STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 17-05

The Scope of the Phrase "Elected or Appointed Person" in Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(h)

Question

Does the phrase "elected or appointed person" as used in Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(h) include all public employees?

Opinion

No. "Elected or appointed person" as used in Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(h) includes only public employees who have been elected or appointed to their respective positions in the executive, legislative, or judicial branch of state government.

ANALYSIS

Under Tennessee law, a district attorney general has discretion to offer suspended prosecution, also known as pretrial diversion, to a "qualified defendant." Tenn. Code Ann. § 40-15-105. But pretrial diversion is not available for

> [a]ny misdemeanor offense committed by any elected or appointed person in the executive, legislative or judicial branch of the state or any political subdivision of the state, which offense was committed in the person's official capacity or involved the duties of the person's office.

Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(h). In other words, an "elected or appointed person" in any of the three branches of state government is not a "qualified defendant" for purposes of pretrial diversion for an offense committed in his or her official capacity.

Persons holding positions in state government by election or appointment are public employees, but there are also public employees who were neither elected nor appointed to their positions. For example, the governor is elected, Tenn. Const. art. III, § 2, supreme court justices are elected, Tenn. Const. art. IV, § 3, the attorney general is appointed by the judges of the supreme court, Tenn. Const. art. VI, § 5, and commissioners of certain departments of the executive branch are appointed by the governor, Tenn. Code Ann. § 4-3-112. These elected and appointed persons may then hire others, who will be public employees, although they are not elected or necessarily appointed to those positions.

Whether the phrase "elected or appointed person" includes *every* "public employee"—i.e., every person working in state government—is a question of statutory construction. When

construing a statute, the goal is to "ascertain and give full effect to the General Assembly's intent . . . without unduly expanding or restricting the language of the statute beyond the legislature's intended scope." *State v. Smith*, 436 S.W.3d 751, 762 (Tenn. 2014). To assist in achieving that goal, courts have developed various principles of statutory interpretation, also referred to as cannons of construction. Context is key. The whole-statute cannon developed "because words are known by the company they keep," and so the language of a statute must be construed in the context of the entire statute and in light of the statute's general purpose. *State ex rel. Comm'r of Transp. v. Eagle*, 63 S.W.3d 734, 754-5 (Tenn. Ct. App. 2001) (citations omitted); *accord Silliman v. City of Memphis*, 449 S.W.3d 440, 460 (Tenn. Ct. App. 2014).

The negative-implication cannon—best known as "expressio unius est exclusio alterius"—"holds that the expression of one thing implies the exclusion of others." *Rich v. Tennessee Bd. of Med. Examiners*, 350 S.W.3d 919, 927 (Tenn. 2011). "When certain persons or things are specified in a law . . . an intention to exclude all others from its operation may be inferred. *Under this maxim, if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.*" *Penley v. Honda Motor Co*., 1999 Tenn. App. LEXIS 550, *13, 1999 WL 605657 (Tenn. Ct. App. Aug. 11, 1999) (citation omitted, emphasis in original).

For example, when the legislature specifies that "the clerk of any circuit or chancery court of" Tennessee has authority to enroll a foreign judgment," the negative-implication doctrine leads to the conclusion that the legislature "intended to exclude courts other than chancery and circuit from enrolling foreign judgments." *Hussey v. Woods*, 2015 Tenn. App. LEXIS 763, *27, 2015 WL 5601777 (Tenn. Ct. App. Sept. 23, 2015). Because the statute specifies certain courts, it cannot be read to include all courts. Similarly, if a statute immunizes cities from damages arising from hazards "on public highways, bridges, or sidewalks," the immunity does not extend to hazards on *all public property* since the law specifies three types of public property but omits others. *See Johnson v. City of Laconia*, 684 A.2d 500, 501-02 (N.H. 1996). Put another way, all public property is excluded by the negative implication of referring to three specific kinds of property only. Had the legislature intended the immunity to apply to all public property it would have used that term, or it might have said "on any public property, including highways, bridges, and sidewalks."

The Tennessee legislature used two very specific terms when it excluded certain defendants from pretrial diversion: persons either "appointed" or "elected" to a position in state government. By expressly including only elected and appointed persons, the legislature impliedly excluded all other public employees. That is, since the statute specifies two exceptions to the general category of "qualified defendants," other exceptions are excluded by negative implication. Thus, public employees who are neither elected nor appointed to their government positions may, if otherwise qualified, be eligible for pretrial diversion. Had the legislature intended to exclude all public employees from pretrial diversion it could have and would have worded Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(h) to say, for example, that pretrial diversion is not available for "[a]ny misdemeanor offense committed by *any employee* in the executive, legislative or judicial branch of the state or any political subdivision of the state, which offense was committed in the person's official capacity or involved the duties of the person's office."

This reading is consistent with relevant legislative history. Video-taped discussion of House Bill 2763 in the House Judiciary Subcommittee on February 29, 2012, indicates that the exclusion from eligibility for pretrial diversion was aimed specifically at elected officials, such as judges, and appointed officials, such as commissioners, as distinguished from public employees who are "hired," because the legislation was intended "to show the voting public" that public officials in positions of trust would "be held to higher standard."

Moreover, construing "elected or appointed person" in Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(h) as not encompassing all "public employees" is consistent with the underlying purpose of the statute. It was the intent of the legislature in excluding elected and appointed officials from pretrial diversion for crimes committed in their official capacities to deter public officials from abusing their public offices and to hold public officials to a higher standard of conduct. *See* AG Op. 12-76 (July 25, 2012) at 3. In doing so, the legislature struck a balance between the general intent of allowing leniency for certain offenses and yet holding high-ranking government officials in positions of trust to account, even for misdemeanors, committed in their official capacities.

In sum, "elected or appointed person" as used in Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(h) does not include all public employees. It includes only public employees who have been elected or appointed to their respective positions in the executive, legislative, or judicial branch of state government.

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