(4), -203.

The cooperatives’ powers are contained in Tenn. Code Ann. § 65-25-205. In 2002, the General Assembly amended Tenn. Code Ann. § 65-25-205 to expressly allow cooperatives to receive and make charitable contributions. By virtue of Chapter 512 of the Public Acts of 2002, subsection (d), in pertinent part, now provides:

(1) In addition to all other powers set forth in this chapter, a cooperative shall have the power and authority to make contributions for bona fide charitable purposes and to accept voluntary contributions pursuant to programs approved by the board of directors, which programs may include, but shall not be limited to, programs in which bills for electric power are rounded up to the next dollar when such contribution is shown as a separate line on the electric bill.

(2) Contributions accepted by a cooperative pursuant to programs authorized by subsection (d)(1) shall not be considered revenues to the cooperative and shall be used only for charitable purposes.

Tenn. Code Ann. §§ 65-25-205(d)(1), (2).¹

It is well established that electric cooperatives derive their power from the Acts that create them. *See Shadow v. Volunteer Elec. Coop.*, 223 Tenn. 552, 448 S.W.2d 416 (1969); 27A Am. Jur.2d Energy and Power Sources § 159 (2015). Consequently, these cooperatives 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. *See Sanifill, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977). Although the Rural Electric and Community Services Cooperative Act is to be construed liberally,² a cooperative's implied authority must still have its source in the language of the Act itself. *See Sanifill*, 907 S.W.2d at 810.

Subsection (d)(1) of Tenn. Code Ann. § 65-25-205 gives a cooperative the power and authority “to accept voluntary contributions.” In construing a statute, courts assume that the General Assembly selected its words deliberately. *Lee v. Franklin Special Sch. Dist. Bd. of Educ.*, 237 S.W.3d 322, 332 (Tenn. Ct. App. 2007) (citation omitted); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754 (Tenn. Ct. App. 2001) (citation omitted). Consequently, each word of a statute is to be given effect. *Anderson Fish & Oyster Co., Inc. v. Olds*, 197 Tenn. 604, 607, 277 S.W.2d 344, 345 (Tenn. 1955); *In re Estate of Dobbins*, 987 S.W.2d 30, 34 (Tenn. Ct. App. 1998) (citation omitted).

“The word ‘voluntary’ refers to a choice that is made consciously and intelligently, and that is not influenced by others.” *Jenkins v. City of Knoxville*, No. 679, 1986 WL 13041, at *3 (Tenn. Ct. App. Nov. 21, 1986). Thus, a voluntary act is “[o]ne that proceeds from one’s own free will, done by one’s choice, or one’s own accord, unconstrained by external inferences, force or influence, and not prompted or suggested by another.” *Brown v. McCulloch*, 24 Tenn. App. 324, 329, 144 S.W.2d 1, 4 (1940). Similarly, an act done “voluntarily” is one that “encompasses the exercise of the will with a deliberate choice between two or more known causes of action.” *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 419 (Okla. 1986); *R.T. Realty, Inc. v. Downes*, 14 Misc.2d 322, 182 N.Y.S.2d 79, 82 (1958). Hence, when the word “voluntary” appears in a statute, it “often implies knowledge of essential facts.” *Jenkins*, 1986 WL 13041, at *3 (citing Black’s Law Dictionary (5th ed.)).

Accordingly, a cooperative may not enroll a member into a charitable contribution program before it provides the “essential facts” of the program to the member. These facts must be provided in order for the member to be able to voluntarily choose to contribute to the program. Thus, the cooperative must establish an “opt in” program. Once the member voluntarily enrolls in the program, the cooperative may then make removal from the program an “opt out” process. The

¹ Presumably, the General Assembly enacted this amendment in response to Tenn. Att’y Gen. Op. 98-178 (Sept. 4, 1998), which stated that electric cooperatives could not round up their customers’ bills to the next highest dollar and then donate the monies to various charitable organizations because they lacked the statutory authority to do so.

² *See* Tenn. Code Ann. § 65-25-226.

cooperative, though, would need to clearly and conspicuously disclose that the member will remain enrolled in the program unless the member takes action to be removed from the program. The cooperative would also need to disclose how a member could cancel enrollment in the program. The cancellation procedure should be easy, and the cooperative should promptly comply with a member's request to cancel his or her enrollment from the program. Otherwise, the cooperative risks running afoul of federal and state consumer protection laws. *See, e.g.*, 15 U.S.C. § 45(a)(1) (prohibiting "unfair or deceptive acts or practices in or affecting commerce"); Tenn. Code Ann. § 47-18-104(a) (prohibiting "unfair or deceptive acts or practices affecting the conduct of any trade or commerce").

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