

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

Opinion No. 04-100

June 24, 2004

Liability of Statewide Independent Living Council

QUESTIONS

1. Are members of the Statewide Independent Living Council immune from liability in a lawsuit in state court, in the same manner as state employees in the performance of their duties, pursuant to Tenn. Code Ann. § 9-8-307, generally, and pursuant to Tenn. Code Ann. § 9-8-307(h), more specifically?

2. If the answer to Question #1 is “yes,” would the Attorney General’s Office authorize legal representation to members of the Council that would be provided by the State of Tennessee?

3. If the members of the Council are deemed “state employees” under Question #1 for purposes of liability and legal representation, and if they are sued in federal court instead of state court, would the Attorney General’s Office authorize legal representation that would be provided by the State of Tennessee, and would any judgments awarded by a federal court be paid by the State of Tennessee in the event a judgment is returned against any members of the Council? If so, under what circumstances would representation be provided and judgments be paid by the State of Tennessee in a federal lawsuit against Council members?

4. If the answer to Question #1 is “no,” would the members of the Council who are also members of the Board of the non-profit corporation be immune from suit in state court under the provisions of Tenn. Code Ann. § 48-58-601(c) or any other provision of law?

OPINIONS

1. Members of the SILC are not “state employees” by reason of their appointment, although some SILC members may otherwise be employees of the State. We have found no statute that expressly defines members of the Statewide Independent Living Council as state employees entitled to immunity from liability under Tenn. Code Ann. § 9-8-307(h). Further, 29 U.S.C.A. § 796d requires the Council to be composed of members, a majority of whom are not employed by any state agency or center for independent living.

2. While Tenn. Code Ann. § 9-8-307(h) applies to those members of the SILC who are otherwise state employees, the specific facts and circumstances surrounding an issue may control whether representation would be provided or approved by the Attorney General and Reporter under Tenn. Code Ann. § 8-6-109. In any circumstance, only those members who are otherwise state employees would be eligible for representation.

3. Members of the SILC are not deemed state employees by reason of their appointment alone. The facts and circumstances surrounding an issue may control whether representation for those members who are state employees would be provided or approved by the Attorney General under Tenn. Code Ann. § 8-6-109 in litigation in federal court. Further, we have found no statute that expressly authorizes payment of any judgment awarded by federal court against either general members of the Statewide Independent Living Council or the Council in its corporate capacity. For those members who are otherwise state employees, Tenn. Code Ann. § 9-8-112 controls payment by the State of any adverse judgments against them.

4. Yes. Tenn. Code Ann. § 48-58-601(c) would apply to the full extent of that statute to provide immunity from suit in state courts for members of the Council who are also members of the Board of the non-profit corporation.

ANALYSIS

1. You have asked whether members of the Statewide Independent Living Council (“SILC”) are immune from liability in a lawsuit in state court, in the same manner as state employees in the performance of their duties, pursuant to Tenn. Code Ann. § 9-8-307, generally, and pursuant to Tenn. Code Ann. § 9-8-307(h).

Tenn. Code Ann. § 9-8-307 vests the Tennessee Claims Commission with exclusive jurisdiction over all monetary claims against the State for certain specified categories of acts or omissions of state employees. State officers and employees are absolutely immune from liability for acts or omissions within the scope of their employment, so long as the act or omission was not willful, malicious, criminal, or done for personal gain. Tenn. Code Ann. § 9-8-307(d) and (h). Tenn. Code Ann. § 8-42-101(3)(A) defines “state employee” to include any state official, any person “employed in the service of and whose compensation is payable by the state, or any person . . . employed by the state whose compensation is paid in whole or in part from federal funds.” “State employee” is further defined to include several specific classes of individuals. Tenn. Code Ann. § 8-42-101(3). Most of the members of the SILC do not fall within any part of this definition.

As you note in your opinion request, the SILC is a non-profit corporation formed on January 1, 1996, to comply with federal requirements to establish a statewide living council in order for the State to be eligible to receive financial assistance from the federal government for independent living services. 29 U.S.C.A. § 796d(a); 34 C.F.R. § 364.21(a)(1). In Tennessee, this funding is used to operate the Department of Human Services’ Vocational Rehabilitation Program. The SILC exists

by virtue of federal law, not state law. Federal law specifically prohibits the SILC's establishment as an entity within a state agency and requires that the SILC be independent of any state agency. 29 U.S.C.A. § 796d(a); 34 C.F.R. § 364.21(a)(2). The SILC is responsible for developing the state plan in conjunction with the State and for monitoring, reviewing, and evaluating the implementation of that plan. 29 U.S.C.A. § 796d(c); 34 C.F.R. § 364.21(g). Federal law requires that members of the SILC be appointed by the Governor with the input of organizations representing or interested in individuals with disabilities. 29 U.S.C.A. § 796d(b); 34 C.F.R. § 364.21(b). Federal law also dictates the composition of the SILC. *Id.* The SILC must include "at least one director of a center for independent living chosen by the directors of centers for independent living within the State." 29 U.S.C.A. § 796d(b)(2)(A); 34 C.F.R. § 364.21(b)(2)(i)(A). The SILC must include, as nonvoting members, a representative from the Tennessee Department of Human Services and "representatives from other State agencies that provide services to individuals with disabilities." 29 U.S.C.A. § 796d(b)(2)(B); 34 C.F.R. § 364.21(b)(2)(i)(B). The SILC may also include as members "other representatives from centers for independent living; parents and guardians of individuals with disabilities;" advocates; representatives from private businesses; and representatives from organizations that serve individuals with disabilities. 29 U.S.C.A. § 796d(b)(3); 34 C.F.R. § 364.21(b)(2)(ii). SILC membership must "provide statewide representation . . . [of] a broad range of individuals with disabilities . . ." and must be "knowledgeable about centers and independent living services." 29 U.S.C.A. § 796d(b)(4)(A); 34 C.F.R. § 364.21(c). A majority of the voting members of the SILC must be individuals with disabilities who are not employed by any state agency or center for independent living. 29 U.S.C.A. § 796d(b)(4)(A)(iv) and (B); 34 C.F.R. § 364.21(b)(2)(iii) and (d). SILC members generally serve three-year terms and may not serve more than two consecutive full terms. 29 U.S.C.A. § 796d(b)(6); 34 C.F.R. § 364.21(f). The SILC is permitted to reimburse members' expenses incurred to attend meetings and perform SILC duties. 29 U.S.C.A. § 796d(f); 34 C.F.R. § 364.21(k). The SILC may also compensate members for each day spent performing SILC duties if the member is not otherwise employed or if performing SILC duties causes the member to forfeit income from a job. *Id.*

Based on the foregoing, and inasmuch as federal law requires that the SILC be independent of the State and that the majority of its members not be state employees in order to qualify for federal funding, it is the opinion of this office that only those SILC members actually employed by the State and being compensated by the State for the performance of their SILC duties in the course of their employment would be found by any court or administrative tribunal to be state employees subject to the absolute immunity provisions of Tenn. Code Ann. § 9-8-307(d) and (h).

2. You also asked whether, if the answer to Question #1 were "yes," the Attorney General's Office would authorize legal representation to members of the Council that would be provided by the State of Tennessee. With regard to those SILC members who might be considered state officials or employees subject to the absolute immunity provisions of Tenn. Code Ann. § 9-8-307(d) and (h), the specific facts and circumstances surrounding the state official or employee's request for representation will control whether representation would be provided or approved by the Attorney General and Reporter. As discussed above, state officers and employees enjoy absolute immunity from liability only for acts or omissions within the scope of their employment and only

if the act or omission was not willful, malicious, criminal, or done for personal gain. Tenn. Code Ann. § 9-8-307(d) and (h).

In addition to his duty to represent the State of Tennessee and its employees, Tenn. Code Ann. § 8-6-109(b)(1) confers upon the Attorney General and Reporter the authority to conduct the trial and direction of civil litigated matters and administrative proceedings in which the State of Tennessee or any department thereof may be interested. A broad discretion is vested in the Attorney General and Reporter in determining what matters may, or may not, be of interest to the people generally. *See State ex rel. Inman v. Brock*, 622 S.W.2d 36, 41-42 (Tenn. 1981). *See also* Op. Tenn. Att’y Gen. No. 88-153 (August 24, 1988).

However, the SILC is not a state agency. While broad discretion is vested in the Attorney General and Reporter under Tenn. Code Ann. § 8-6-109(b)(1), only those members who are actually state employees conducting state business would be eligible for representation by this office. The discretion of the Attorney General and Reporter is necessarily exercised on a case-by-case basis.

3. You also asked whether, if the members of the Council were deemed “state employees” under Question #1 for purposes of liability and legal representation, and if they were sued in federal court instead of state court, the Attorney General’s Office would authorize legal representation that would be provided by the State of Tennessee, and whether any judgments awarded by a federal court would be paid by the State of Tennessee in the event a judgment is returned against any members of the Council.

While members of the Council are not deemed state employees by their appointment alone, the Attorney General and Reporter may determine to provide representation for those members who are otherwise state employees conducting state business, even if the suit is in federal court. Tenn. Code Ann. § 8-6-109. Under those circumstances alluded to above, such representation may be provided. In all cases where the interest of the State requires additional counsel to the Attorney General and Reporter, the Governor is authorized to employ such counsel. Tenn. Code Ann. § 8-6-106.

For those members of the SILC who are also state employees apart from their appointment, Tenn. Code Ann. § 9-8-112 would determine the extent to which an adverse judgment would be paid by the State. In part, that statute provides:

(a) The board of claims is authorized to pay final judgments for state employees, as defined in § 8-42-101, for any damages, including interest thereon, which are awarded in a final judgment in a civil lawsuit against the employee in a court of competent jurisdiction where it is determined by the board that the incident on which such damages were awarded occurred when the employee was acting in good faith within the scope of such employee's official duty and under apparent lawful authority or orders.

4. You asked whether, if the answer to Question #1 were “no,” the members of the Council who were also members of the Board of the non-profit corporation would be immune from suit in state court under the provisions of Tenn. Code Ann. § 48-58-601(c) or any other provision of law.

Tenn. Code Ann. § 48-58-601(c) provides that:

[a]ll directors, trustees, or members of the governing bodies of nonprofit cooperatives, corporations, clubs, associations and organizations described in subsection (d), whether compensated or not, shall be immune from suit arising from the conduct of the affairs of such cooperatives, corporations, clubs, associations or organizations. Such immunity from suit shall be removed when such conduct amounts to willful, wanton or gross negligence.

The SILC was incorporated in 1996 as a non-profit corporation. According to information available from the Secretary of State’s website, the corporation is presently in good standing. Tenn. Code Ann. § 48-58-601(d) lists the categories of entities to which this statutory immunity will apply. If the SILC is one of the entities so defined, Tenn. Code Ann. § 48-58-601(c) would be applicable.

We have not found any other provision of law that would provide immunity under the circumstances of your inquiry.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

RICHARD M. MURRELL
Assistant Attorney General

Requested by:

Virginia T. Lodge, Commissioner
Department of Human Services
Citizens Plaza Building
400 Deaderick Street
Nashville, TN 37248