

The Arkansas Register



Volume XXVIII, Number 11

May 2005

TABLE OF CONTENTS

ATTORNEY GENERAL

Opinions 4

RULES AND REGULATIONS 9

INSURANCE DEPARTMENT

Orders 12

LEGISLATIVE AUDIT

Orders 14

Charlie Daniels
Secretary of State
State Capitol, Room 026
Little Rock, AR 72201-1094

Editor **Jon Davidson**

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Charlie Daniels

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THE ARKANSAS REGISTER

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ATTORNEY GENERAL OPINIONS

Opinion No.:2005-014

Verkamp, John Paul
State Representative

RE:Is my understanding correct that pursuant to Sec. 4 of Act 649 of 2003, a medical director of a long-term care facility sued solely in that capacity cannot be held jointly liable for a judgment against co-defendants and that this result would be true even if one or more of the co-defendants was unable to pay a judgment? Q2) Am I also correct in my understanding that no other private individual enjoys the same statutory protection from joint liability as that bestowed on medical directors by Sec. 4 of Act 649? **RESPONSE:** Q1) Yes, see A.C.A. 16-55-203 and -204, subject to the qualification that a variety of equitable considerations based upon the facts of any particular case might bear on the determination of liability. Q2) Yes, assuming that by "joint liability" you mean a possible increase of a judgment against a tort-feasor when a codefendant is adjudged unable to pay the several damages imposed against him. Under the Civil Justice Reform Act, A.C.A. 16-55-201 through -220 (Supp. 2003), medical directors who meet the conditions set forth in A.C.A. 16-55-204 comprise the only category of individuals whose liability cannot be increased if a codefendant is adjudged unable to pay a judgment against him. No other provision of the Code extends this limitation of liability to any other category of defendant.

Opinion No.:2005-017

Evans, David
State Representative

RE:Pursuant to provisions of ACA 16-17-129(a), can a county quorum court levy and collect an additional fine on cases prosecuted in a city court without an ordinance from the city council within that city court's jurisdiction? Q2) Is the additional \$5.00 fine proposed by ACA 16-17-129 to be paid to the county when assessed on a defendant or at such time as the fine is paid in full? Q3) Is the statute constitutional in that it authorizes the imposition of this \$5.00 amount as a

fine versus a cost? **ANSWER:** Q1) No, regardless of the existence of a city ordinance. The legislative history indicates that the county is authorized to levy the additional fine in district court only. Q2) The fine is to be collected at the same time and distributed in the same manner as other fines that are imposed in district court. See Attorney General Op. 2003-288 (citing A.C.A. 16-17-132 and 16-13-709). Q3) The statute is a constitutional exercise of the General Assembly's general authority over classification of crimes and sentencing.

Opinion No.: 2005-021

Harrelson, Steve
State Representative

RE:If an organized employer has negotiated with its union employees that electronic direct deposit is a condition of employment and all future employees have been made aware of this, may an employee "opt out"? Q2) Does the law construe the term "may," as it appears in ACA 11-4-402(B), as legal protection from discharge if the employee violates the negotiated contract between union and employer, especially after the full membership of the union ratified the agreement through vote? **RESPONSE:** In my opinion, I cannot definitively answer your first question because the answer will necessarily depend on findings of facts related to the language of the posited negotiated contract. I have, however, set out some relevant law in the opinion. With respect to your second question, it is also my opinion that a definitive answer would require a factual determination based on the language of the posited negotiated contract.

Opinion No.:2005-022

Baker, Gilbert
State Senator

RE:Is there a time limit on how soon an individual must be confirmed or denied after appointment to a public facilities board by the mayor? Q2) If the governing body does not confirm the mayor's

ATTORNEY GENERAL OPINIONS

appointment, does the mayor choose from the remaining names on the list or does it revert back to the board for reconsideration and resubmission of three more names? Q3) Are there any special steps that need to be followed if the mayor's appointment is denied after serving for four months? Q4) Are there any special steps that need to be follows when seven months have passed between the vacancy and the final appointment? Q5) If the mayor was free to choose a person from the remaining two names, do both individuals have to reside in the district if the bylaws have such a requirement? Q6) If only one person resided in the district and the mayor did not think that person was a proper choice to serve on the board, would the mayor have the authority to submit three new names to the board? Q7) If the board did not want to confirm a person chosen by the mayor, would the board have the authority to appoint another person? Q8) By law, three names must be submitted. If three names are submitted, and one of the three does not meet the qualifications of the bylaw, has the board violated state law? Q9) If the board violated the law by not submitting three qualified persons, would the mayor have the authority to appoint whomever he wants without having to refer to the list of candidates submitted by the board? If not, how should he proceed? ANSWER: Q1) No. See A.C.A. 14-137-108 (part of the Ark. Public Facilities Boards Act). Q2) He generally chooses from the remaining names. Q3) &4) No particular conclusions can be drawn based merely upon the delay between the appointment and the confirmation denial. Q5) The question is whether the individual was properly nominated, given the fact that he or she does not meet the presumptively valid bylaw requirement. I believe it is evident that the answer to this question is "no." Q6) No, but the mayor could inform the board that one of its nominees was not qualified and demand that it resubmit another name. I cannot speculate regarding the possible outcome in that event, other than to note that the mayor would in my view be acting within the letter and the spirit of the statute in demanding the new nomination. Q7) No. Q8) While the board's nominations do not satisfy the statute, this does not mean, that the mayor would then be authorized to submit three names or that the board would be required to resubmit all three names. Rather, I believe the board should name another nominee to substitute for the one who was not qualified.

Opinion No.:2005-037

Miller, Paul
State Senator

RE:Pursuant to provisions of ACA 14-90-201, can the three electors appointed to the board of assessment also be members of an improvement district? Q2) Can the three commissioners appointed by the city council also serve as assessors of an improvement district? Q3) Does ACA 14-90-603 give the commissioners the authority to readjust the assessment on property from time to time if it is deemed necessary to pay for existing improvements and continued operation? Q4) Does ACA 14-90-701 give the Improvement District Commissioners the authority to request an increase in improvement district assessments in order to guarantee the future operation of an improvement district and subsequently require the city council to levy the necessary recommended increase as long as such increase meets the requirements of existing law? Q5) Does ACA 14-90-101 et seq. apply to the Municipal Recreation Improvement District (MRID) of Horseshoe Bend? **RESPONSE:** Q1) Yes. Q2) No, unless a local ordinance expressly allowed otherwise. See A.C.A. 14-42-107(b)(1). Q3) No. Section 14-90-603 of the Code authorizes adjusting assessments "according to additional improvements," not to pay for "existing improvements and continued operation." Q4) No, for the same reason. The commissioners could not "meet the requirements of existing law" by directing an increase in assessments "in order to guarantee the future operation of an improvement district"; A.C.A. 14-90-701 authorizes such an increase only "to complete a municipal improvement or pay therefor." Q5) Yes, except as expressly provided otherwise in chapter 90 of title 14 of the Code.

Opinion No.:2005-039

Davies, Richard W.
Director, AR Dept of Parks and Tourism

RE:Does ACA 8-6-412 authorize all Arkansas certified law enforcement officers to enforce the Litter Control Act outside their ordinary jurisdictional boundaries?

ATTORNEY GENERAL OPINIONS

RESPONSE: No. In my opinion, A.C.A. 8-6-412 merely authorizes a certified law enforcement officer to enforce the provisions of the Litter Control Act within the officer's jurisdictional boundaries and subject to the restrictions of A.C.A. 16-81-106 (Supp. 2003).

Opinion No.:2005-048

Green, Rick
State Representative

RE:Is the Van Buren Public Library considered a county library or a city library? **RESPONSE:** A conclusive response would require more information about the library and the issue at hand. It appears that the library is part of the Crawford County Library System, which is a joint county-city library governed by an interlocal cooperation agreement pursuant to ACA 13-2-407. This may be the source of the ambiguity in determining whether it is a county or city library. Local counsel should be consulted to ensure compliance with state law.

Opinion No.:2005-050

Laverty, Randy
State Senator

RE:May Boone County sell property to Boone County Special Services, a state/federally funded entity which provides services to disabled persons, at a price other than that spelled out in ACA 14-16-105 and also eliminate the need for the appraisal process and sale at public auction? **RESPONSE:** Yes, so long as the sale is supported by adequate consideration. Pursuant to 14-16-107, whenever a portion of county lands is dedicated for the benefit of any lawfully incorporated, quasi-public, nonprofit, nonsectarian organization, that county real property may be sold to any buyer, upon the approval of the county judge and a 2/3 vote of the quorum court of the county without the necessity of soliciting for competitive bids. These conditions are met in this case, rendering inapplicable the competitive bidding requirements set forth at ACA 14-16-105. However, the sale must be supported by

adequate consideration, possibly including public benefit.

Opinion No.: 2005-053

Rogers, J. R.
State Representative

RE:What are the exact authorities and duties of constables in Arkansas, and the training requirements, if there are any? **RESPONSE:** I have enclosed a packet of opinions that addresses various powers, duties, and authorities of constables in Arkansas. Please refer to these enclosures, which summarize the authorities, duties, and training requirements of constables.

Opinion No.:2005-055

Laverty, Randy
State Senator

RE: May all the expenses incurred by a county civil attorney or county attorney employed under authority of ACA 16-21-114 be prorated over all taxing entities or is reimbursement restricted to services either requested by that taxing entity or legal services incurred in assessing property, collecting taxes and receiving and disbursing revenues? **RESPONSE:** Only necessary legal costs in assessing property, collecting taxes and receiving and disbursing revenues may be prorated to taxing entities other than the county, in accordance with ACA 16-21-114(f).

Opinion No.:2005-056

Oliver, Steve
Pros Attorney, 18th Judicial District East

RE:Pursuant to provisions of ACA 20-47-201 regarding involuntary mental commitment proceedings, is an affidavit from the receiving physician acceptable at the initial probable cause hearing or is the physician required to appear at the hearing? **RESPONSE:** In

ATTORNEY GENERAL OPINIONS

my opinion, because an emergency involuntary civil detainee has a statutory right to cross examine witnesses against him under A.C.A. 20-47-211(4) (Repl. 2001), an affidavit rather than in person testimony from the physician may be insufficient at the initial probable cause hearing mandated by A.C.A. 20-47-210 (Repl. 2001).

Opinion No.:2005-066

Edwards, Marilyn
State Representative

RE:Is a child daycare center which receives no state funds, is situated within a church, and is a nonprofit organization required to admit children who claim the philosophical exemption from vaccinations pursuant to ACA 6-18-702? **RESPONSE:** No. In my opinion A.C.A. 6-18-702 (Supp. 2003) as amended by Act 1994 of 2005 authorizes, but does not require, a private daycare center to admit a student who is not immunized if his parents or guardian object to immunization on religious or philosophical grounds when the daycare center receives no state funds.

Opinion No.:2005-067

Oliver, Steve
Pros Attorney, 18th Judicial District East

RE:Is a volunteer fire department supported by membership dues and state and federal funds exempt from the requirements of ACA 25-19-101 to -106, the Freedom of Information Act (FOIA)? **RESPONSE:** No. In my opinion, a volunteer fire department that is partially funded by public funds, provides a service that is traditionally the purview of the government, and is intertwined with the activities of the government in protecting the health and safety of the citizenry is subject to the provisions of the Freedom of Information Act, A.C.A. 25-19-101 through -109 (Repl. 2002 & Supp. 2003). Of course, I do not have all of the facts regarding this particular fire department before me, but if, as you suggest, it receives direct public funding, in my opinion it is subject to the Freedom of Information Act.

Opinion No.:2005-085

Rogers, Reginald
Legal Counsel, AR Dept of Health

RE:Is the decision of the custodian of the records to release the names of certain employees, which may lead to the identification of reassigned personnel, consistent with the Freedom of Information Act (FOIA)? **ANSWER:** Yes, with the understanding that the custodian applied the test identified in Attorney General Opinion 2005-074, made the requisite factual determinations, and decided that releasing the employee rosters did not equate to releasing job performance records. These records of the employees' names are thus properly classified as personnel records, and are open under the applicable test.

Opinion No.:2005-086

Turner, Bob
Interim Director, LR Public Works

RE:Is the decision of the custodian of records to release scoring sheets and the final tally sheet prepared by the interview panel formed to interview applicants for the position of scale house operations supervisor in response to a Freedom of Information Act request consistent with provisions of the FOIA? **RESPONSE:** For reasons discussed in the opinion, I believe the decision of the custodian is consistent with the FOIA.

Opinion No.:2005-088

Wills, Robbie
State Representative

RE:Assuming that election officials have sufficient time to comply with all election procedures regarding an Amendment 7 petition seeking referendum on a local ordinance (see ACA 7-9-111(h)), does the city council have the authority and discretion, under City Ordinance 1.36.03 or Amendment 7, to order a special election for a date which is earlier than that specified in the

ATTORNEY GENERAL OPINIONS

petition? RESPONSE: Declined to address due to pending litigation in Spatz v. City of Conway (Faulkner County Circuit Court, Third Division).

Opinion No.:2005-089

Ormond, Charles
State Representative

RE:Request for certification of the popular name and ballot title for a proposed constitutional amendment to establish an Arkansas owned and operated corporation to regulate charitable bingo, a statewide lottery or lotteries, wagering games, and for other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the measure.

Opinion No.:2005-094

Wilson, Ronald C.
Attorney at Law

RE:Is the decision of the custodian of records to release a copy of the interview transcript and summary

of the investigation regarding Mr. Wilson's client in response to a Freedom of Information Act (FOIA) request consistent with provisions of the act? **RESPONSE:** Having reviewed the documents at issue, I believe that the disclosability of the documents will depend on certain factual considerations that only the custodian is situated to determine.

Opinion No.:2005-100

Witherell, Stacey
Employee Services Manager

RE:Is the decision of the custodian of records to release the race, sex, hire date, fire date, date of resignation, beginning and ending salary, and job title for fifty alert center employees from January 2000 to present consistent with provisions of the Freedom of Information Act (FOIA)? **ANSWER:** Yes.

ADOPTED RULES AND REGULATIONS

EDUCATION DEPARTMENT

Administrative Services

Docket No: 005.01.05-001F
Effective Date: 05/23/2005
Contact: Wanda Shockey
Telephone: 501-324-9502

Governing the Certification and Continuing Professional Development of Child Nutrition Directors, Managers, and Workers

Early Childhood

Docket No: 005.24.05-001F
Effective Date: 05/23/2005
Contact: Paul Lazenby
Telephone: 501-682-8587

ADE 203 - Rules Governing the Arkansas Better Chance Program

Office of Accountability

Docket No: 005.19.04-009F
Effective Date: 05/23/2005
Contact: Ron Tolson
Telephone: 501-682-4342

Procedures of Renewing a Standard Arkansas Teaching License

Docket No: 005.19.04-010F
Effective Date: 05/23/2005
Contact: Gayle Potter
Telephone: 501-682-4558

ADE 200 - Governing Comprehensive Plan for Consistency and Rigor in Course Work

Docket No: 005.19.04-011F
Effective Date: 05/23/2005
Contact: Annette Barnes
Telephone: 501-682-4393

ADE 199 - Rules Governing the Standards for Accreditation of Arkansas Public Schools and School Districts

GAME AND FISH COMMISSION

Docket No: 002.00.05-004F
Effective Date: 05/16/2005
Contact : James Goodhart
Telephone: 501-223-6327

2005-2006 General Hunting Regulations

HUMAN SERVICES

Administrative Services

Docket No: 016.14.05-007F
Effective Date: 07/01/2005
Contact : Joe Franklin
Telephone: 501-682-9631

Social Services Block Grant Comprehensive Services Program Plan for State Fiscal Year 2006

Docket No: 016.14.05-008F
Effective Date: 07/01/2005
Contact: Joe Franklin
Telephone: 501-682-9631

Social Services Block Grant Program Manual

Behavioral Health Services

Docket No: 016.23.05-001F
Effective Date: 06/01/2005
Contact: Anne Wells
Telephone: 501-686-9489

Physician Certification of Adult With A Serious Mental Illness and Physician Certification of Children With Serious Emotional Disturbance

ADOPTED RULES AND REGULATIONS

Medical Services

Docket No: 016.06.04-070F
Effective Date: 05/19/2005
Contact: Nikki Wade
Telephone: 501-682-8859

Children's Services Targeted Case Management Update Transmittal #5

Docket No: 016.06.04-074F
Effective Date: 05/19/2005
Contact: Carolyn Patrick
Telephone: 501-682-8359

Section I of All Arkansas Medicaid Manuals

Docket No: 016.06.04-082F
Effective Date: 05/19/2005
Contact: Nikki Wade
Telephone: 501-682-8859

DDS Alternative Community Services Update #46

Docket No: 016.06.04-083F
Effective Date: 05/19/2005
Contact: Betty Reed
Telephone: 501-682-8363

Official Notice DMS-2004-R-20, DMS-J-1: Exogen - Ultrasonic Osteogenic Stimulator for Treatment of Non-Union Fractures

Docket No: 016.06.04-084F
Effective Date: 05/19/2005
Contact: Betty Reed
Telephone: 501-682-8363

Nurse Practitioner Update #46

Docket No: 016.06.04-085F
Effective Date: 05/19/2005
Contact: Carolyn Patrick
Telephone: 501-682-8359

Rehabilitative Services for Youth and Children Update #9

Docket No: 016.06.04-086F
Effective Date: 05/19/2005
Contact: Betty Reed
Telephone: 501-682-8363

Official Notice DMS-2004-L-19, DMS-2004-R-21: Enterra Therapy for Treatment of Gastroparesis

Docket No: 016.06.04-087F
Effective Date: 05/19/2005
Contact: Betty Reed
Telephone: 501-682-8363

Official Notice DMS-2004-A-7, DMS-2004-L-17, DMS-2004-R-18: Gastrointestinal Tract Imaging with Endoscopy Capsule

Docket No: 016.06.05-001F
Effective Date: 05/19/2005
Contact: Nikki Wade
Telephone: 501-682-8859

Dental Update #70

Docket No: 016.06.05-002F
Effective Date: 05/19/2005
Contact: Dorothy Vance
Telephone: 501-683-2916

Podiatrists Update Transmittal #51

ADOPTED RULES AND REGULATIONS

Docket No: 016.06.05-007F
Effective Date: 05/19/2005
Contact: Nikki Wade
Telephone: 501-682-8859

Child Health Services Early and Periodic Screening, Diagnosis, and Treatment (EPSDT)

Docket No: 016.06.05-008F
Effective Date: 05/23/2005
Contact: Nikki Wade
Telephone: 501-682-8859

Division of Youth Services and Division of Children and Family Services Targeted Case Management Provider Manual

Docket No: 016.06.05-009F
Effective Date: 05/19/2005
Contact: Dorothy Vance
Telephone: 501-683-2916

Hearing Services Provider Manual Update Transmittal #49

Docket No: 016.06.05-033F
Effective Date: 06/01/2005
Contact: Renita Honorable
Telephone: 501-682-8577

Provider Manual Update Transmittal - Section V

Docket No: 016.06.05-035F
Effective Date: 05/19/2005
Contact: Renita Honorable
Telephone: 501-682-8577

Transportation Update #64

Docket No: 016.06.05-036F
Effective Date: 05/19/2005
Contact: Carolyn Patrick
Telephone: 501-682-8359

Section III - All Medicaid Provider Manuals

LABOR DEPARTMENT

Employment Security Division

Docket No: 010.02.05-001F
Effective Date: 05/01/2005
Contact: Allen Pruitt
Telephone: 501-682-3152

Regulation 15 - Notice of Claims Filed and Benefits Charged, Employer Response, and Noncharge Rights

STATE PLANT BOARD

Docket No: 003.11.05-001F
Effective Date: 05/19/2005
Contact: James Scott
Telephone: 501-570-1159

Amendments to Liquid Measuring Devices section of National Institute of Standards & Technology Handbook 44

Docket No: 003.11.05-002F
Effective Date: 05/19/2005
Contact: James Scott
Telephone: 501-570-1159

2004 Amendments to the National Institute of Standards & Technology Handbooks 44, 130, 133 and the adoption of the 2005 editions of the American Society of Testing and Material manuals

INSURANCE DEPARTMENT

05-003

Consent Order
In the Matter of

Gibraltar National Insurance Company

05-004

Consent Order
In the Matter of

Keith Joseph Kinchen

05-005

Consent Order
In the Matter of

Ronna Carol Harness

05-006

Consent Order
In the Matter of

Katisha Lynn Crain

05-007

Adoption Order
In the Matter of

Wonder State Life Insurance Company

05-008

Adoption Order

In the Matter of the Report of the
Targeted Market Conduct Examination of
**Farmers Insurance Company, Inc., Farmers
Insurance Exchange, and Mid-Century
Insurance Company**

05-009

Order of Cancellation

In the Matter of the Certificate of Authority of
**Life and Health Insurance
Company of America**

05-010

Consent Order
In the Matter of

Samantha Smith

05-011

Emergency License Suspension Order
In the Matter of

Carolyn Dixon

05-012

Consent Order

In the Matter of

Acklin Funeral Home, Inc.

05-013

Order of Continued Suspension
In the Matter of the Certificate of Authority of
Acceptance Insurance Company

05-014

Order

In the Matter of

Fidelity Standard Life Insurance Company

05-015

Emergency Suspension Order

In the Matter of

James Cecil Black

05-016

Order of Continued Suspension
In the Matter of the Certificate of Authority
Fidelity Mutual Life Insurance Company

05-018

Emergency License Suspension Order
In the Matter of

Tim Newkirk

05-019

Order

In the Matter of the Application for Approval
of Acquisition of Control of
**Ulico Indemnity Company by Darwin National
Assurance Co. et al.**

INSURANCE DEPARTMENT

05-020

Order of Suspension

In the Matter of the Certificate of Authority of
Cumberland Casualty and Surety Company,
a Florida Company

05-021

Order of Cancellation

In the Matter of the Certificate of Authority of
Colorado Western Insurance Company

05-022

Order of Continued Suspension

In the Matter of the Certificate of Authority of
National Health Insurance Company

05-023

Order of Continued Suspension

In the Matter of the Certificate of Authority of
Casualty Reciprocal Exchange

05-025

Order

In the Matter of the Surplus Line Registration of
Commercial Casualty Insurance Company
of North Carolina

05-026

Order of Continued Suspension

In the Matter of the Certificate of Authority of
GHS Fire Insurance Company (Formerly
Thurston Fire & Casualty Insurance Company)

05-027

Emergency License Suspension Order

In the Matter of

David Murry Widener and
Widener Insurance Agency, Inc.



ORDERS AND NOTICES

LEGISLATIVE AUDIT May 2, 2005

Agency	Period Covered
Arkansas State Highway and Transportation Department	6/30/04
Department of Human Services	6/30/03
Department of Information Systems Two-Year Period Ended	6/30/04
Arkansas State Highway Employees Retirement System	6/30/04
Arkansas Public Employees Retirement System	6/30/04
Arkansas State Police Retirement System	6/30/04
Arkansas Judicial Retirement System	6/30/04
Department of Finance and Administration Employee Benefits Division - Two-Year Period Ended	6/30/04
Department of Finance and Administration - Revenue Division Office of Revenue Legal Counsel - Two-Year Period Ended	6/30/04
Arkansas Prosecuting Attorneys' Association	12/31/04
Department of Higher Education	6/30/03
Soil and Water Conservation Commission	6/30/04
Arkansas Employment Security Department (Private)	6/30/04
Arkansas State Board of Public Accountancy (Private)	6/30/04
Arkansas Development Finance Authority (Private)	6/30/04

ORDERS AND NOTICES

Arkansas Safe Drinking Water Revolving Loan Fund Program (Private)	6/30/04
State of Arkansas Construction Assistance Revolving Loan Fund Program (Private)	6/30/04
Disability Determination for Social Security Administration (Private)	9/30/04
Central Arkansas Planning and Development District, Inc. (Private)	6/30/04
Central Interstate Low-Level Radioactive Waste Commission (Private)	6/30/04
Southeast Arkansas Economic Development District, Inc. (Private)	6/30/04
West Central Arkansas Planning & Development District, Inc. (Private)	6/30/04
White River Planning and Development District, Inc. (Private)	6/30/04
Health Resources of Arkansas, Inc. (Private)	6/30/04
Arkansas Crime Information Center	6/30/04
State Crime Laboratory	6/30/04
Arkansas Department of Environmental Quality	6/30/04
Arkansas Geological Commission - Two-Year Period Ended	6/30/04
Arkansas State Board of Pharmacy	6/30/04
Arkansas State Board of Registration for Professional Engineers and Land Surveyors - Two-Year Period Ended	6/30/04
Office of Prosecutor Coordinator	6/30/04
Arkansas Public Service Commission	6/30/04
Arkansas Real Estate Commission - Two-Year Period Ended	6/30/04
Arkansas Northeastern College	6/30/04

ORDERS AND NOTICES

Arkansas State University - Beebe	6/30/04
Arkansas State University - Mountain Home	6/30/04
Black River Technical College	6/30/04
Henderson State University	6/30/04
Northwest Arkansas Community College	6/30/04
Ouachita Technical College	6/30/04
Southeast Arkansas College	6/30/04
Southern Arkansas University	6/30/04
Northwest Technical Institute	6/30/04

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