

March 4, 2005

Dear Sir:

You have the following question: When they are issuing citations for violations of the city's zoning, building and sanitation codes, are the city's codes enforcement officers "police officers" performing law enforcement functions within the meaning of Tennessee Code Annotated, §§ 38-8-101 et seq.?

The answer is no. The city's MTAS consultant also answered that question in the negative on February 17. However, I will bolster that answer with a legal analysis.

This question arises from an allegation from a citizen that when the city's codes enforcement officers issue citations for the violation of the city's zoning, building and property maintenance codes, they are functioning as police officers, and must meet the minimum standards for police officers contained in Tennessee Code Annotated, §§ 38-8-101 et seq.

### **Analysis of Question**

#### **Statutes authorizing citations in lieu of arrest and ordinance summonses**

There are two statutes that govern the issuance of citations by persons who are not general law enforcement officers: Tennessee Code Annotated, §§ 7-63-101 et seq., provides for the issuance by such persons of citations in lieu of arrest. Tennessee Code Annotated, §§ 7-63-201 et seq., provides for the issuance by such persons of ordinance summonses.

#### **Citations in lieu of arrest**

Tennessee Code Annotated, §§ 7-63-101 et seq., is the product of Public Acts 1969, Chapter 208. That Act originally read, authorized the issuance of citations in lieu of arrest in traffic cases, reading, "Hereafter, when any person violates any traffic ordinances, law or regulation of any municipal, metropolitan or city government...." However, that statute was amended by Public Acts 1973, Chapter 101. Section 1 of that Act changed the above language to "Hereafter, when any person violates any traffic, or other ordinances, law or regulation of any municipal, metropolitan or city government...." Private Acts 1969, Chapter 208, also contained a provision governing the issuance of citations in lieu of arrest in traffic accident, "as a result of which the officer has reasonable and probable grounds to believe that the driver of any vehicle involved in said accident has violated any traffic ordinance cases, law or regulation of any municipal, metropolitan or city government...." Public Acts 1973, Chapter 208, broadened that language to include other municipal offenses, by changing that language to read, "as a result of which Tennessee Code Annotated," 7-63-101, provides that:

When any person violates any traffic, or *other ordinance, law or regulation or any municipal, metropolitan or city government* in the presence of a:

- (1) Law enforcement officer of such government;
  - (2) Member of the fire department or building department who is designated as a special police officer of the municipality....
- Such officer or inspector may issue, in lieu of arresting the offender and having a warrant issued for the offense, a citation or complaint for such offense. A copy of such citation, which shall contain the offense charged and the time and place when the offender is to appear in court, shall be given to the offender.

Tennessee Code Annotated, §§ 7-63-102--105 contain the process for the issuance and hearing on citations in lieu of arrest:

- The offender must sign the agreement to appear and to waive the issuance and service of a warrant in order to prevent the offender's arrest. [§ 7-63-102]

- When the offender has signed the agreement to appear, the court has a duty to try the cases upon the citation or complaint, without the issuance and service of a warrant upon the defendant, and that the citation or complaint "shall in all respects be deemed and treated as though it were a warrant property served upon the defendant." [§ 7-63-103]

- If the offender refuses to sign the agreement to appear and to waive the issuance and service of a warrant:

*then it shall be the duty of the officer, in whose presence the offense is committed, forthwith to place the offender under arrest and take the offender before the property authority to procure a warrant, serve the same upon the offender and book the offender as in the case of other violations....* [§ 7-63-104]

- If the offender signs the agreement, but fails to appear, then the court shall immediately issue two warrants against the offenders: one for the original offense, and one for the failure to appear, provided that the municipal government has made the failure to appear an offense, or has adopted the state law creating such an offense. [§ 7-63-105]

Tennessee Code Annotated, § 7-63-106, begins by speaking of the use of citations in lieu of arrest in traffic accidents, but continues:

*or in the case of other violations other than traffic accidents, the officer has reasonable and probable grounds to believe that the owner or occupant of property involved in a violation has violated any ordinance, law or regulation of any municipal, metropolitan government or city government in this state.*

Section 6-301 of the Municipal Code, citing Tennessee Code Annotated, § 7-63-101 et seq., provides that:

the city council appoints the fire chief in the fire department and the codes enforcement officer special police officers having the authority to issue citations in lieu of arrest. The fire chief shall have the authority to issue citations in lieu of arrest for violations of the fire code adopted in title 7, chapter 2 of this municipal code of ordinances. The codes enforcement officer shall have the authority to issue citations in lieu of arrest for violations of the building, utility, fire and housing codes adopted in titles 7 and 12 of this municipal code of ordinances.

The second paragraph of § 6-301 of the Municipal Code, also provides for the arrest by the special police officer of the offender in the event that he does not sign the agreement to appear. However, it is my understanding that the city's special police officers designated under § 6-301 do not make such arrests.

### **Ordinance Summonses**

Tennessee Code Annotated, § 7-63-201, provides that:

Notwithstanding § 7-63-201, any municipal, metropolitan or city government may designate by ordinance or resolution certain municipal enforcement officers in the areas of sanitation, litter control and animal control who may not arrest or issue citations in lieu of arrest pursuant to part one of this chapter, but who, upon witnessing a violation of any ordinance law or regulation of that municipal, metropolitan or city government, may issue an ordinance summons, leaving a copy with the offender, showing the offense charged and the time and place when such offender is to appear in court.

Tennessee Code Annotated, § 7-63-201 provides that "such ordinance summons shall be treated as a citation in lieu of arrest as provided for in" 7-63-102 and 103.

Tennessee Code Annotated, § 7-63-203 provides that if the offender refuses to sign the ordinance summons agreement to appear, the municipal enforcement officer in whose presence the violation is committed may have a summons issued by the clerk of the municipal, metropolitan or city court, or that officer may seek the assistance of a police or peace officer to witness the violation who may issue a citation in lieu of arrest or arrest for the failure to sign the citation in lieu of arrest.

Tennessee Code Annotated, § 7-63-204, provides that the court shall issue a warrant for an offender who does not appear after signing the ordinance summons agreement to appear.

Section 6-202 of the Municipal Code, citing Tennessee Code Annotated, §§ 7-63-201 et seq., says:

.... the council designates the codes enforcement officer to issue ordinance summonses in those areas. This enforcement officer may not arrest violators or issue citations in lieu of arrest, but upon witnessing a violation of any ordinance, law or regulation in the areas of sanitation, litter control, or animal control, may issue an ordinance summons and give the summons to the offender.

#### **Statute containing minimum standards for police officers**

Tennessee Code Annotated, §§ 38-8-101 et. seq., contains minimum standards for the selection and training of police officers in Tennessee. Tennessee Code Annotated, § 38-8-101 defines the following pertinent terms in connection with those standards:

- (1) “Full time police officer” means any person employed by any municipality or political subdivision of the state of Tennessee whose primary responsibility is the prevention and detection of crime, and the apprehension of offenders, and whose primary source of income is derived from employment as a police officer.
- (2) “Part-time/temporary/reserve/auxiliary/police officer” means any person employed by any municipality or any political subdivision of the state of Tennessee whose primary responsibility is to support the full-time police officer in the prevention and defection of crime, apprehension of offenders, and assisting in the prosecution of offenders for appropriate remuneration in measure with specifically assigned duties and/or job description.
- (3)(A) “Special deputy” means any person who is assigned

specific police functions as to the prevention and detection of crime and general laws of this state on a volunteer basis, whether working alone or with other officers.

(B) Any police officer working on a volunteer basis shall receive no pay or benefits except for honorariums and may be utilized for an unlimited number of hours.

**Reconciliation of Tennessee Code Annotated, §§ 7-63-101 et seq. and 7-63-201 et seq. [citations in lieu of arrest and ordinance summonses] and of Tennessee Code Annotated, § 38-8-101 et seq. [minimum standard for police officers]**

The above statutes do not appear difficult to reconcile. Tennessee Code Annotated, §§ 7-63-101 et seq., gives the city the authority to appoint members of the fire department and of the building department “special police officers.” Although that statute does not expressly limit those special police officers to the issuance of citations in lieu of arrest in the areas of fire or building code enforcement, it does so by implication. The city’s ordinance itself giving effect to that statute appoints the fire chief a special police officer for the limited purpose of issuing citations in lieu of arrest for fire code violations, and the codes enforcement officer a special police officer for the limited purposes of issuing citations in lieu of arrest in building, utility, fire and housing code violations. Tennessee Code Annotated, § 7-63-201 gives the city the authority to appoint municipal enforcement officers in the areas of sanitation, litter control and animal control the authority to issue ordinance summonses. The city’s ordinance giving effect to that statute authorizes the codes enforcement officer to issue ordinance summonses in those areas.

Under Tennessee Code Annotated, §§ 7-63-101 et seq., and 7-63-201 et seq., and §§ 6-202 and 6-301 of the Municipal Code, the fire chief and the codes enforcement officer have limited law enforcement functions. In carrying out those limited law enforcement functions, those officers do not fall within the definition of a full-time police officer, part-time police officer, etc., or a “special deputy” under Tennessee Code Annotated, § 38-8-101. They do not qualify as full-time police officer under that statute because they do not have the primary responsibility for the prevention and defection of crime, and the apprehension of offenders, and their primary source of income is not derived from employment as a police officer. They do not qualify as temporary/reserve/auxiliary police officers because they do not have the primary responsibility to support full-time police officers in the prevention and detection of crime, apprehension of offenders, and assisting in the prosecution of offenders. Finally, they do not qualify as special deputies because neither one of them is “any person who is assigned specific functions as to the prevention and detection of crime and the general laws of this state on a *volunteer basis*, whether working alone or with other police officers.” Their limited law enforcement functions are not remotely “volunteer”; by ordinance they are appointed to those functions.

### **Case law and Tennessee Attorney General's Opinion on Question**

There are surprisingly few cases on whether certain local government employees who have limited law enforcement functions are police officers. The principal case in this area appears to be *McNitt v. City of Philadelphia*, 189 A. 300 (Pa. 1937). There an assistant fire marshal argued that he was a "policeman and fireman" within the meaning of the city's charter under which policemen and firemen had civil service protection. The Court rejected his argument, reasoning that while no statute defined the term "policeman" and "fireman," the functions of those positions were different than the functions of an assistant fire marshal:

The petitioner is not a policeman or fireman in the 'ordinary sense' of those words. 'Society and the criminal are at war,' as Justice Gibson once observed. In that war policemen are 'at the front.' Policemen are the guardians of the public safety. When 'killers' and other felons are to be apprehended, the job is assigned to the police. The number of policemen slain in the performance of duty is proof that in society's unending warfare against criminals a policeman's post is one of danger. There are other officials 'behind the line,' doing work essential to the cause of law and order, but they do not give [sic.] the title or uniform or duties or hazards of policemen. Fire marshals, mine inspectors, factory inspectors, boiler inspectors, and mile inspectors are all charged with law-enforcing duties, but they help enforce laws affecting only special subjects, while a policeman's duty is the enforcement of all laws whose violation affects the peace and good order of the community....If fire marshals possessed a title descriptive of their distinctive duties, they would be called fire investigators. They, like factory inspectors and mine inspectors, have important duties to perform in the enforcement of law and the protection of life and property, but their functions are not the functions of policemen. There is a close analogy between the functions of fire marshals and, for example, the functions of mine inspectors. The latter are charged, inter alia, with the duty to see that 'every necessary precaution is taken to secure the safety of the workmen and that the provisions of the mining act are observed and obeyed.' Their right and duty to 'cause arrests to be made,' for violation of the mining law are clearly implied, yet they are not policemen.... A fire marshal is not, while a policeman is, under the order of the superintendent of police.... [At 301]

The assistant fire marshal argued that he had caught one fire bug "red-handed" in the act of setting a fire, had arrested another fire bug with the aid of firearms, and had personally made

many other arrests, including 13 in connection with one investigation under the fire marshal's direction. That conduct was admirable, declared the Court, but it did not make him a policeman or fireman. Said the Court:

Any mayor or district attorney or magistrate or any vigilant citizen might show equal courage and zeal in 'catching fire-bugs red-handed' and accelerating their progress toward the penitentiary, without ipso facto, attaining the legal status of either a policeman or a fireman. An official status is not begotten merely by mating of personal ambition with commendable activity. It is a public endowment, not a personal achievement. An official status is conferred by the sovereign power acting through its duly authorized agencies. So far as this state has spoken through the Legislature, an assistant fire marshal is not a policeman or fireman, and neither reason nor authority would warrant the judiciary in construing the words 'fire marshal' or 'assistant fire marshal.' [At 301]

In *Commonwealth v. Beaver Falls City Council*, 366 A.2d 911 (Pa. 1976), the same Court, citing *McNitt*, above, held that female parking attendants, who had the primary responsibility to ticket automobiles at parking meters, but who were sometimes asked to look out for stolen vehicles, and on occasion had transported female prisoners, were not police officers. The Court said that "the title of policeman (may) be properly appointed to one who performs services critical to public safety in the investigation and detection of serious crimes: a person trained, equipped (with ... gun, handcuffs, bade of office and motor vehicles) and actually engaged in the defection of persons suspected of crime." [At 914]

Similarly, in *Mason v. City of Welch*, 375 S.E.2d 572 (W.Va. 1988), the Supreme Court of West Virginia held that parking meter attendants were not members of the police department for the purposes of a civil service act. They performed the limited law enforcement function of issuing citations for illegal parking, directing traffic, helping citizens in various ways, occasionally performed police dispatch duties, and occasionally searched female suspects. However, said the Court, they never were granted, and did not exercise, general law enforcement powers, did not have the power of arrest, did not carry deadly weapons, and were not trained as police officers. A West Virginia Statute defined "member of a paid police department" as:

[A]ny individual employed in a paid police department who is clothed with the police power of the State in being authorized to carry deadly weapons, make arrests, enforces traffic and other municipal ordinances, issue summons for violations of traffic and other municipal ordinances, and performs other duties within the scope of active, general law enforcement.

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A “member of a paid police department,” concluded the Court, “requires the person in question to have *general*, not limited, law enforcement power.” [At 575] [The Court’s emphasis.]

Those cases support the proposition that various definitions of police officers in Tennessee Code Annotated, § 38-8-101, clearly refer to police officers who have general law enforcement powers. That is true of even the definition of “special deputy.” That definition refers to a certain class of deputies who have “specific police functions as to the prevention and detection of crime and general laws of this state on a volunteer basis, whether working alone or with other police officers.” It is clear that the Fire Chief and the Codes Enforcement Officer are not volunteer officers under Tennessee Code Annotated, §§ 7-63-101 et seq. and 7-63-201 et seq.

It is also worthwhile to note that Tennessee Attorney General’s Opinion 79-212 (April 30, 1979), opined that aides and assistants to the Alcoholic Beverage Commission who enforce the liquor laws of the state are not police officers within the meaning of Tennessee Code Annotated, § 38-8-101 et seq. That is true, says that opinion, even though those aides and aspirants have the right to carry firearms and execute search warrants in carrying out their duties to collect taxes upon alcoholic beverages. Those persons have no general law enforcement powers or duties.

Sincerely,

Sidney D. Hemsley  
Senior Law Consultant

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