

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207

NASHVILLE, TENNESSEE 37202

December 28, 2010

Opinion No. 10-119

Contract between County-wide Fire Department and Nonprofit Fire Service

QUESTIONS

1. Under Tenn. Code Ann. §§ 5-17-101, *et seq.*, a county may form a county-wide fire department and may contract with existing fire departments to provide fire protection services in any area of the county. Tenn. Code Ann. § 5-17-102(a)(7)(B). If a county has entered into a contract with a non-profit volunteer fire department that is currently recognized by the State Fire Marshal's office under Tenn. Code Ann. §§ 68-102-301, *et seq.*, and that has not satisfied the provisions of the contract with the county, can the county terminate the contract and make other provisions to provide fire protection coverage to their contracted area?

2. If the county terminates its contract with a non-profit volunteer fire department, what effect would the termination have on "recognition" of the department by the State Fire Marshal's office?

3. Does a county-wide fire department created by county resolution after the date of the Fire Department Recognition Act, Tenn. Code Ann. §§ 68-102-301, *et seq.*, take precedence over existing fire departments within the unincorporated portions of the county—that is, can a county force an existing volunteer fire department out of business if it does not choose to become part of a newly-formed county-wide fire department?

OPINIONS

1. Tenn. Code Ann. § 5-17-102 (a) provides that a county fire department "is empowered to do all things necessary to provide coordinated fire protection to all areas of the county." This is a broad grant of authority and logically includes terminating a fire service agreement with a non-profit fire department that is not meeting its obligations to provide service under the contract. But, absent a threat to community safety, the county's right to terminate would still be governed by the terms of the contract itself. A county fire department has no legal obligation to contract with a non-profit fire department, and may make other arrangements to provide service to the area previously covered by the private department before the contract was cancelled.

2. Rules promulgated under this statute do not address this issue. A county may inform the State Fire Marshal's Office that it has terminated a fire service agreement, but nothing

requires the Fire Marshal to revoke or refuse to renew a fire department's certificate of recognition because of such termination.

3. No statute expressly authorizes a county-wide fire department to prevent a private fire department from continuing to operate within the county. This authority probably falls outside the county-wide fire department's statutory power to "do all things necessary to provide coordinated fire protection to all areas of the county" under Tenn. Code Ann. § 5-17-102(a).

ANALYSIS

This opinion concerns two different statutory schemes. First, under Tenn. Code Ann. §§ 68-102-301, *et seq.*, no city, county, or private entity may operate as a "fire department" unless it has been authorized to do so by the State Fire Marshal's Office. Tenn. Code Ann. § 68-102-303. The term "fire department" means a "department of a municipality, county, or political subdivision, or an organization, agency, or entity that offers its services, for or without pay, for the purpose of suppressing fires, performing rescue services, or for other emergency response purposes." Tenn. Code Ann. § 68-102-302. The definition does not include law enforcement agencies, emergency medical agencies licensed by the Tennessee Emergency Medical Services Board, and rescue squads that do not provide fire protection. *Id.*

Thus, in general, either a public or a private entity must be recognized as a "fire department" by the State Fire Marshal's Office before operating a fire suppression service. Tenn. Code Ann. § 68-102-303 provides in relevant part that, "[t]he state fire marshal, in consultation with the Tennessee Fire Chiefs Association (TFCA), shall promulgate rules and regulations pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, relative to the standards and qualifications for becoming *and remaining* a fire department." (emphasis added). The Commissioner of Commerce and Insurance is the State Fire Marshal and supervises and directs the activities of the Fire Prevention Division. Tenn. Code Ann. § 68-102-112.

Under Tenn. Code Ann. § 68-102-306(a), no new fire department may be established or recognized within Tennessee without the approval of the local elected governing body. This approval must specify the geographical territory to be covered by the new fire department. *Id.* Under regulations promulgated by the Tennessee Department of Commerce and Insurance, Division of Fire Prevention, these requirements apply after July 1, 2003, and before a new fire department is established or recognized within Tennessee. Tenn. Comp. R. & Regs. 0780-2-20-.04(d). A certificate of recognition from the State Fire Marshal's Office must be renewed every three years. Tenn. Code Ann. § 68-102-304. A recognized fire department must submit its renewal application at least thirty (30) days before the expiration of the department's certificate of recognition. Tenn. Comp. R. & Regs. 0780-2-20-.06(2).

Second, under Tenn. Code Ann. §§ 5-17-101, *et seq.*, a county may create a county-wide fire department. Under Tenn. Code Ann. § 5-17-102(a)(7):

With the specific exceptions relating to metropolitan governments provided for in this section, the county-wide fire department is empowered to do ***all things***

necessary to provide coordinated fire protection to all areas of the county,
including, but not limited to:

* * * *

- (7) Enter into and perform all necessary contracts, including, but not limited to:
- (A) Contracts for the supply of water where necessary for fire protection;
 - (B) Contract to have existing fire departments and others provide fire protection services in any area of the county, including, but not limited to:
 - (i) Contracts with incorporated towns and utility districts to provide such service within or without their corporate limits;
 - (ii) Contracts to provide fire protection services for any city, town, district, or any part thereof within the county;
 - (C) Contracts to provide training and maintenance;
 - (D) Contracts to provide and be provided all special service functions, such as arson investigation, inspection, and emergency ambulance and rescue services.

(emphasis added).

1. Cancellation of Existing Contracts

Tenn. Code Ann. § 5-17-101(e) provides:

Any county choosing to create a county-wide fire district as authorized by this section, may, with the approval of the local legislative body, mandate that all interlocal agreements and contracts with providers for services permitted under this section contain performance based criteria designed to ensure timely response and effective services, the exact methodology of which is to be determined by local ordinance.

The request asks whether a county-wide fire department may terminate a contract with a non-profit fire department that is not complying with the provisions of its contract with the county.

Tenn. Code Ann. § 5-17-102 (a) provides that a county-wide fire department “is empowered to do all things necessary to provide coordinated fire protection to all areas of the county.” This is a broad grant of authority, and logically includes terminating a fire service agreement with a nonprofit fire department that is not meeting its obligations to provide service under the contract. But, absent a threat to community safety, the county’s right to terminate would still be governed by the terms of the contract itself. A county fire department has no legal obligation to contract with a non-profit fire department, and may make other arrangements to provide service to the area previously covered by the non-profit before the contract was cancelled.

2. County Authority to Rescind Approval under Tenn. Code Ann. § 68-102-306(a)

The second question is whether, once a county cancels the existing contract, the non-profit fire department would still be “recognized” under Tenn. Code Ann. §§ 68-102-301, *et seq.* Under Tenn. Code Ann. § 68-102-306(a), no new fire department may be created after July 1, 2003 unless the local elected governing body approves it. Its approval must specify the geographical territory to be covered by the new fire department. Neither the statute nor the rules promulgated by the Commissioner of Commerce and Insurance address this issue. But the county’s decision to cancel an existing contract with a non-profit fire department, by itself, would not affect recognition of that fire department by the State Fire Marshal under Tenn. Code Ann. §§ 68-102-301, *et seq.*

The question then becomes whether a county may rescind its approval of a non-profit fire department it previously approved under Tenn. Code Ann. § 68-102-306(a). The statute does not address this issue. Rules of the Commissioner of Commerce and Insurance promulgated under this statute recognize that the county or city may change the territory within which a new fire department is authorized to operate. Rule 0780-2-20-.02(3) of the Tennessee Comp. R. & Regs. provides:

All new fire departments formed after July 1, 2003 shall notify the State Fire Marshal’s Office within thirty (30) days of any **change** in geographical territory to be covered by such fire department. The fire department shall provide proof of the approval of the local elected governing body of any **change** in territorial boundaries. The fire department shall provide the State Fire Marshal’s Office with a written description or geographic description of territorial boundaries.

(emphasis added). But the rules do not specify a procedure by which a county may rescind its initial approval of a fire department’s authority to operate in the county. As cited above, Tenn. Code Ann. § 68-102-303 provides in relevant part that, “[t]he state fire marshal, in consultation with the Tennessee Fire Chief Association (TFCA), shall promulgate rules and regulations pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, relative to the standards and qualifications for becoming *and remaining* a fire department.” (emphasis added). This statute suggests that the Commissioner of Commerce and Insurance may, by rule, address circumstances under which the Fire Marshal’s Office might refuse to recognize a fire department, revoke its recognition of the fire department, or refuse to renew the fire department’s certificate. Absent such rules, however, the Fire Marshal is not bound by the county’s termination of a fire service provider.

3. Preventing Existing Fire Departments from Operating in the County

The last question is whether a newly created county-wide fire department would have priority over other fire departments already operating in the county. The request asks whether the county-wide fire department may force these fire departments out of business if they choose not to become part of the county-wide fire department. We interpret this to inquire whether the county, upon forming a county-wide fire department, may prevent a privately owned and duly recognized fire department from operating within the county. No statute expressly authorizes a

county-wide fire department to prevent a private fire department from continuing to operate within the county. Further, this authority probably falls outside the county-wide fire department's statutory power to "do all things necessary to provide coordinated fire protection to all areas of the county" under Tenn. Code Ann. § 5-17-102(a). The term "coordinated fire protection" suggests that the statute empowers a county-wide fire department to ensure that existing fire services work together rather than eliminating some fire departments entirely.

ROBERT E. COOPER, JR.
Attorney General and Reporter

CHARLES L. LEWIS
Deputy Attorney General

ANN LOUISE VIX
Senior Counsel

Requested by:

The Honorable Judd Matheny
State Representative
205 War Memorial Building
Nashville, Tennessee 37243