STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 29, 2017

Opinion No. 17-22

Assistants to the Commissioner of Commerce and Insurance with Respect to Prevention and Investigation of Destructive Fires

Question 1

Pursuant to title 68, chapter 102 of the Tennessee Code Annotated, which deals with the prevention and investigation of destructive fires, may the commissioner of commerce and insurance appoint multiple assistants to serve the same territory or jurisdiction? If so, what is the chain of authority among those assistants for purposes of satisfying the requirements of title 68, chapter 102?

Opinion 1

No. As a general matter, the commissioner does not have the authority to appoint assistants. Rather, assistants are designated by statute under Tenn. Code Ann. § 68-102-108(b). To the extent that statute designates multiple assistants for the same territory, each designated individual serves as an assistant and must satisfy all requirements of an assistant. Even in the limited circumstances in which the commissioner has appointment authority, that authority extends only to replacing a removed assistant, appointing an assistant if one is not designated by statute, appointing an assistant to take the place of a person who is designated by statute but declines to serve, or appointing special assistants if further investigation into a fire is needed.

Question 2

How is an assistant's territory or jurisdiction defined for purposes of title 68, chapter 102?

Opinion 2

An assistant's territory or jurisdiction, within the meaning of title 68, chapter 102, is congruent with the geographical location in which the assistant serves in the position that qualifies him or her as an assistant under Tennessee Code Annotated § 68-102-108(b).

Question 3

If a person is certified as an assistant to the commissioner while serving as a fire chief and is subsequently appointed by a county mayor to serve as the county fire marshal, how does the change in position affect that person's certification as an assistant to the commissioner?

a. Is the person required to surrender the certificate to the commissioner within 10 days after vacating the fire chief position—the position in which that person was originally certified as an assistant?

b. If the person fails to surrender the certificate to the commissioner within 10 days after vacating the fire chief position, does the person remain an assistant to the commissioner for purposes of title 68, chapter 102?

Opinion 3.a

Yes, assuming the person was designated an assistant by virtue of his or her position as fire chief. Pursuant to Tenn. Code Ann. § 68-102-108(c), the person must surrender the certificate to the commissioner within 10 days after vacating the fire chief position.

Opinion 3.b

No. Surrendering the certificate has no bearing on the person's status as an assistant. Rather, assuming the person was designated as an assistant by virtue of his or her position as fire chief, the person loses the status of assistant by operation of law when he or she vacates the fire chief position.

Question 4

May a county fire marshal, pursuant to his or her duty under Tenn. Code Ann. § 5-6-121(a) to "assist in the prevention of fire and arson," delegate his or her statutory responsibilities as an assistant to the commissioner under title 68, chapter 102?

Opinion 4

A county fire marshal may delegate his or her duties as an assistant that are ministerial in nature, but may not delegate those duties that involve discretion or judgment.

ANALYSIS

Tennessee Code Annotated title 68, chapter 102, assigns the duty to prevent and investigate fires to the department of commerce and insurance. The chapter further delegates duties to the commissioner, the commissioner's deputies, and assistants.

1. The following officials are statutorily designated as "assistants" to aid the commissioner in the performance of those duties:

> (1) In an incorporated city or place having both a fire marshal and a fire department, either the fire marshal or the chief of the fire department, whomever such city or place appoints;

(2) In an incorporated city or place having either a fire marshal or a fire department, but not both, such fire marshal or the chief of such fire department;

(3) The chief of every private fire company organized within a municipality pursuant to title 7, chapter 38;

(4) The mayor of each incorporated place having no fire marshal, fire department, or private fire company;

(5) Within the bounds of any county, but outside any municipality contained in the county, the chief of any county-wide fire department authorized by title 5, chapter 17;

(6) Within the bounds of any county, but outside any municipality contained in the county, the chief of any incorporated fire department whose geographic fire response district has been established and approved by the county mayor of such county; and

(7) In an incorporated city or other place that has no fire marshal, a fire marshal from another local government.

Tenn. Code Ann. § 68-102-108(b). Further, the statute provides that the commissioner *shall* issue a certificate evidencing the officer's status as an assistant to any individual designated by the statute. Tenn. Code Ann. § 68-102-108(c).

In construing a statute, courts must carry out the legislative intent and purpose of the General Assembly without unduly restricting or expanding a statute's coverage beyond its intended scope. *Arden v. Kozawa*, 466 S.W.3d 758, 764 (Tenn. 2015); *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 420 (Tenn. 2013); *Waldschmidt v. Reassure Am. Life Ins. Co.*, 271 S.W.3d 173, 176 (Tenn. 2008). The best indicator of the General Assembly's intent and purpose is the plain and ordinary meaning of the statutory language. *Shore*, 411 S.W.3d at 420. The court must presume that every word has "meaning and purpose." *Id.* In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue in the context of the statute as a whole, and the provisions of a statute should be construed in a way that renders them compatible, not contradictory. *Calaway v. Schucker*, 193 S.W.3d 509, 520 (Tenn. 2005).

By its plain terms, Tenn. Code Ann. § 68-102-108(b) *designates* assistants—it does not give the commissioner the power to *appoint* assistants. There are, however, three circumstances under which the commissioner may appoint assistants. Only the third circumstance provides for the appointment of more than one assistant.

First, if there is no officer as provided for in § 68-102-108(b), or if the officer declines to serve as an assistant, "the commissioner may appoint an assistant instead." Tenn. Code. Ann. § 68-102-109(a). This circumstance presupposes that no § 68-102-108(b) assistants exist in a particular jurisdiction, and permits the commissioner to appoint "*an* assistant," which clearly refers

to a single assistant. Thus, under the plain and ordinary meaning of the statute, the commissioner may not rely on § 68-102-109(a) to designate multiple assistants in a particular jurisdiction.

Second, an assistant may be removed for cause, in which case the commissioner may appoint his or her successor. *Id.* § 68-102-109(b). By the plain language of the statute, this circumstance arises only when a particular assistant is removed for cause, and the commissioner may appoint only that particular assistant's successor. Thus, the commissioner may not rely on § 68-102-109(b) to designate multiple assistants.

Third, to "make further investigations as to the origin or circumstances of any fire occurring in this state," the commissioner may appoint "special assistants." Tenn. Code. Ann. § 68-102-127(a). The use of the plural "assistants" in this section expressly contemplates that the commissioner may appoint multiple assistants for the purposes of investigating specific fires. Thus, in this particular and limited circumstance, the commissioner may designate multiple special assistants for the same territory, although the special assistants' authority is limited to the particular fire.

2. An assistant's territory or jurisdiction is not explicitly defined in title 68, chapter 102, but certain statutory provisions make clear that an assistant's powers and duties are geographically confined to the place in which that person serves in the position qualifying him or her as an assistant pursuant to Tenn. Code Ann. § 68-102-108(b). For example, Tenn. Code Ann. § 68-102-116 requires assistants to "inspect buildings or premises *within their jurisdiction* upon the written complaint of any citizen, or whenever the commissioner, or the commissioner's deputies or assistants, deem it necessary." (Emphasis added). And Tenn. Code Ann. § 68-102-111(a) sets forth an assistant's duty to "investigate the cause, origin, and circumstance of every fire occurring in any city or place in this state by which property has been destroyed or damaged . . . ." This duty is triggered by the occurrence of such a fire *within the assistant's territory*. Tenn. Code Ann. § 68-102-111(a) ("The investigation shall be begun immediately upon the occurrence of the fire by the assistant *in whose territory the fire has occurred* . . . ." (emphasis added)). Although § 68-102-111 does not define "territory," when it refers to "assistants to the commissioner," it cites § 68-102-108 (among others), which designates assistants based upon their positions within certain territories. Read as a whole and in harmony, these statutory provisions indicate that an assistant's territory is the geographical location in which the assistant serves in the position that qualifies him or her as an assistant under § 68-102-108(b).

3. Every person designated an assistant must submit to the commissioner certain information and documentation within 30 days after being designated an assistant. Tenn. Code Ann. § 68-102-108(c). When the commissioner receives that information, he or she must issue to the officer a certificate showing the person's status as an assistant. *Id.* The person must "surrender the certificate to the commissioner within ten (10) days after vacating the office *by virtue of which this section designates such person as an assistant*." *Id.* (emphasis added).

Here, we assume the person was designated as an assistant due to his or her position as fire chief. The person is now vacating that office—i.e., the office "by virtue of which [the person was designated] as an assistant." That fire chief ceases to be an assistant as soon as he is no longer fire

chief. He must surrender the certificate to the commissioner within 10 days after vacating the fire chief position.

But surrendering the certificate has no bearing on his status as an assistant. A person is designated as an assistant by virtue of his or her holding one of the positions enumerated in Tenn. Code Ann. § 68-102-108(b). In other words, he becomes an assistant by operation of the law and he ceases to be an assistant by operation of the law. The certificate merely "evidences the officer's status as an assistant." Tenn. Code Ann. § 68-102-108(c). When describing a person's duties upon becoming an assistant, the statute refers to that person as an "assistant." *See id.* However, when describing a person's obligation to surrender the certificate after vacating the qualifying position, the statute refers to that person as the "recipient" of the certificate, not as an "assistant," indicating that the person lost the status of assistant when he or she vacated the qualifying position. *See id.* ("The recipient shall surrender the certificate to the commissioner within ten (10) days after vacating the office by virtue of which this section designates such person as an assistant."). Therefore, the person serving as fire chief would lose the status of assistant upon his or her vacation of the fire chief position, regardless of the date of surrender of the certificate.

4. Tennessee courts have defined "public officer" as "an incumbent of a public office; an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises the functions concerning the public assigned to him by law." *Gamblin v. Town of Bruceton*, 803 S.W.2d 690, 692–93 (Tenn. Ct. App. 1990) (quoting *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978)). Accordingly, assistants to the commissioner are public officers. They are appointed in a manner prescribed by law. *See* Tenn. Code Ann. § 68-102-108(b). Assistants also exercise the functions concerning the public assigned to them by law; the task of an assistant is to aid the commissioner in enforcing the laws in title 68, chapter 102, relating to the prevention of fires, storage, sale, and use of combustibles and explosives, installation and maintenance of fire alarm systems and fire extinguishing equipment, construction, maintenance, and regulation of fire escapes, means and adequacy of fire exits, and suppression of arson and the investigation of the cause, origin, and circumstances of fires. Tenn. Code Ann. §§ 68-102-102 and 68-102-108(a).

As public officers, assistants may delegate ministerial duties—i.e., duties that do not involve the exercise of official discretion or judgment[1]—if there is no statutory provision prohibiting such delegation, but they may not delegate duties involving discretion or judgment in the absence of statutory authorization. Tenn. Op. Att'y Gen. No. 05-112 (July 18, 2005); Tenn. Op. Att'y Gen. No. 85-126 (Apr. 18, 1985); 67 C.J.S. *Officers* § 330 (2017). Title 68, chapter 102, neither prohibits the delegation of ministerial duties nor authorizes the delegation of discretionary duties. Therefore, a county fire marshal, in his or her capacity as an assistant to the commissioner, may delegate his or her duties as an assistant that are ministerial in nature, but may not delegate those duties that involve discretion or judgment.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

BRIAN A. PIERCE
Assistant Attorney General

Requested by:

The Honorable Roger Kane
State Representative
202A War Memorial Building
Nashville, Tennessee 37243

[1] A ministerial duty is one "that requires neither the exercise of official discretion nor judgment." Black's Law Dictionary (10th ed. 2014).