STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 14, 2016

Opinion No. 16-43

Secondary Employment of Uniformed Police Officers as Security Personnel

Question 1

Does "departmental approval" as used in Tenn. Code Ann. § 62-35-103(a)(15)(B) refer to the primary jurisdiction of the individual commissioned, uniformed police officer, state trooper, or sheriff's deputy (collectively "peace officer") or the Department of Commerce and Insurance ("Commissioner")?

Opinion 1

"Departmental approval" refers to the law enforcement agency of the peace officer's primary jurisdiction.

Question 2

Does Tenn. Code Ann. § 62-35-103(a)(15)(B) apply to a part-time or reserve peace officer who is commissioned by a Tennessee law enforcement agency but not certified by the Tennessee Peace Officer Standards and Training Commission ("POST")?

If not, can the Commissioner bring disciplinary action against that part-time or reserve peace officer for engaging in a type of secondary employment described in Tenn. Code Ann. § 62-35-103(a)(15)(B)?

Opinion 2

Yes. Tenn. Code Ann. § 62-35-103(a)(15)(B) applies to part-time or reserve peace officers who are commissioned by a Tennessee law enforcement agency but not certified by POST.

Question 3

Does the responsibility for notifying the chief law enforcement officer under Tenn. Code Ann. § 62-35-141(a) fall upon the primary jurisdiction of the individual peace officer who engages in secondary employment as security personnel or the licensed contract security company that employs the peace officer?

Against which parties, if any, can the Commissioner bring disciplinary action for failing to provide such notification?

Opinion 3

Under Tenn. Code Ann. § 62-35-141(a), the licensed contract security company that employs the peace officer outside his or her primary jurisdiction is responsible for notifying the chief law enforcement officer of the jurisdiction in which the peace officer is temporarily employed. The Commissioner may pursue disciplinary action against the licensed contract security company if it violates the notification requirement.

Question 4

Does the notification requirement under Tenn. Code Ann. § 62-35-141(a) apply to a part-time or reserve peace officer who provides security services to another in a secondary jurisdiction?

Does the answer change if that part-time or reserve peace officer is certified by POST?

Does the answer change depending on the types of services provided by that part-time or reserve peace officer?

Opinion 4

No. Tennessee Code Annotated § 62-35-141(a) applies only to full-time peace officers. The notification requirement under Tenn. Code Ann. § 62-35-141(a) does not apply to part-time or reserve officers regardless of their certification status with POST or the types of services they provide.

ANALYSIS

The Private Protective Services Licensing and Regulatory Act ("Act"), Tenn. Code Ann. § 62-35-101 *et seq.*, governs the licensing and conduct of "contract security companies." A "contract security company" is defined as "any person engaging in the business of providing or undertaking to provide a security guard and patrol service on a contractual basis for another person." Tenn. Code Ann. § 62-35-102(6). A "person" is defined as "any individual, firm, association, company, partnership, corporation, nonprofit organization, institution or similar entity." Tenn. Code Ann. § 62-35-102(8). Therefore, any individual or entity that provides security services to another for compensation must comply with the provisions of the Act. The Act is administered by the Commissioner of Commerce and Insurance ("Commissioner"), who is authorized to take disciplinary action against those who violate the Act. *See* Tenn. Code Ann. § 62-35-102(5) and § 62-35-130.

A person must be licensed by the Commissioner to provide security services to another. "Except as otherwise provided in this chapter, it is unlawful for any person to act as a contract security company without having first obtained a license from the commissioner." Tenn. Code Ann. § 62-35-104. The Act lists persons who are exempt from its provisions. *See* Tenn. Code Ann. § 62-35-103. Unless specifically exempted by the Act, any individual or entity that provides security services to another for compensation must be licensed by the Commissioner.

Commissioned, uniformed peace officers are authorized, regardless of their primary jurisdiction, to direct traffic in temporary work zones or for incident management purposes upon any public roadway located in Tennessee.

> Commissioned, uniformed police officers, state troopers, and/or sheriff deputies, *upon departmental approval*, are authorized, *regardless of primary jurisdiction*, to direct traffic in departmental approved uniforms or utilizing other governmental equipment, as may be required, in temporary work zones or for incident management purposes, to meet the needs of and control all road users, whether motorists, bicyclists, or pedestrians, within the highway, including persons with disabilities in accordance with the Americans with Disabilities Act of 1990 (ADA), Title II, Paragraph 35.130, upon any public roadway located within the state.

Tenn. Code Ann. § 62-35-103(a)(15)(B) (emphasis added).

1. Departmental Approval.

The Act requires the individual peace officers to seek "departmental approval" before commencing secondary employment as private security personnel directing traffic in temporary work zones or for incident management purposes. The Act does not define "department." In the context of the Act, however, it is clear that the departmental approval required under Tenn. Code Ann. § 62-35-103(a)(15)(B) refers to approval from the law enforcement agency of the individual peace officer's primary jurisdiction, not to approval from the Commissioner.

First, the Act mentions the "commissioner" in all references to the Department of Commerce and Insurance. *See e.g.*, Tenn. Code Ann. § 62-35-104 ("Except as otherwise provided . . . a license from the commissioner"); § 62-35-129(a) ("The commissioner shall be responsible for administering and enforcing this chapter."); § 62-35-130(a) ("The commissioner may take disciplinary action against a licensee, registrant or applicant . . . ."). In contrast, the Act mentions the "department" only in reference to local law enforcement agencies. *See, e.g.*, § 62-35-141(a)(1) (identifying the chief law enforcement officer of each jurisdiction for notification purposes). Had the legislature intended to require approval by the Commissioner under Tenn. Code Ann. § 62-35-103(a)(15)(B), it would have referred specifically to the Commissioner, since the Act otherwise consistently mentions the "Commissioner" when it refers to the Department of Commerce and Insurance.

Second, Tenn. Code Ann. § 62-35-103(a)(15)(B) specifically exempts from the Act commissioned, uniformed peace officers when they are employed to direct traffic in temporary work zones or for incident management purposes. In other words, the legislature carved out an exception to the Commissioner's regulatory authority for peace officers who are employed to direct traffic under Tenn. Code Ann. § 62-35-103(a)(15)(B). Requiring the Commissioner's approval for an activity that the legislature specifically identified as exempt from the Act would be self-contradictory and would violate the rule of construction that a statute should be read as a coherent whole. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) ("The court's goal is to construe a statute in a way that avoids conflict and facilitates the harmonious operation of the law.").

2. Application of Exemption to Part-Time Peace Officers.

The exemption in Tenn. Code Ann. § 62-35-103(a)(15)(B) applies to part-time or reserve peace officers who are commissioned by a Tennessee law enforcement agency but not certified by POST. Section 62-35-103(a)(15)(B) authorizes commissioned, uniformed peace officers to direct traffic in temporary work zones or for incident management purposes upon any public roadway located in Tennessee. Unlike other parts of the Act, § 62-35-103(a)(15)(B) does not specifically distinguish between full-time and part-time officers. For example, the Act specifically exempts from its scope full-time sworn peace officers who are receiving compensation for services as a guard, patrol, or watchperson under a contract with a private business that is properly licensed by the State. *See* Tenn. Code Ann. § 62-35-103(a)(7). The absence of a similar distinction in § 62-35-103(a)(15)(B) indicates that the legislature intended the exemption to include part-time commissioned, uniformed peace officers. *See Carver v. Citizens Utilities Co.*, 954 S.W.2d 34, 35 (Tenn. 1997) (recognizing the general rule of statutory construction "that the mention of one subject in a statute means the exclusion of other subjects that are not mentioned").

The application of the Act does not turn on whether a part-time or reserve officer is commissioned by a Tennessee law enforcement agency but not certified by POST. Tennessee Code Annotated § 62-35-103(a)(15)(B) simply exempts commissioned, uniformed peace officers. It is silent on the officers' certification by POST. As noted above, the provision's omission of any reference to POST certification indicates that the legislature did not intend to give POST certification any significance with respect to that exemption. *Cf.* Tenn. Code Ann. § 62-35-141(b) (specifically referring to Tenn. Code Ann. § 38-8-101 *et seq*.). Therefore, a part-time or reserve officer's certification status with POST does not affect his or her exemption under § 62-35-103(a)(15)(B).

3. Notification

Under Tenn. Code Ann. § 62-35-141(a), the licensed contract security company that employs the peace officer outside his or her primary jurisdiction is responsible for notifying the chief law enforcement officer of the jurisdiction in which the peace officer is employed. "Notice shall be provided in writing by the *employer* of the full-time sworn peace officer within five (5) days prior to the date of first service, unless other arrangements are made with the chief law enforcement officer of the jurisdiction." Tenn. Code. Ann. § 62-35-141(a)(2) (emphasis added).

The Commissioner may pursue disciplinary action against a licensed contract security company if it violates the notification requirement. Under Tenn. Code Ann. § 62-35-130, the Commissioner has the discretion to take disciplinary action for violation of any provision of the Act. The Commissioner's disciplinary authority, however, is limited to those within the Act's purview. The law enforcement agency of the individual peace officer's primary jurisdiction is not a licensed contract security company. Thus, the Commissioner may not pursue disciplinary action against that agency. The peace officer's secondary employer is, however, a licensed contract security company. Accordingly, the Commissioner may pursue disciplinary action against the contract security company that employs the peace officer if it fails to give notice as required by Tenn. Code Ann. § 62-35-141(a).

4. Application of Notification Requirement to Part-Time Peace Officers.

The notification requirement under Tenn. Code Ann. § 62-35-141(a) applies only to full-time sworn peace officers. The Act does not require the employers of part-time or reserve peace officers to notify the chief law enforcement officer of the jurisdiction where such officers are employed as security personnel. In fact, the Act does not exempt from its provisions part-time or reserve peace officers except under very limited circumstances as described in Tenn. Code Ann. § 62-35-103(a)(15)(B). Therefore, unless a part-time or reserve officer is employed to direct traffic in temporary work zones or for incident management purposes, he or she is subject to all other provisions of the Act. Because the provision specifically mentions only full-time officers, Tenn. Code Ann. § 62-35-141(a) does not apply to part-time or reserve peace officers regardless of their POST status or the types of services they provide.

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