

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

August 4, 2009

Opinion No. 09-148

Board's Authority to Impose Fee Upon Application to Transfer Probation/Parole Supervision

QUESTIONS

1. Must the fee for application to transfer a probationer/parolee's supervision to another State be promulgated pursuant to the Uniform Administrative Procedures Act?
2. If so, was the fee so promulgated?

OPINIONS

1. No, setting the fee on an application to transfer supervision to another State is not subject to the rule-making provisions of the Uniform Administrative Procedures Act.
2. As the answer to the first question is no, the second question is moot.

ANALYSIS

On May 18, 2009, the 106th General Assembly passed Pub. Ch. 313, which states in pertinent part:

SECTION 1. Tennessee Code Annotated, Section 40-28-201(a)(1), is amended by adding the following sentence at the end of the subdivision:

(a)(1) In addition, any offender who is under the jurisdiction and supervision of the board who requests to transfer residence to another state under the interstate compact for the supervision of adult offenders, codified at part 4 of this chapter, shall pay to the board an application fee for said transfer. Such fee shall be set by rule promulgated by the board.

Pursuant to Pub. Ch. 313, an offender must pay a fee upon application to transfer residency to another state for probation/parole supervision under the interstate compact. Further, the fee shall be set by rule promulgated by the Tennessee Board of Probation and Parole.

Pub. Ch. 313 does not state that the Board must promulgate the rule pursuant to the Uniform Administrative Procedures Act. In *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), the petitioner argued that the lethal injection protocol procedures were rules and the Department of Correction failed to comply with the UAPA rule-making procedures. The Tennessee Supreme Court held that the enabling statute, Tenn. Code Ann. § 40-23-114 (c), did not reference the UAPA and therefore, it was not applicable. The Court held:

Finally, we conclude that the petitioner's reliance on Tennessee Code Annotated section 40-23-114(c), which states that "[t]he department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this statute," is not persuasive. This statute does not address the definition of "rules" under the UAPA or the relevant exceptions. Moreover, virtually all other statutes in the Tennessee Code that authorize the promulgation of rules and regulations expressly refer to the UAPA. In short, the absence of an express reference to the UAPA in section 40-23-114(c) is entirely consistent with our conclusion that the UAPA is inapplicable.

Abdur'Rahman, 181 S.W.3d at 312 (citations omitted).

Similarly, in *Hughes v. Tennessee Department of Correction*, 2007 WL 1574276 at *2 (Tenn.Ct.App.) *permission to appeal denied*, (Tenn. Sept. 17, 2007), the Court held that the enabling statute, Tenn. Code Ann. § 41-1-119(b), did not require compliance with the rule-making provisions of the UAPA. The statute provided that "[t]he commissioner has the authority to promulgate necessary rules and regulations to implement the provisions of this section pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5." The Court held that the language was not mandatory and, therefore, that compliance with the UAPA was not necessary.

In Op. Tenn. Att'y. Gen. 99-010 (January 25, 1999), this Office opined that the State Board of Education was not required to promulgate curriculum frameworks under the UAPA rule-making provisions. This Office stated:

Tenn. Code Ann. § 49-1-302(a)(8) clearly empowers the SBE to adopt curriculum frameworks. There is nothing in the education statutes that requires the frameworks to be promulgated according to the formal rulemaking procedures of the UAPA. The General Assembly did not specifically direct the SBE to prescribe or adopt rules and regulations governing curricula. Rather, the statute prescribing the SBE's powers and duties directs the SBE to "set policies governing all curricula and courses of study in the public schools." By way of contrast, there are many sections in the education statutes in which the General Assembly does specifically direct the SBE to prescribe or adopt "rules and regulations," or to

promulgate standards, criteria, or procedures in accordance with the UAPA.

This Office concluded that, in the absence of a specific directive from the legislature, the question whether the SBE must continue to follow formal rulemaking procedures depended on whether the curriculum frameworks are “rules” within the meaning of the UAPA.

“Statements concerning only the internal management of state government and not affecting private rights, privileges or procedures available to the public “are not “rules” under the UAPA. Tenn. Code Ann. § 4-5-102(10)(A). In *Mandela v. Campbell*, 978 S.W.2d 531 (Tenn. 1998), the Tennessee Supreme Court found that TDOC Uniform Disciplinary Procedures were internal operating procedures regarding disciplinary charges against inmates. The Court held that the policy was not a rule under the UAPA, as the policy concerned internal management of state government and did not affect the private rights, privileges, or procedures available to the public. In *Abdur’Rahman v. Bredesen*, *supra*, the Court found that the lethal injection protocol was not a rule as defined by the UAPA, as it fit statutory exceptions, including “statements concerning only the internal management of state government and not affecting private rights privileges or procedures available to the public.” Similarly, in *Hughes v. Tennessee Department of Correction*, *supra* at *2, the Court found that the TDOC Policy on Inmate Drug/Alcohol Testing and Sanctions did “not affect the private rights, privileges or procedures available to the public since the policy is only applicable to inmates of a correctional detention facility.” Moreover, based on Tenn. Code Ann. § 4-5-102(10) and the Tennessee Supreme Court decision in *Mandela*, the court concluded “that the conditions and procedures for conducting urinalysis testing of inmates are internal operating procedures rather than ‘rules’ and thus do not fall within the ambit of the UAPA.” *Id.*

The Tennessee Board of Probation and Parole’s action setting a \$150 fee upon a supervised offender’s application for transfer to another state under the Interstate Compact for Adult Offenders Supervision is not a “rule” under the UAPA. The fee-setting is part of the internal operating procedures of the Board and affects supervised offenders only; it does not impact the private rights, privileges, or procedures available to the general public. Because the setting of the fee does not fit within the definition of “rule” under the UAPA, and in the absence of a specific directive from the legislature to follow formal rulemaking procedures in setting the fee, the Board’s action was not required to be promulgated as a rule under the UAPA.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

PAMELA S. LORCH
Senior Counsel

Requested by:

The Honorable Roger E. Nell
District Public Defender
19th Judicial District
112 South Second Street
Clarksville, TN 37040