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Opinion No. 05-112

Activation of Tennessee State Guard and Members' Liability

QUESTIONS

1. May the governor's authority to activate, control, and supervise the Tennessee state guard be delegated to the adjutant general?
2. May members of the Tennessee state guard be considered to be on active duty while they are in a non-paid status, for the purposes of determining eligibility for workers' compensation benefits or immunity from suit?
3. May members of the Tennessee state guard be registered as volunteers under Tenn. Code Ann. § 8-42-101(3)(B) and be immune from suit, although not eligible for workers' compensation benefits?

OPINIONS

1. Yes, the governor may delegate his authority to activate, supervise and control the Tennessee state guard to the adjutant general.
2. No, Tennessee state guard members may not be considered to be on active duty while they are in a non-paid status for the purposes of determining eligibility for worker's compensation benefits or immunity from suit.
3. Yes, Tennessee state guard members may be registered as volunteers for the purposes of determining eligibility for immunity from suit.

ANALYSIS

1. The governor is the commander in chief of the Tennessee state guard. Tenn. Const. art. III, § 5. *See also* Tenn. Code Ann. § 58-1-105. As the commander in chief, the governor is statutorily granted certain powers and duties, including the authority to activate, control, and supervise the Tennessee state guard. Tenn. Code Ann. §§ 58-1-105, 58-1-106, 58-1-401, 58-1-405, and 58-1-408. The governor may only delegate such discretionary duties to the adjutant general if authorized to do so by statute. 63C Am. Jur. 2d *Public Officers and Employees* § 235 (1997); 67 C.J.S. *Officers* §§ 194, 201 (1978); *Nelms v. Civil Service Comm'n*, 220 N.W.2d 300, 320 (Minn. 1974); *Steele v. Gray*, 219 N.W.2d 312, 316 (Wis. 1974), *modified on other grounds*, 223 N.W.2d 614 (Wis. 1992).

The governor can activate the Tennessee state guard pursuant to Tenn. Code Ann. §§ 58-1-106 (a) and (c), which states:

(a) The governor shall have the power, in case of invasion, disaster, insurrection, riot, attack or combination to oppose the enforcement of the law by force and violence, or imminent danger thereof, or other grave emergency, to order into the active service of the state . . . the Tennessee state guard.

* * *

(c) As an alternative and cumulative procedure, upon the request of the governing body of a city or county, and its representation, by resolution duly and regularly adopted, that there is a breakdown of law and order, a grievous breach of the peace, a riot, resistance to process of this state, or disaster, or imminent danger thereof, the governor may order into the active service of the state . . . the Tennessee state guard.

The situations enumerated by Tenn. Code Ann. § 58-1-106 (a) and (c) in which the Tennessee state guard may be activated fit the general definition of an "emergency" as set out in Tenn. Code Ann. § 58-2-101 (6).¹ During an emergency, "the governor is commander in chief of . . . forces available for emergency duty." Tenn. Code Ann. § 58-2-107 (d). He is authorized to "delegate or assign command authority by prior arrangement embodied in appropriate executive orders or rules [or] by orders issued at the time of the emergency." *Id.*

The governor is authorized to establish a military staff, including the adjutant general. Tenn. Code Ann. § 58-1-110. The adjutant general "shall be the executive head of the military department and commanding general of the military forces of the state." Tenn. Code Ann. § 58-1-114. He serves "at the pleasure of the governor" (§ 58-1-115) and "shall further perform such duties . . . as

¹The statute defines "emergency" to mean, "an occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property." Tenn. Code Ann. § 58-2-101 (6).

may be designated by the governor." Tenn. Code Ann. § 58-1-116 (b). The adjutant general has statutory authority to "direct the planning and employment of the military forces of the state in carrying out their state military mission." Tenn. Code Ann. § 58-1-116. We think the language of these statutes, particularly Tenn. Code Ann. § 58-1-116 (b), authorizes the governor to delegate his authority to activate, control, and supervise the Tennessee state guard to the adjutant general.

The adjutant general also has the authority pursuant to Tenn. Code Ann. § 58-1-410 to supervise and control the state guard, with the governor's approval, when it is not activated. The statute provides:

During such time as the state guard is not activated, the adjutant general is authorized and empowered, on the approval of the governor, to set up and maintain a reserve organization of the state guard upon a voluntary basis under such system as to the adjutant general may seem most feasible in order to provide means for the creation of an armed force in case the national guard of the state be again called into federal service.

Tenn. Code Ann. § 58-1-410.

2. As this Office has previously opined, the Tennessee state guard, as an entity, enjoys the sovereign immunity of the State of Tennessee during active state duty and in the course of that duty. *See* Op. Tenn. Att'y Gen. No. 02-011 (January 10, 2002). Individual members of the state guard may also be immune under the same conditions. *Id.* In addition, members of the Tennessee state guard who incur injury while on active duty and in the course of that duty may be eligible for workers' compensation benefits. *Id.* However, Tennessee state guard members can never be considered to be on active duty in a non-paid status for the purpose of determining workers' compensation eligibility or immunity from suit.

In order to be considered an employee for workers' compensation purposes, it is necessary to receive valuable consideration. *Black v. Dance*, 643 S.W.2d 654 (Tenn. 1982). *See also Hill v. King*, 663 S.W.2d 435 (Tenn. App. 1985) (Court found that unpaid deputy sheriff, who received only a badge, uniform, pistol, and expenses, is not eligible for workers' compensation benefits). Therefore, the Tennessee state guard cannot be considered to be on active duty while in a non-paid status for purposes of determining eligibility for workers' compensation benefits.

The governor's ability to call the Tennessee state guard to active state service is addressed in Tenn. Code Ann. § 58-1-106. Compensation for the state guard when called to active state service is addressed in Tenn. Code Ann. § 58-1-411:

Members of the state guard when assigned to state military duty by the commander in chief, or when ordered to active state service pursuant to § 58-1-106, shall be paid from the funds appropriated, or otherwise legally made available to the military department, at the

rate of pay and allowances as prescribed by the adjutant general.

Because Tenn. Code Ann. § 58-1-102 (16) defines "shall," as used in this chapter, in a mandatory sense, the Tennessee state guard is in a paid status when called to active state duty. Therefore, when in a non-paid status, state guard members enjoy neither immunity from suit, nor workers' compensation benefits.

3. It is possible, though, to register Tennessee state guard members as volunteers, pursuant to Tenn. Code Ann. § 8-42-101 (3) (B), thereby classifying them as "state employees" for immunity purposes. Tenn. Code Ann. § 58-1-401 states:

Whenever the president of the United States shall call any part of the national guard of this state into active federal service, the governor is authorized to enlist, organize, maintain, equip and discipline a volunteer defense force, other than the national guard, to be known as the Tennessee state guard.

In addition, Tenn. Code Ann. § 58-1-410 provides:

During such time as the state guard is not activated, the adjutant general is authorized and empowered, on the approval of the governor, to set up and maintain a reserve organization of the state guard upon a voluntary basis under such system as to the adjutant general may seem most feasible in order to provide means for the creation of an armed force in case the national guard of the state be again called into federal service.

When a department or agency head designates any person as a participant in a volunteer program, this person is considered a state employee. Tenn. Code Ann. § 8-42-101 (3) (B). "It is the duty of each agency and department to register with the board of claims the names of all persons participating in a volunteer program authorized by such department or agency head." Tenn. Code Ann. § 8-42-101 (3) (B).

State employees enjoy immunity from state law tort claims and some qualified federal immunity. *See* Op. Tenn. Att'y Gen. No. 02-011. Because volunteers are considered state employees for these purposes according to Tenn. Code Ann. § 8-42-101 (3) (B), Tennessee state guard members, registered as volunteers while not on active duty, will be afforded immunity within the scope of their volunteer duties. However, they will not enjoy workers' compensation benefits. *Id.*

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