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Opinion No. 04-060

Authority of Board of Accountancy to Hire or Terminate Executive Director and Board Staff

QUESTION

Whether the State Board of Accountancy has the sole authority to hire and terminate its executive director and all members of the board's staff in positions that require professional qualifications?

OPINION

Yes. The State Board of Accountancy has the sole authority to hire and terminate its executive director and all members of the board's staff in positions that require professional qualifications.

ANALYSIS

Tenn. Code Ann. § 62-1-105(c) states that the State Board of Accountancy shall appoint an Executive Director and shall retain and establish the qualifications and compensation for all staff requiring professional qualifications. The relevant portion of the statute reads as follows:

The board shall have an executive director, who shall be a certified public accountant with an active certificate in the state. The executive director shall be appointed by the board, and compensation for the executive director shall be established by the board. The board shall retain, and establish the qualifications and compensation for investigators and other staff requiring professional qualifications. The executive director and all members of the board's staff requiring professional qualifications shall serve at the pleasure of the board.

On its face, this statute appears to give clear authority to the Board of Accountancy to hire and terminate its Executive Director and other professional staff. A problem occurs, however, when two other statutes are considered. These statutes are Tenn. Code Ann. § 56-1-302, which addresses the duties of the Director of the Division of Regulatory Boards, and Tenn. Code Ann. § 4-3-1304, which addresses the administration of regulatory boards. The pertinent portions of these statutes read as follows:

§ 56-1-302(a). Notwithstanding any contrary provisions of law, except title 55, chapter 17, the director has the power, duty and responsibility to:

- (1) Act as chief administrative officer for each board;
- (2) Employ all consultants, investigators, inspectors, legal counsel and other personnel necessary to staff and carry out the functions of the boards, and assign such personnel in a manner designed to assure their most efficient use, excluding the board of pharmacy

§ 4-3-1304(a). All state regulatory boards are attached to the division of regulatory boards which is authorized to administer all the administrative functions and duties of the regulatory boards, except those discretionary regulatory duties and powers vested by law in the board members. The regulatory boards attached to the division are as follows:

- (1) Auctioneer commission;
- (2) Board for licensing general contractors;
- (3) Board of accountancy

Thus, there appears to be a clear conflict between the provisions of § 62-1-105 and the two statutes quoted above. While § 62-1-105 gives the Board authority to hire its own Executive Director and professional staff, § 56-1-302 gives the Director of the Division of Regulatory Boards the “power, duty and responsibility” to “employ all personnel necessary to staff and carry out the functions of the boards.” It would seem reasonable to infer that the Executive Director and the professional staff of the Board of Accountancy would fit under this category. The conflict is further compounded by § 4-3-1304 which authorizes the Division of Regulatory Boards to “administer all the administrative functions and duties of the regulatory boards.” If the hiring and termination of the Executive Director and the professional staff are considered to be administrative functions, they would thus fall into the domain of the Director of the Division of Regulatory Boards.

When two or more statutes address the same topic, the courts must first try to give both laws effect if at all possible. *Morton v. Mancari*, 417 U.S. 535, 551 (1974), *quoted in Equitable Life Assur. Soc. v. Grosvenor*, 426 F. Supp. 67 (D. Tenn. 1976), *aff’d*, 582 F.2d 1279 (6th Cir. 1976). In the present situation, however, there does not seem to be a reading that would resolve the conflict between the three statutes regarding who has the authority to hire and terminate the Executive Director and the professional staff of the Board of Accountancy. Unless there is a clear showing of an intent to repeal an earlier statute, the only justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945). A subsequent statute can repeal an earlier statute only when the earlier one is expressly repealed or repealed by implication. *Equitable Life v. Grosvenor*, 426 F. Supp. at 71. A statute is expressly repealed when the later law designates the statute repealed in such manner “as to leave no doubt as to what statute is intended.” *Id.*

In this case, § 4-3-1304 was enacted in 1959, and the portion regarding the administrative functions of the Division of Regulatory Boards has not changed since then. Section 56-1-302 was enacted in 1978, and the portion stating that the Director of the Division of Regulatory Boards has the duty to employ the staffs of the regulatory boards also has not changed. Both of these statutes were enacted prior to § 62-1-105, which was passed in 1980 and has been amended several times, most recently in 2002. According to the case law, § 62-1-105 can repeal § 4-3-1304 and § 56-1-302 only if those statutes are expressly repealed or repealed by implication. *Equitable Life v. Grosvenor*, *supra* at 71. It would appear that the portions regarding the hiring of staff in § 4-3-1304 and § 56-1-302 are repealed by implication as they relate to the Executive Director and professional staff of the Board of Accountancy. Section 62-1-105(c) states, “The executive director shall be appointed by the board The board shall retain, and establish the qualifications and compensation for staff requiring professional qualifications. [And they] shall serve at the pleasure of the board.” Since § 62-1-105 is the later enacted statute, it would appear implicitly to repeal § 56-1-302 as it relates to the Executive Director and professional staff of the Board of Accountancy. Furthermore, it would also appear implicitly to repeal § 4-3-1304 as it relates to the Executive Director and professional staff of the Board of Accountancy.

The legislative history of § 62-1-105 further buttresses the conclusion that this statute was intended to override § 56-1-302 and § 4-3-1304 as they apply to the Executive Director and professional staff of the Board of Accountancy. In 1980, when the statute was enacted, the statute read that “[t]he Commissioner of Insurance shall employ a qualified person, to serve as executive secretary to the board of accountancy.” 1980 Tenn. Pub. Acts ch. 518, §5. That statute, as enacted, was similar to § 56-1-302 which provided that the Director of the Division of Regulatory Boards would employ the staff of the boards. Section 62-1-105, as passed in 1980, gave the Commissioner of Insurance the power to employ the executive secretary of the Board of Accountancy. This was essentially the same as § 56-1-302, since the Commissioner of Insurance employs the Director of the Division of Regulatory Boards. In 1992, however, § 62-1-105 was amended to read that “the executive director shall be appointed by the board, with the approval of the commissioner of personnel.” 1992 Tenn. Pub. Acts ch. 960. The intent of this amendment was clearly to take the hiring authority away from the Commissioner of Insurance and give it to the Board of Accountancy itself. In the House hearing on the subject, Representative Alvin King stated, “[This amendment] authorizes [the Board of Accountancy] to employ administrative and other staff members as necessary. Under the current law the Commissioner of Commerce and Insurance employs the executive secretary for the Board.” House of Representatives Floor Debate on H.B. 2401, 97th General Assembly, Reg. Sess. H-74 (Tenn. 1992). In the Senate hearing, Senator John Hicks observed that the bill provided that “the board shall have an executive director . . . and [that it] will also change the name of the current secretary to an administrator, and all of this is done with the approval of the commissioner of personnel rather than the governor.” Senate Floor Debate on S.B. 2337, 97th General Assembly, Reg. Sess. S-69 (Tenn. 1992). The legislators’ comments clearly indicate that their intent in passing the amendment was to give hiring authority to the Board itself, subject only to the approval of the Commissioner of Personnel.

In 1995, § 62-1-105 was amended again to read, “The Executive Director shall be appointed by the board, and compensation for the Executive Director shall be established by the board. The term of the Executive Director shall be six years, subject to dismissal by the board for cause.” 1995 Tenn. Pub. Acts. ch. 424. The amendment eliminated the requirement that the Commissioner of Personnel approve the appointment of the Executive Director. In recess during the Senate Finance, Ways and Means Committee hearing on the bill, one of its drafters, former U.S. Senator and State Treasurer Harlan Mathews, was requested to address the Committee, and he explained, “This bill says that this profession ought to be treated basically in the same way as the legal profession, being given the authority to employ and set the compensation for their professional staff.” Senate Floor Debate on S.B. 472, 99th General Assembly, Reg. Sess. (Tenn. 1995). The language of the amendment clearly reflects this legislative intent to give the Board of Accountancy the authority to employ its own professional staff.

In 2002, § 62-1-105(c) was further amended to state, “The board shall retain, and establish the qualifications and compensation for investigators and other staff requiring professional qualifications. The Executive Director and all members of the board’s staff requiring professional qualifications shall serve at the pleasure of the board.” 2002 Tenn. Pub. Acts. ch. 654. The amendment also added the provision that any expenditure by the board under the provisions of §62-1-105 shall be subject to approval by the Commissioner of Finance and Administration. As Senator Jerry Cooper stated in the Senate hearings on the amendment, “One thing it does is to let the Executive Director serve at the pleasure of the board.” Senate Floor Debate on S.B. 2916, 102nd General Assembly, 1st Reg. Sess. #S-23 (Tenn. 2002). Again, the amendment shows that the legislative intent was to allow the Board of Accountancy to hire and terminate its Executive Director and professional staff at will. The only limitation on this authority is that all expenditures are subject to budgeting and approval by the Commissioner of Finance and Administration. Tenn. Code Ann. § 62-1-105(c).

Section 62-1-105 is a very specific statute concerning only the State Board of Accountancy, whereas § 56-1-302 and § 4-3-1304 address the entire Division of Regulatory Boards. “When there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” *Morton* at 551; *see, e.g., Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Rodgers v. United States*, 185 U.S. 83, 87-89 (1902). Clearly, §62-1-105 is a specific statute, as it relates only to the Board of Accountancy, and it should, therefore, not be nullified by either § 56-1-302 or § 4-3-1304, two general statutes. That § 62-1-105 was enacted after § 56-1-302 and § 4-3-1304 further supports the conclusion that it is the controlling statute.

Accordingly, Tenn. Code Ann. § 62-1-105 gives the Board of Accountancy the sole authority to hire and terminate its Executive Director and any other member of its staff requiring professional qualifications. The Executive Director and all members of the Board’s staff requiring professional qualifications serve at the pleasure of the Board, although all expenditures by the Board are subject to approval by the Commissioner of Finance and Administration. Tenn. Code Ann. § 62-1-105 implicitly repeals § 56-1-302 and § 4-3-1304 as they relate to the Board of Accountancy. Thus, the controlling statute regarding hiring and termination of the Executive Director and the professional

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staff of the Board of Accountancy is Tenn. Code Ann. § 62-1-105, and that statute clearly gives the authority to the Board of Accountancy itself.

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