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In the Matter of:
Erin R. Knight
Petitioner

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OCT 12 2017

STATE BOARD OF EDUCATION

PETITION FOR DECLARATORY ORDER

In accordance with Tenn. Code Ann. § 4-5-223 and Tenn. Comp. R. & Regs. 1360-04-01-.07, the Petitioner Erin R. Knight (Knight) petitions the State Board of Education (Board) for a declaratory order and states:

Name of Petitioner: Erin R. Knight.

Address of Petitioner: 809 Winding Hills Lane, Hixson, Tennessee 37343.

Agency rule, order, or statutory provision on which declaratory order is sought:

- Uniform Administrative Procedures Act (UAPA) (Tenn. Code Ann. §§ 4-5-101 *et seq.*).
- Tenn. Code Ann. § 49-1-302(a)(5)(A)(iv).
- Tenn. Comp. R. & Regs. 1360-04-01.
- Tenn. Comp. R. & Regs. 0520-02-03-.09.

Statement of the facts of the controversy and description of how this rule, order or statute affects or should affect the Petitioner:

Facts

Knight holds a Tennessee teaching license (Lic.# 000184524). By letter dated May 26, 2017, the Board notified Knight that it was proposing to revoke Knight’s license under the authority of Tenn. Comp. R. & Regs. 0520-02-03-.09(2)(c) “for being on school premises during school hours under the influence of alcohol.” [Exhibit A]. The letter further informed Knight that

if she did not request a hearing within 30 days of receiving the letter, the Board would administratively revoke her license at its next regularly scheduled meeting.

Discussion

I. The Board has no authority to revoke Knight's license.

(a) The Board has no authority to promulgate and enforce Rule 0520-02-03-.09.

The Board has proposed to revoke Knight's teaching license under the authority of Tenn. Comp. R. & Regs. 0520-02-03-.09(2)(c), a rule that the Board promulgated under the purported authority of Tenn. Code Ann. § 49-1-302(a)(5)(A). Regarding the revocation of licenses, Tenn. Code Ann. § 49-1-302(a)(5)(A)(iv) states:

- (a) It is the duty of the board, and it has the power to:
 - (5) (A) Adopt *policies* governing:
 - (iv) The revocation of licenses and certificates for misconduct....

The statute only authorizes the Board to adopt *policies* regarding revocation of licenses. The statute does not confer upon the Board the power or authority to promulgate *rules* governing the revocation of licenses for misconduct.

The UAPA explains the distinction between "policies" and "rules." A "policy" is a set of decisions, procedures and practices, pertaining to the internal operation or actions of an agency. Tenn. Code Ann. § 4-5-102(10). A "rule," on the other hand, is an agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of an agency. Tenn. Code Ann. § 4-5-102(12).

In other words, a "policy" deals only with the internal management of state government. A policy does not affect the private rights, privileges and procedures available to the public, and it therefore need not be promulgated under the UAPA procedures for promulgation of rules. See, Tenn. Code Ann. § 4-5-102(12)(A). A "rule," on the other hand, does affect the private rights,

privileges or procedures available to the public; and a State agency must promulgate a “rule” under the UAPA. See, *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 312 (Tenn. 2005); *Mandela v. Campbell*, 978 S.W.2d 531, 533-34 (Tenn. 1998); *State Board of Regents of University v. Gray*, 561 S.W.2d 140 (Tenn. 1978)

In order to promulgate a rule, however, an agency must have been given that power by the General Assembly. *Methodist Healthcare-Jackson Hosp. v. Jackson-Madison County Gen. Hosp. Dist.*, 129 S.W.3d 57, 69 (Tenn. Ct. App. 2003). The power of an administrative agency to promulgate rules must be granted by the General Assembly in a limited and defined way so that administrative officials can discern and implement the legislature’s will. *Bean v. McWherter*, 953 S.W.2d 197, 199 (Tenn. 1997). “[T]he powers of [an administrative agency] must be found in the statutes. If they are not there, they are non-existent.” *Id.* (quoting *Tennessee-Carolina Transp., Inc. v. Pentecost*, 334 S.W.2d 950, 953 (Tenn. 1960). “The power of an administrative agency must find its source in an express statutory grant of authority.” *Id.*

The departments, agencies, and commissions of government have no inherent or common-law power of their own. *State ex rel. Comm’r of Transp. v. Eagle*, 63 S.W.3d 734, 769 (Tenn. Ct. App. 2001). A governmental agency has only that authority that is either expressly granted by statute or that arises by necessary implication from an express grant of authority. *BellSouth Adver. & Pub’g Corp. v. Tenn. Reg. Auth.*, 79 S.W.3d 506, 512 (Tenn. 2002); *Sanifill of Tenn., Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *Tennessee Pub. Serv. Comm’n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn. 1977).¹

¹ Tenn. Code Ann. § 49-5-417 does not supply the necessary implication to support general rulemaking authority of the sort at issue here. Tenn. Code Ann. § 49-5-417 is a narrow authorization to the Board to summarily revoke a teacher’s license under specific narrow circumstances, none of which are present here.

When the legislature in Tenn. Code Ann. § 49-1-302(a)(5)(A)(iv) authorized the Board to adopt policies, the legislature knew that policies and rules were distinct. See, e.g., *Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 444 (Tenn. 2017) (legislature is presumed to know the law); *State v. Hawk*, 170 S.W.3d 547, 552 (Tenn. 2005) (same); *State v. Mixon*, 983 S.W.2d 661, 669 (Tenn. 1999) (same); *Hamby v. McDaniel*, 559 S.W.2d 774, 776 (Tenn. 1977) (same). The legislature chose to authorize the Board to adopt policies, not rules. Tenn. Code Ann. § 49-1-302(a)(5)(A)(iv) is clear and unambiguous. It must be construed in accordance with the terms the legislature chose. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004); *Lipscomb v. Doe*, 32 S.W.3d 840, 844 (Tenn. 2000).

The only authority that the legislature has conferred upon the Board to promulgate *rules* for the revocation or suspension of licenses is found in Tenn. Code Ann. § 49-5-108(d)(2). That statutory grant of authority is narrow. The statute authorizes the Board to promulgate rules to suspend or revoke the license of an educator who is delinquent or in default a guaranteed student loan. In no other circumstance has the General Assembly conferred upon the Board the authority to promulgate rules for revoking a teacher's license for misconduct. Under the principle of *expressio unius est exclusio alterius*, the legislature's express authorization of rules only for these narrow purposes requires a presumption that the legislature acted purposefully in excluding other subject matter in the scope of the rulemaking authorization. See, e.g., *In re Kaliyah S.*, 455 S.W.3d 533, 554 (Tenn. 2015); *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013).²

² Tennessee's system of public education includes local boards of education and local superintendents. The legislature has left the task of disciplining professional educators primarily to those local officials and not the State regulatory board. See, e.g., Tenn. Code Ann. §§ 49-2-301(b)(1)(GG) and 49-5-501 et seq. In this way, the State's regulation of educators is unlike regulation of other professionals in fields where no local body is empowered to impose discipline. The limited rulemaking authority of the Board relative to license revocation does not permit the Board to assume disciplinary power that the legislature chose to leave to local school system officials. Cf., *Thompson v. Memphis City Schools Bd. of Educ.*, 395 S.W.3d 616, 622 (Tenn. 2012) ("The Legislature has plenary and exclusive authority to establish the makeup and structure of Tennessee's system of free public schools"); *Lawrence County Education Ass'n v. Lawrence County Bd. of Educ.*, 244 S.W.3d 302, 310 (Tenn. 2007) (same).

In promulgating Rule 0520-02-03-.09., the Board exceeded its authority. An unauthorized agency action is a nullity. *State ex rel. Comm'r of Transp. v. Eagle*, 63 S.W.3d at 769; *Johnson v. Alcoholic Bev. Comm'n*, 844 S.W.2d 182, 186 (Tenn. Ct. App. 1992). Any actions or proposed actions regarding the revocation, suspension, or formal reprimand of licenses or certificates for misconduct by the Board pursuant to Rule 0520-02-03-.09 are *ultra vires*, without force or effect.

(b) The Board has no authority to administratively revoke, suspend or formally reprimand Knight's license.

In its May 26, 2017 letter, the Board told Knight that if she failed to request a hearing within 30 days the Board would administratively revoke her teaching license at its next scheduled meeting. The Board's threatened procedure is inconsistent with the general requirements of the UAPA for a license revocation.

The UAPA provides:

No revocation, suspension, or withdrawal of any license is lawful unless, *prior to the institution of agency proceedings*, the agency gave notice by mail to the licensee of facts or conduct that warrant the intended action, *and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.*

Tenn. Code Ann. § 4-5-320(c) (emphasis added). Thus, an agency that wishes to revoke or suspend a license must first give notice to the licensee of the facts or conduct that warrant the intended action. Second, the agency must give the licensee an opportunity to show compliance with all lawful requirements for the retention of the license. Third, if the licensee fails to show compliance or refuses that opportunity, the agency can seek to revoke or suspend a license only by initiating agency proceedings.

Once the agency initiates agency proceedings, the matter becomes a contested case. *Id.*, Tenn. Code Ann. § 4-5-307. The agency is then required to provide the licensee with notice and

an opportunity to be heard. Tenn. Code Ann. § 4-5-307(b). The required notice must include the following:

- (1) A statement of the time, place, nature of the hearing, and the right to be represented by counsel.
- (2) A statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the statutes and rules involved.
- (3) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon timely, written application a more definite and detailed statement shall be furnished ten (10) days prior to the time set for the hearing.

Tenn. Code Ann. § 4-5-307(b)(1) - (3); see also Tenn. Comp. R. & Regs. 1360-04-01-.06(2).³

There is no provision in the UAPA that allows an agency to skip the second step, the opportunity for the licensee to show compliance with all lawful requirements for retention of her license. There is no provision in the UAPA that allows an agency to skip the third step, initiation of agency proceedings, and the contested case that follows. There is no provision in the UAPA that allows an agency to consolidate the second and third steps. And there is no provision in the UAPA that allows an agency to shift the burden to the licensee to initiate agency proceedings with respect to license revocation or suspension.

Request for Stay of Proceedings and Declaratory Order.

For the foregoing reasons, Knight respectfully requests that the Board grant this Petition; stay any further license revocation proceedings against Knight; convene a contested-case hearing in accordance with Tenn. Code Ann. § 4-5-223(a)(1); and issue a Declaratory Order providing:

1. That any actions or proposed actions regarding the revocation, suspension or formal reprimand of licenses or certificates for misconduct by the Board under the authority of

³ The only exception to this procedure is found in Tenn. Code Ann. § 49-5-417, where the General Assembly has granted the Board the express statutory authority to revoke an educator's license without a hearing *only* when an educator has been convicted of certain offenses, none of which are applicable here.

Rule 0520-02-03-.09 are *ultra vires*, null and void because the Board had no statutory authority to promulgate Rule 0520-02-03-.09;

2. That the Board has no authority to administratively revoke, suspend or formally reprimand an educator's license;
3. That before instituting agency proceedings against an educator's license, the Board must give notice under Tenn. Code Ann. § 4-5-320(c) and provide the educator an opportunity to show compliance with all lawful requirements for the retention of the license;
4. That the Board may undertake no further proceedings to revoke an educator's license if the educator shows compliance with all lawful requirements for retention of her license; and
5. That if the educator does not show compliance with all lawful requirements for retention of her license, the Board must initiate agency proceedings in accordance with the UAPA and Tenn. Comp. R. & Regs. 1360-04-01 in order to proceed with a proposed revocation of the educator's license.

Dated this 12th day of October, 2017.



Erin R. Knight
809 Winding Hills Lane
Hixson, Tennessee 37343
Petitioner



Richard L. Colbert, No. 9397
Nina M. Eiler, No. 33457
KAY GRIFFIN, PLLC
222 2nd Ave. N., Suite 340-M
Nashville, Tennessee 37201
(615) 742-4800

Attorneys for Petitioner



BILL HASLAM
GOVERNOR

DR. SARA L. HEYBURN
EXECUTIVE DIRECTOR

TENNESSEE
STATE BOARD OF EDUCATION
1ST FLOOR, ANDREW JOHNSON TOWER
710 JAMES ROBERTSON PARKWAY
NASHVILLE, TN 37243-1050
(615) 741-2966 (615) 741-0371 fax
www.tn.gov/sbe

May 26, 2017

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Erin Knight
809 Winding Hills Lane
Hixson, Tennessee 37343

RE: Tennessee Educator License #000184524

Dear Ms. Knight:

I represent the Tennessee State Board of Education ("SBE") in matters concerning educator licensing pursuant to Tenn. Code Ann. § 49-1-302(a)(5)(A), which charges the SBE with the discipline of educators who violate state law and rules and regulations. Pursuant to Rule 0520-02-03-.09(2)(c) of the *Rules of the State Board of Education*, your Tennessee educator license is subject to revocation for being on school premises during school hours under the influence of alcohol. The Board proposes to revoke your educator license.

Furthermore, pursuant to Rule 0520-02-03-.09(4) of the *Rules of the State Board of Education*, you are entitled to a hearing before the Board may take such action. Please advise me **in writing and within thirty (30) days of the date you receive this letter**, whether you wish to request a hearing. If I do not receive your written request for a hearing within the time allotted, I will recommend that the Board administratively revoke your educator license at its next regularly scheduled meeting. A copy of Rule 0520-02-03-.09 is enclosed.

Sincerely,

Brittani C. Kendrick
Staff Attorney

Enclosure

cc: Ms. Brooke Olson, Office of Teacher Licensing

