

STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 10-07

Authority of Board of Probation and Parole to Supervise Individuals on Pretrial Diversion

QUESTION

Is the Board of Probation and Parole authorized to supervise an individual placed on pretrial diversion pursuant to Tenn. Code Ann. § 40-15-101?

OPINION

No. There is nothing in either the statute creating the Board of Probation and Parole or the statute creating pretrial diversion that authorizes the Board to supervise criminal defendants placed on pretrial diversion.

ANALYSIS

“Administrative agencies have only such power as is granted them by statute, and any action which is not authorized by the statutes is a nullity.” *Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655, 657 (Tenn. Ct. App. 1982) (quoting *General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Board*, 560 S.W.2d 910, 913 (Tenn. Ct. App. 1976)). It is a general rule that no intent may be imputed to the legislature in the enactment of a statute other than such as is supported by the face of the statute itself. *City of Nashville v. Kizer*, 194 Tenn. 357, 364, 250 S.W.2d 562, 565 (1952). This rule likewise applies in determining the power of an administrative agency. *Williams v. American Plan Corp.*, 216 Tenn. 435, 443, 392 S.W.2d 920, 924 (1965).

The Board of Probation and Parole was created to provide a system of probation and parole for criminal defendants who were “convicted of crime.” Tenn. Code Ann. § 40-28-101. The duties of probation and parole officers are specified in Tenn. Code Ann. § 40-28-111:

- (a) The duties of probation and parole officers shall be to supervise, investigate and check on the conduct, behavior and progress of *parolees* assigned to them for

supervision and shall make to the board a report of the investigations, and shall perform other duties and functions as the regulations of the board may direct.

(b) The duties of probation and parole officers shall be to supervise and investigate the conduct and behavior of *persons placed on probation* by the courts or pursuant to § 40-35-501(a)(3) and to perform other duties and functions as the regulations of the board may direct.

(emphasis added). Thus, there are only two classes of individuals subject to the statutory duties of probation and parole officers: “parolees” and “persons placed on probation.” Although “parolee” is not defined for purposes of Title 40, Chapter 28, the term “parole” is:

“Parole” means the release of a prisoner to the community by the board prior to the expiration of the prisoner’s term subject to the conditions imposed by the board and to its supervision, or where a court or other authority has issued a warrant against the prisoner and the board, in its discretion, has released the prisoner to answer the warrant of the court or authority.

Tenn. Code Ann. § 40-28-102(5). Likewise, “persons placed on probation” is not defined, but the term “probation” is:

“Probation” means the release by a court of a person found guilty of a crime, upon verdict or plea, without imprisonment subject to conditions imposed by the court and subject to the supervision of the probation service[.]

Tenn. Code Ann. § 40-28-102(6). Clearly, both classes—parolees and persons placed on probation—are comprised of persons who have been convicted of a criminal offense.

In contrast, the Pretrial Diversion Act provides a means of avoiding a trial on criminal charges in favor of pretrial rehabilitation. Tenn. Code Ann. §§ 40-15-102, -105. “The self-evident purpose of pretrial diversion is to spare appropriately selected first offenders the stigma, embarrassment and expense of trial and the collateral consequences of a criminal conviction.” *Pace v. State*, 566 S.W.2d 861, 868 (Tenn. 1978). During the process, the defendant and the prosecution enter into a memorandum of understanding whereby the prosecution is suspended while the defendant pursues rehabilitation and abides by conditions imposed by the memorandum. Tenn. Code Ann. § 40-15-105(a). One of the conditions that may be required is that “the defendant participate in a supervised rehabilitation program which may include treatment, counseling, training, and education.” Tenn. Code Ann. § 40-15-105(a)(2)(C). Although the statute does not state so specifically, it appears to anticipate the rehabilitation program’s being operated by a “county, municipal, or authorized private agency.” Tenn. Code Ann. § 40-15-104. If the defendant successfully completes pretrial diversion, the trial court shall dismiss the criminal charges with prejudice. Tenn. Code Ann. § 40-15-105(e).

There is nothing in the general statute that establishes the Board of Probation and Parole to indicate that the General Assembly intended to authorize it to supervise criminal defendants who are placed on pretrial diversion. Moreover, the Board's participation in pretrial diversion, which occurs without entry of a judgment of conviction, would be directly contrary to the duties specified in Tenn. Code Ann. § 40-28-111. Furthermore, there is nothing in the Pretrial Diversion Act to indicate that the General Assembly intended to create a specific exception from the general rule for that particular purpose. *Wade v. Madding*, 161 Tenn. 88, 28 S.W.2d 642, 649 (1930) ("Specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which otherwise might be broad enough to include it."). Indeed, the only participation of the Board authorized in pretrial diversion is the preparation of a pretrial investigation report when there is no local agency available to do so. *See* Tenn. Code Ann. § 40-15-104. Therefore, it is the opinion of this office that the Board of Probation and Parole is not authorized to supervise an individual placed on pretrial diversion pursuant to Tenn. Code Ann. § 40-15-105.

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