

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 02-035

Correctional Officers Carrying Firearms While Off Duty (Revised)

QUESTIONS

1. Tenn. Code Ann. § 39-17-1350(d) provides that “vested correctional officers” may carry firearms while off duty pursuant to Tenn. Code Ann. § 39-17-1350(a). Does this statute authorize off duty carrying of firearms by correctional officers who are vested with limited law enforcement authority pursuant to Tenn. Code Ann. §4-3-609, by all correctional officers who are vested in the Tennessee Consolidated Retirement System, or by some other class of correctional officers?

2. Does Tenn. Code Ann. § 39-17-1350(d) authorize security personnel other than correctional officers, who are employed by the Department of Correction, to carry firearms while off duty?

OPINIONS

1. Tenn. Code Ann. § 39-17-1351(d) does not authorize the off duty carrying of firearms by correctional officers who are vested with limited law enforcement authority under Tenn. Code Ann. §4-3-609 or by all officers who are vested in the Tennessee Consolidated Retirement system. The statute authorizes only correctional officers who have five or more years of service as correctional officers with the Department of Correction to carry firearms while off duty.

2. No. Tenn. Code Ann. § 39-17-1350(d) does not authorize any Department of Correction security personnel other than correctional officers who have five or more years of service as correctional officers with the Department of Correction to carry firearms while off duty.

ANALYSIS

1. Vested Correctional Officers

A. Introduction.

The issue whether Tenn. Code Ann. § 39-17-1351(d), as amended by Chapter 175 of the 2001 Public Acts, authorizes the off duty carrying of firearms by security personnel employed by the Department

of Correction, other than correctional officers, was originally addressed in Op. Tenn. Atty. Gen. No. 01-126. In addressing this issue, the office examined the Rules and job specifications for various employee classifications of the Department of Correction along with Tenn. Code Ann. § 4-3-609. Based on analysis of the language of these sources, this office concluded that Chapter 175 authorized the off duty carrying of firearms only by correctional officers, not by other security personnel. The office further concluded that the only correctional officers who were authorized to carry off duty were those who are vested with limited law enforcement authority by the Commissioner of Correction pursuant to and consistent with the requirements of Tenn Code Ann. § 4-3-609.

After the release of Op. Tenn. Atty. Gen. No. 01-126, the Department of Correction asked this office to specifically address the question whether Chapter 175 authorized the off duty carrying of firearms by correctional officers who have vested in the state retirement system. To address this question, it is necessary to reexamine the rationale of Opinion 01-126.

The opinion recognized that the term “vested correctional officer” is not defined in Chapter 175. The opinion noted that the term “vested” appeared to be used in only one other statute that concerned the Department of Correction.¹ That statute, Tenn. Code Ann. §4-3-609, generally provides for certain correctional officers, upon designation by the Commissioner, to be “vested” with limited law enforcement authority while exercising specific departmental functions spelled out in the statute.² The opinion reasoned that the ambiguity in the term “vested correctional officer” could be resolved by incorporating the meaning of the term “vested” as used in Tenn. Code Ann. § 4-3-609. Since that construction initially appeared to resolve the ambiguity, the opinion did not discuss the legislative history of Chapter 175. The Department has specifically asked whether the term “vested” as used in Chapter 175 could be construed to authorize the off duty carrying of firearms by all correctional officers who are vested in the state retirement system.

Such a construction is plausible. For example, the term is used in statutes governing retirement benefits. In that context, a state employee becomes vested in the state retirement system after five years of service. Tenn. Code Ann. § 8-5-301. The Department has urged consideration of the legislative history of Chapter 175 in considering whether “vested” has the same meaning in Chapter 175 as in Tenn. Code Ann. §4-3-609, or means vested in the state retirement system.

There is some case law to the effect that extrinsic aids to statutory construction, such as legislative

¹It is appropriate, in construing a statute, to consider the legislature’s use of the same terms in other parts of the code. *See State v. Levandowski*, 955 S.W.2d 603, 605 (Tenn. 1997) (comparing use of term “report” in false report statute, Tenn. Code Ann. §39-16-502(a)(1) with use of that term in other parts of title 39).

²The statute authorizes the carrying of firearms by such designated personnel while they are on the grounds of institutions while under the supervision of the Department, while transporting inmates between institutions, while pursuing escapees and while assisting local law enforcement in the apprehension of escapees.

history, should not be consulted when the language of related statutes can resolve the ambiguity.³ According to these cases, the general rule is that only when the language is “ambiguous and does not yield a clear interpretation” may legislative history be consulted.⁴ On the other hand, however, there is also case law supporting the proposition that even a small degree of ambiguity can support consideration of legislative history.⁵ In addition, ambiguity is often in the eye of the beholder.⁶ In view of these authorities, and on

³ For example, in *Bradford Furniture Co. v. Storey*, 910 S.W.2d 857 (Tenn. 1995), the Court appears to have used such an approach:

If the intent can be determined from the plain language of the provision read in the context of the entire statutory scheme, *we must conclude our inquiry there*. See *Carson Creek Vacation Resorts, Inc. v. Department of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); *Wilson v. Johnson County*, 879 S.W.2d 807, 809 (Tenn. 1994); *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991).

Id., at 859(emphasis added). Although the Court stated that its holding on the case was based on the statutory language in the context of the provision and the “sparse” legislative history, its reasoning indicates that language based aids of construction provided the primary support for its ruling. See *Id.*, at 861.

⁴

Where there is no ambiguity in the language of an act, comments of legislators, or even sponsors of the legislation, before its passage are not effective to change the clear meaning of the language of the act.

D. Canale & Co. v. Celauro, 765 S.W.2d 736, 738 (Tenn. 1989) (plain language of Sales Tax Act included transfer of vehicles from a parent corporation to a wholly owned subsidiary as a taxable transfer, even before the amendment specifically including such transfers). See also, *Bradford*, at 859, citing *Carr v. Ford*, 833 S.W.2d 68, 69-70(Tenn. 1992); *Baker v. Promark Products West, Inc.*, 692 S.W.2d 844, 847 (Tenn. 1985).

⁵ Sutherland’s treatise on statutory construction suggests that although courts might state that legislative history should be consulted only when a statute is ambiguous, they often do consult legislative history when statutory language is relatively unambiguous. 2A N. Singer, ed., *Sutherland on Statutes and Statutory Construction*, §§ 45-48. (6th ed. 2000).

In *Carter v. State*, 952 S.W.2d 417, 419 (Tenn. 1997), the Court, in construing the limitations provision in Tennessee’s post conviction relief statute, Tenn. Code Ann § 40-30-202, concluded that the phrase “any person having a ground for relief” was vague and looked to the legislative history. In that case, the Court recognized that the phrase could reasonably be interpreted to give it more than one meaning. The court said:

The meaning of the phrase “any person having a ground for relief recognized under this act” is uncertain. The interpretation proffered by the petitioner is that the phrase means any person alleging a constitutional defect in the conviction or sentence, regardless of whether the claim would have been barred under the previous statute of limitations. As the state points out, however, the phrase is just as susceptible of being interpreted to mean any person having a cognizable ground for relief that is not barred by the previous statute of limitations. The mere fact that this phrase is reasonably interpreted either way makes it ambiguous.

Id. Another approach looks to the subject matter of the statute, its objective and scope, the problems it seeks to prevent or correct and the purpose it is intended to accomplish. *Lavin v. Jordan*, 16 S.W.3d 362 (Tenn. 2000). In *Lavin*, the issue before the Court was whether, under Tenn. Code Ann. §§ 37-10-101 through 103, parents could be liable

reconsideration, the office concludes that even after considering other related statutes regarding the meaning of the word “vested” here, there remains a degree of ambiguity sufficient to suggest that the prudent course of action is to consider legislative history.

B. Meaning of the Term “Vested Correctional Officer”

The legislative history of Chapter 175 consists primarily of tape recordings of proceedings related to final passage on the House and Senate Floors. At the start of the House debate on Chapter 175, Representative Buck said the bill means “vested with the state of Tennessee.” During the course of the abbreviated debate on the measure, however, Speaker Nafieh asked about the time period required before “vesting” occurred. Representative Windle, the bill’s sponsor, responded by stating that it took four or five years to vest.⁷ In explaining the significance of the term “vested,” Representative Windle indicated that the purpose of the vesting requirement was to insure that a correctional officer received sufficient firearms training before being authorized to carry a firearm while off duty. Representative Windle explained that by virtue of the vesting requirement, by the time a correctional officer is eligible to carry a firearm off duty, he or she will have received 40 hours of academy instruction and an additional eight hours of firearms training each year through the fifth year of service.

The foregoing legislative history suggests two possible constructions of the term “vested” as used in Chapter 175. One possibility is that the term means vested in the state retirement system. Under that construction, a correctional officer with five or more total years of state service, regardless of where the service took place, would be entitled to carry a firearm while off duty. Another possibility is that the term must be construed together with “correctional officer”, and that the legislature intended the term “vested correctional officer” to mean a correctional officer who has had five or more years of service *as a correctional officer* with the Department of Correction.

The first construction would not accomplish the stated legislative purpose of requiring training and

for unlimited damages for the tortious acts of their children. After reviewing the various provisions in pari materia, the Court determined that the provisions were reasonably susceptible to more than one interpretation and were therefore vague. The Court then looked to other interpretive aids, including the legislative history as shown by the various amendments to the statute which had been made over time.

⁶Compare majority opinion in *State v. Levandowski*, 955 S.W.2d 603, 605 (Tenn. 1997)(“report” includes only written or oral statements initiated by a person) with dissent, 955 S.W.2d at 606 (Drowota, Holder, JJ.)(“report” unambiguously includes both statements initiated by a person, and statements made in response to law enforcement inquiries).

⁷Vesting for retirement purposes requires five years of creditable service, not four. Tenn. Code Ann. § 8-5-301.

experience with firearms before authorizing off-duty carrying.⁸ Such a construction would not allow persons with over four but less than five years of experience as a correctional officer to carry off-duty, but at the same time would permit someone with far less than five years of such experience to carry off-duty so long as that person is in correctional officer status and has vested in the retirement system.

This result would not occur under the second approach. The legislative history, when considered together with the manifest purpose of the amendment, suggests that what the legislature intended was that the term “vested correctional officer” means five or more years of employment as a correctional officer with the Department of Correction.⁹ Taken as a whole, the legislative history indicates that by using the term “vested,” the General Assembly intended to borrow only the five year time period from the retirement statutes, and to use that time period as a minimum period of service as a correctional officer before a correctional officer may carry a firearm while off duty.¹⁰

This conclusion varies from that of previous opinion 01-126, which concluded that only correctional officers vested with peace officer authority under Tenn. code Ann. § 4-3-609 could carry firearms while off duty. Peace officer authority and authority to carry a firearm, though often related, are two different things. In view of the legislative history which shows no intent to link the two, the portion of the previous opinion which states that only officers designated by the commissioner pursuant to section 4-3-609 can carry firearms off duty is withdrawn. The office is of the opinion that all correctional officers who have spent five years in correctional officer status and who have vested in the state retirement system are qualified to carry firearms off duty.

2. Off Duty Carrying of Firearms by Other Employees of the Department of Correction

Consideration of the legislative history of Chapter 175 does not require any change in the original opinion’s conclusion regarding the authority of security personnel other than correctional officers to carry

⁸Vesting in the state retirement system is based on years of creditable state service, as opposed to years of creditable service with any particular department or agency. Thus if the retirement definition of vested were imported whole into Chapter 175, a person having five or more years of state service who becomes employed by the Department of Correction would become immediately eligible to carry a firearm while off duty regardless of whether that person had any previous training or experience with carrying firearms as a correctional officer.

⁹At another point in the discussion, Representative Windle stated that the correctional officers who asked him to sponsor this particular bill thought it was best that a correctional officer had four years of experience with a firearm before being allowed to carry one while off duty. *Id.*, at 3. There was no further explanation concerning the four year period. From the debate as a whole, however, it is likely that someone probably believed, mistakenly, that vesting in the retirement system occurred after four years of service.

¹⁰ The legislative history from the Senate version is consistent with that from the House. In the floor debate on S.B. 1747, the Senate version of the bill, Senator Davis, the bill’s sponsor, addressed a question about the length of service. He said, in response to a question from Senator Fowler, that a correctional officer with one or two years of experience would not be allowed to carry a firearm while off duty. That person would have to work as a correctional officer for at least five years before he or she would be allowed to do so.

firearms while off duty. Under canons of statutory construction, the express mention of one subject in a statute implies the exclusion of others that are not mentioned. *Penley v. Honda Motor Co., Ltd.*, 31 S.W.3d 181 (Tenn. 2000). The text of Chapter 175 mentions only vested correctional officers. There is no suggestion in the legislative history that persons other than correctional officers were to be authorized to carry firearms off duty. Therefore nothing in this revised opinion affects the analysis and conclusions concerning the definition of the term “correctional officer” as set forth in the previous opinion.¹¹ Thus, it remains the opinion of this office that Tenn. Code Ann. §39-17-1351(d), as amended by Chapter 175 of the 2001 Public Acts, does not authorize other security employees of the Department of Correction to carry firearms while off duty.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MICHAEL A. MEYER
Assistant Attorney General

Requested by:

Honorable Donal Campbell
Commissioner, Department of Correction
4th Floor, Rachel Jackson Bldg.
Nashville, TN 37243

¹¹In that opinion, the definition of Correctional officer was found by reading Tenn. Code Ann. §§ 41-1-103 and 41-1-116 in conjunction with the Department of Personnel job specifications for correctional officers. From those sources, it was determined that a correctional officer is someone who is employed to perform correctional and certain security functions at a state penal institution involving the custody, transport and rehabilitation of inmates, who has taken the required oath, and who has completed the required academy training. *See*, Op. Tenn. Atty. Gen. No. 01-126, at 2-4.