

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

**September 24, 2021**

**Opinion No. 21-15**

**Authority Issues Involving County Health Departments**

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**Question 1**

Does 2021 Tennessee Public Acts, chapter 550 give the county mayor or the county health officer authority to issue county-wide health mandates?

**Opinion 1**

Public Chapter 550 gives the county health officer—not the county mayor—authority to issue county-wide health mandates necessary to protect the general health and safety of the citizens of the county.

**Question 2**

If the county health officer has authority to issue county-wide health mandates, who prevails if there is a conflict between the county health officer and the county mayor regarding such mandates? Can the county mayor countermand a health regulation issued by the county health officer?

**Opinion 2**

When there is a special statute, like a Private Act, that gives the county mayor authority to issue a county-wide mandate to protect the public health under specified circumstances, the authority granted under that statute prevails. But in most instances the county health officer will be the official authorized to issue county-wide health mandates by virtue of the recent passage of Public Chapter 550.

**Question 3**

How far does the authority to issue county-wide health mandates extend? Is the institution of business-capacity limits or county-wide curfews permissible? May face coverings in public spaces be mandated?

**Opinion 3**

A county health officer's ability to issue county-wide health mandates pertaining to communicable diseases via rules and regulations is limited—and can even be foreclosed—by state law. Thus, the validity of any county-wide health mandate issued by a county health officer would

depend on its particular terms and applicable state law, including rules and regulations promulgated by the Commissioner of Health.

#### **Question 4**

If the county health officer has the authority to issue county-wide health mandates, what power does the county health officer have to enforce such mandates?

#### **Opinion 4**

Public Chapter 550 transferred the power to issue rules and regulations from county boards of health to county health officers, but the legislation did not transfer the power to enforce those rules and regulations—an enforcement power formerly held by county health directors—to county health officers.

#### **Question 5**

In light of Tenn. Code Ann. § 68-2-603, which states that the county health officer is appointed by the Tennessee Commissioner of Health, may a county mayor remove the county health officer from office without the permission of the Commissioner if the county health director, who was appointed by the county mayor, hired the county health officer?

#### **Opinion 5**

The Commissioner of Health is the sole person authorized to appoint the county health officer. Because the right of removal from office is an incident to the right of appointment when the tenure of an office is not prescribed by statute or the Tennessee Constitution, only the Commissioner of Health may remove a county health officer under Tenn. Code Ann. § 68-2-603. Accordingly, a county mayor may not remove the county health officer without the permission of the Commissioner of Health unless another law, i.e., a Private Act, gives the county mayor the power to do so.

### **ANALYSIS**

#### ***1. & 2. Authority of County Health Officers and County Mayors to Issue County-wide Health Mandates Following the Passage of Public Chapter 550***

##### ***a. Structure of County Health Departments***

Each county in Tennessee is required to establish a county health department, which is headed by, and under the immediate direction of, a “county health director.” Tenn. Code Ann. § 68-2-603(a)(1). The county health director acts as the administrative officer of the county health department, implements the programs of the state department of health, and enforces rules and regulations established by the Tennessee Commissioner of Health. *Id.* §§ 68-2-603(a)(2), (b). The county health director is appointed by the Commissioner of Health, in concurrence with the county mayor. *Id.* §§ 68-2-603(a)(2), (6).

The Commissioner of Health is also authorized to appoint a “county health officer” who is “responsible for providing medical direction including medical enforcement actions.” *Id.* § 68-2-603(c). The county health officer is empowered to order certain actions, such as quarantine and the closure of public establishments in specified instances. *Id.* § 68-2-609.<sup>1</sup>

County legislative bodies have the authority to establish county boards of health. *Id.* § 68-2-601. These boards govern the policies of county health departments and are tasked with establishing annual budgets for the county health departments. *Id.* § 68-2-601(f)(1), (4). For years, these boards have had the additional power to (1) enforce rules and regulations promulgated by the Commissioner, and (2) adopt rules and regulations as may be necessary to protect the general health and safety of the citizens of the county. *See* 1985 Tenn. Pub. Acts, ch. 172, § 1 (formerly codified at § 68-2-601(f)(2), (3)).<sup>2</sup> But since the passage of Public Chapter 550, effective May 26, 2021, county boards of health no longer have these two additional powers. 2021 Tenn. Pub. Acts, ch. 550, §1.

### ***b. Public Chapter 550***

With the passage of Chapter 550, county boards of health now have just an advisory role; they advise the county mayor on the enforcement and adoption of rules and regulations. *See id.* (codified at Tenn. Code Ann. §§ 68-2-601(f)(2), (3)).<sup>3</sup>

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<sup>1</sup> The county health officer must be “a graduate doctor of medicine or osteopathy, schooled and experienced in public health work and licensed to practice in the state of Tennessee.” Tenn. Code Ann. § 68-2-603(c). If the county health director is a qualified physician, that person may also serve as a county health officer. *Id.* § 68-2-603(a)(5).

<sup>2</sup> Tenn. Code Ann. § 68-2-601(f) formerly provided:

The powers and duties of county boards of health are to:

- (1) Govern the policies of full-time county health departments established in accordance with this chapter;
- (2) Through the county health director or the county health officer, or both, enforce such rules and regulations as may be prescribed by the commissioner essential to the control of preventable diseases and the promotion and maintenance of the general health of the county;
- (3) Adopt rules and regulations as may be necessary or appropriate to protect the general health and safety of the citizens of the county. The regulations shall be at least as stringent as the standard established by a state law or regulation as applicable to the same or similar subject matter. Regulations of a county board of health supersede less stringent or conflicting local ordinances; and
- (4) Require that an annual budget be prepared and, when this budget has been approved by the county board of health, submit the same to the county legislative body for consideration and subsequent provision of necessary funds to meet all obligations under the adopted budgets.

<sup>3</sup> Tennessee Code Ann. §§ 68-2-601(f)(2) and (3) now provide:

The powers and duties of county boards of health are to:

\* \* \*

Chapter 550 also made significant changes to the powers and duties of the county health director and the county health officer. Formerly, the county health director had the duty to enforce the regulations of the county board of health and the Tennessee department of health in counties which did not establish a board of health. *See* Tenn. Code Ann. §§ 68-2-603(a)(2), (b) (2013). Now, the power to enforce the rules and regulations of the Tennessee department of health is vested solely in the county health director, and the county health director no longer has a duty to enforce the regulations of the county board of health since the board presently has no power or duty to adopt regulations. *See* 2021 Tenn. Pub. Acts, ch. 550, §§ 2, 3 (codified at Tenn. Code Ann. §§ 68-2-603(a)(2), (b)). And the power to adopt rules and regulations as may be necessary to protect the general health and safety of the citizens of the county was added to the list of actions that the county health officer may “order.” *See id.*, § 4 (codified at Tenn. Code Ann. §§ 68-2-609(4)).<sup>4</sup>

Accordingly, the county health officer is now the official with the authority to issue county-wide health mandates necessary to protect the general health and safety of the citizens of the county. While Chapter 550 did make county boards of health advisory to county mayors, the legislation bestowed no additional powers on county mayors. In short, Chapter 550 transferred all power to promulgate rules and regulations from county health boards to county health officers.<sup>5</sup>

Consequently, any authority for a county mayor to issue a county-wide health mandate would have to come from another statutory source. *See* 63C Am. Jur. 2d Public Officers and Employees § 222 (public officers’ powers and duties must be executed in the manner directed, and by the officer specified, by the applicable provisions granting such powers and duties); *see also Elliott Nat’l Bank v. Western and Atl. R.R.*, 70 Tenn. 676, 680 (1879) (the powers of public agents

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(2) Advise the county mayor on the enforcement of such rules and regulations as may be prescribed by the commissioner essential to the control of preventable diseases and the promotion and maintenance of the general health of the county;

(3) Advise the county mayor on the adoption of rules and regulations as may be necessary or appropriate to protect the general health and safety of the citizens of the county[.]

<sup>4</sup> Tenn. Code Ann. § 68-2-609 now provides:

The county health officer is empowered to order:

- (1) The quarantine of any place or person, if the county health officer finds that quarantine is necessary to protect the public health from an epidemic;
- (2) The closure of any public establishment, facility or building if the county health officer finds unsanitary conditions of such a nature and extent to significantly threaten the public health;
- (3) The closure of any public establishment, facility or building, if the county health officer is otherwise authorized by law to take that action; or
- (4) Rules and regulations as are necessary or appropriate to protect the general health and safety of the county.

<sup>5</sup> *See id.*

being defined by statute are limited, and no pretension of authority or customary action can amplify that authority beyond the statutory limitation).

For example, the Mutual Aid and Emergency and Disaster Assistance Agreement Act of 2004 authorizes a county mayor “to declare a local state of emergency affecting such official’s jurisdiction by executive order consistent with and governed by § 58-2-110(3)(A)(v).” Tenn. Code Ann. § 58-8-104(a). Upon declaring such a local state of emergency, “the county mayor . . . may, in the interest of public health, safety, and welfare, issue orders to direct and compel the evacuation of the entire unincorporated area of the county or any portion thereof.” *Id.* § 58-8-104(e). In this instance, a county mayor’s evacuation order issued in conformance with Tenn. Code Ann. § 58-8-104 would not only be authorized but would also take precedence over any local rule or regulation to the contrary issued by the county health officer. *See Strader v. United Family Life Ins. Co.*, 218 Tenn. 411, 417, 403 S.W.2d 765, 768 (1966) (a special statute or a special provision of a particular statute controls a general provision in another statute); *Woodroof v. City of Nashville*, 183 Tenn. 483, 488, 192 S.W.2d 1013, 1015 (1946) (“where the mind of the legislature has been turned to the details of a subject and they have acted upon it, a statute treating the subject in a general manner should not be considered as intended to affect the more particular provision”).

In short, when there is a special statute that gives the county mayor the authority to issue a county-wide mandate to protect the public health under specified circumstances, the authority granted under that statute prevails. But in most instances, the county health officer will be the official who possesses the authority to issue county-wide health mandates by virtue of the recent passage of Chapter 550.

### ***3. Extent of County Health Officer’s Authority to Issue County-wide Health Mandates***

Even so, a county health officer’s ability to issue county-wide health mandates pertaining to communicable diseases via rules and regulations is limited—and can even be foreclosed—by state law.

First, the authority of the county health officer is limited by the rules and regulations promulgated by the Commissioner of Health to prevent the spread of communicable diseases,<sup>6</sup> since it is the duty of all county health authorities “to carry out such rules and regulations as the department of health may prescribe for their object the prevention and restriction of . . . [communicable] diseases.” Tenn. Code Ann. § 68-5-103 (addressing all communicable diseases except venereal diseases). Accordingly, a county health officer cannot issue rules and regulations that are inconsistent with those promulgated by the Commissioner. *See* Tenn. Code Ann. 4-5-221(c) (duly promulgated rules and regulations of state administrative agencies have the force and effect of law in Tennessee).

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<sup>6</sup> *See* Tenn. Code Ann. § 68-5-104(a)(2) (authorizing the Commissioner to promulgate rules and regulations as may be necessary to prevent the spread of contagious or communicable diseases to protect the public health and welfare); *see also id.* § 68-1-201(a)(2) (authorizing the Commissioner to promulgate rules and regulations to prevent the introduction of epidemic diseases in this state).

Second, the governor has the power to displace any—or all—authority that a county health officer might otherwise have to issue rules and regulations. As explained in *Tenn. Att’y Gen. Op. 20-07* (Apr. 27, 2020),

[t]he General Assembly has vested the Governor with exclusive responsibility and authority to assume control over all aspects of the State’s response to an emergency such as the COVID-19 pandemic. Because the executive orders that the Governor issues pursuant to that authority have the force and effect of law, the Governor’s directives in response to an emergency supersede and preempt any action taken by political subdivisions of the State. Absent an express delegation of power by the Governor, local governmental entities may not take actions that are either more restrictive or less restrictive with respect to the subjects addressed in the Governor’s executive orders governing the State’s emergency response to COVID-19. . . .

Third, state law directly prohibits certain health mandates altogether. For instance, no governmental entity or officer is permitted to require a person to receive an immunization, vaccination, or injection for the SARS-CoV-2 virus or any variant of the SARS-CoV-2 virus.<sup>7</sup> *Tenn. Code Ann.* §§ 68-5-115, -116.

In sum, the validity of any rule or regulation issued by a county health officer would depend on its particular terms and applicable state law, including rules and regulations promulgated by the Commissioner of Health.

#### **4. *Enforcement Authority of County Health Officers***

Before the passage of Chapter 550, county boards of health had the authority to issue rules and regulations, and the county health director had the authority to enforce those rules and regulations.<sup>8</sup> While Chapter 550 transferred the power to issue rules and regulations from county boards of health to county health officers, it did not transfer the power to enforce those rules and regulations to county health officers. The only enforcement power of county health officers remains confined to “medical enforcement actions.”<sup>9</sup>

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<sup>7</sup> The “SARS-CoV-2 virus” is the virus responsible for COVID-19 and the disease that it causes. *See* World Health Org., *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It*, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (last visited Sept. 13, 2021).

<sup>8</sup> *See* note 2, *supra*, and accompanying text.

<sup>9</sup> *See* note 1, *supra*, and accompanying text. “Medical enforcement actions,” as interpreted and administered by the Department of Health, include actions such as “public health measures” and “health directives.” A “public health measure” directs “a carrier or owner or operator of premises to cooperate with health authorities’ efforts to prevent or control transmission of a disease that poses a health threat to others.” *Tenn. Comp. R. & Regs.* 1200-14-04-.02(16). Similarly, a “health directive” is “a written statement (or, in compelling circumstances, an oral statement followed by a written statement), based on clinical or epidemiological evidence of the kind relied upon by competent medical experts, that is issued by the Commissioner or health officer, requiring a person to cooperate with health authorities’ efforts to prevent or control transmission of a disease that poses a health threat to others.” *Tenn. Comp. R. & Regs.* 1200-14-04-.02(10). A health directive is “individual and specific and shall not be issued to a class of persons.” *Tenn. Comp. R. & Regs.* 1200-14-04-.04(1).

## 5. Authority to Remove the County Health Officer

The Commissioner of Health is authorized to appoint county health officers under Tenn. Code Ann. § 68-2-603(c). The statute, though, does not address removal of these officers, nor does it prescribe a term of office for these officers.<sup>10</sup> In this instance, Tennessee courts have consistently held that the power to remove is an incident of the power to appoint when the tenure of office is not prescribed by statute or the Tennessee Constitution. *Gillespie v. Rhea Cnty.*, 191 Tenn. 487, 493, 235 S.W.2d 4, 7 (1950); *Williams v. Boughner*, 46 Tenn. 486, 492 (1869); *cf. Gamblin v. Town of Bruceton*, 803 S.W.2d 690, 693 (Tenn. Ct. App. 1990) (citing *Brock v. Foree*, 168 Tenn. 129, 131, 76 S.W.2d 314, 315 (1934)) (right of removal from office is an incident to the right of appointment unless the term of the official is fixed by law for a definite period). Accordingly, the power to remove a county health officer under Tenn. Code Ann. § 68-2-603 lies with the Commissioner of Health.

The scenario presented in which a mayor appoints a county health director, who, in turn, “hires” the county health officer, is not contemplated by Tennessee’s statutory scheme. Since 1985 when the General Assembly overhauled the law governing the provision of local health services in this State, the Commissioner of Health has been the only official expressly identified as having the authority to appoint county health officers. 1985 Tenn. Pub. Acts, ch. 172, § 3 (codified at Tenn. Code Ann. § 68-2-603(c)). It is, however, possible that law other than Tenn. Code Ann. § 68-2-603 could apply. For instance, Private Acts relative to county boards of health and county health departments in effect on July 1, 1985, remain in effect. Tenn. Code Ann. § 68-2-606. If such a Private Act for a particular county provides for the appointment of the county health director by the mayor and the hiring of the county health officer by the county health director, the terms of that Private Act governing the removal of the county health officer would apply, (*see, e.g., Arnwine v. Union County Bd. of Educ.*, [120 S.W.3d 804, 807 \(Tenn. 2003\)](#)) (explaining that a local government may act when the power to do so is granted in the “express words” of a statute or private act)), in which case the county mayor could remove the county health officer without the consent of the Commissioner if the Private Act gives the county mayor the power to do so.

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<sup>10</sup> County health officers are “officers” under Tennessee law. A “public officer” is “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.” *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (citation omitted); *see Frazier v. Elmore*, 180 Tenn. 232, 238, 173 S.W.2d 563, 565 (1943) (“public office” is a position to which specific duties or functions have been assigned).

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