



Arkansas
Secretary
Of State

The Arkansas Register



Volume XXVI, Number 2

August 2002

Corporate Records - Elections - Capitol Building and Grounds

State Capitol - Little Rock, Arkansas 72201-1094 - 800.482.1127 - www.sosweb.state.ar.us

TABLE OF CONTENTS

ATTORNEY GENERAL

Opinions 4

RULES AND REGULATIONS 7

INSURANCE DEPARTMENT

Orders 9

LEGISLATIVE AUDIT

Orders 10

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

Editor Jon Davidson

**Published by
*Secretary of State***

The *Arkansas Register* is an official publication of the State of Arkansas. It contains administrative rules and regulations adopted by state agencies, boards and commissions pursuant to Act 434 of 1967, as amended. The *Arkansas Register* also includes Attorney General opinions, notice of legislative audit reports and insurance orders. The subscription rate is \$40 per year or \$3.50 a copy, distributed monthly, postpaid within the United States.

THE ARKANSAS REGISTER

DISCLAIMER

The Secretary of State website, www.sosweb.state.ar.us, contains copies of rules filed by Arkansas state agencies, boards and commissions with the *Arkansas Register* in an “acceptable electronic format” as per Act 1648 of 2001. The rules contained therein are not to be considered “official” copies of agency rules. The official copies remain the paper copies housed in the *Arkansas Register* division of the Secretary of State’s office. While the rule texts are not the “official” copies every attempt has been made to ensure their accuracy and reliability. However, the Secretary of State’s office makes no warranties or guarantees regarding the content of the copies presented on its website.

ACCESS TO RULES

Electronic versions of agency rule filings are available from the Secretary of State website. The rules may be accessed by clicking on the title of the rule listed in **BLUE**. Most of the rules are available in an Adobe PDF format, however, some rules may link you to a specific website for the particular agency. Rule titles followed by asterisks (***) are not available in an electronic form. To receive a hard copy of these types of rules or any other rule you may either contact the agency contact person or the office of the *Arkansas Register*. Copies of rules obtained from the office of the Register are subject to a .25 cent per page copy charge. Inquiries may be directed to the *Arkansas Register* office at the contact points listed below.

Secretary of States’ office
Arkansas Register
026 State Capitol
Little Rock, AR 72201
(501) 682-3527
jedavidson@sosmail.state.ar.us

ATTORNEY GENERAL OPINIONS

OPINION NO.: 2002-179

Elliott, Joyce
State Representative

RE:Regarding state employees: During nonwork periods and uncompensated time in nonwork stations, do state employees have the right of free speech and freedom of association as it relates to the rights of state employees to communicate with one another and with members of the public, including representatives of labor organizations? Q2) Regarding state employees: Do state employees have the right to choose to join or not join a labor organization and to be free from interference or coercion by others in making that choice? Q3) Regarding access: Do representatives of labor organizations have the same rights of access to state buildings and public space as any other members of the public (e.g., parking lots, cafeterias, lobbies and other facilities and space that is open to the public)? **RESPONSE:** Q1) I cannot answer this question without knowing what sorts of speech activities have occurred at the various public workplaces. The opinion reviews the various standards of review that apply under U.S. Const. amend. 1 and Ark. Const. art. 2, sec. 6 regarding the freedom of speech and freedom of association depending on the nature of the forum. Q2) Both Ark. Const. amend. 34 and ACA 11-3-303 guarantee state workers the right to make an uncoerced choice regarding union membership. Q3) Yes, subject to the condition that a right of access does not necessarily carry with a right to engage in a particular speech

OPINION NO.: 2002-181

Gullett, Brenda
State Senator

RE:Is a city rezoning ordinance subject to referendum under Amendment 7 to the Arkansas Constitution? **RESPONSE:** The opinion does not answer the question, but reviews the legislative/administrative distinction and sets forth an approach for analyzing that distinction, drawn from another jurisdiction.

OPINION NO.: 2002-184

Ormond, Charles L.
State Representative

RE:Pursuant to the provisions of Arkansas Game and Fish Reg. 11.08, could a dog owner be ticketed by a wildlife enforcement officer for his dog being on someone else's property without prior complaint from the property owner? **RESPONSE:** "Yes," subject to the condition that the wildlife enforcement officer has this authority only with respect to dogs that have been purposely released in order to hunt. I have reached this conclusion notwithstanding the fact that A.C.A. § 15-41-113 might arguably be read as criminalizing the act of ticketing under such circumstances. Although I do not believe A.C.A. § 15-41-113 applies to regulations adopted after its enactment, which preceded the issuance of Regulation 11.08, I would reach the same conclusion even if it did apply. Given that the Arkansas Constitution affords the Game and Fish Commission exclusive authority to regulate hunting, Ark. Const. amend. 35, I believe any legislative effort to restrict this authority is constitutionally impermissible. The question of whether a dog was released in order to hunt is obviously one of fact that only a court could address. If the circumstances reflect that a dog was released accidentally or for any purpose other than to hunt, I believe the wildlife enforcement officer would lack the authority to issue a citation.

OPINION NO.: 2002-193

Dangeau, LeRoy
State Representative

RE:Does the Woodruff County Nursing Home, a 132-bed skilled nursing facility owned and operated by Woodruff County, qualify for sovereign immunity? **RESPONSE:** The answer to this question as phrased is no, given that "sovereign immunity" applies only to the state, not to the state's political subdivisions and agents thereof. However, the nursing home may qualify for the statutory immunity that is afforded counties pursuant to A.C.A. § 21-9-301 or pursuant to the

ATTORNEY GENERAL OPINIONS

common-law protection of charitable immunity. Finally, any particular claim may be barred by the concept of qualified immunity, which applies under appropriate circumstances to bar federal constitutional claims against official state or local actors. Determining which, if any, of these varieties of immunity might apply will entail conducting a factual review of the sort that exceeds my authority to undertake as a basis for issuing an official opinion. However, I can and will set forth the tests a reviewing court would apply in determining whether to dismiss any given claim.

OPINION NO.: 2002-196

Melton, Don (Col.)
Director, AR State Police

RE: Does 5 U.S.C. 9101 preempt state law concerning the requirements of a notarized signature for the release of Arkansas criminal history information for non-criminal justice purposes? Q2) If the federal law does preempt the state law, are the private contractors of the federal government included with the enumerated federal agencies in the federal law such that they are not required to provide a notarized signature? Q3) If the federal law does not preempt the state law, is the Arkansas State Police required by ACA 21-15-107 to obtain a notarized signature on the request for criminal history forms that come from the private contractor or may some other form of validation of signature be used? ANSWER: 1) It is not necessary to address the federal preemption question because state law does not require a notarized signature for requests from the federal government or a federal government contractor when checking the background of prospective federal employees. The only requirement for a notarized consent from is in ACA 21-25-107(d)(1), and it only pertains to background checks in connection with state employment. 2) Same. 3) Same

OPINION NO.: 2002-197

Scroggin, Preston
State Representative

RE: If utility lines were originally laid outside the boundaries of the right of way, then can a city, after a period of seven years, automatically acquire the right of way? Q2) Can a municipality run city vehicles and/or pickup trucks on off-road fuel? RESPONSE: Q1) Although no Arkansas authority has addressed this issue, as a general principle of property law, a city can acquire a prescriptive easement. Accordingly, assuming the misplacement occurred inadvertently under a claim of right, I believe the answer is probably yes. Q2) Yes, so long as the vehicles are used for official purposes. See ACA 26-56-224 and -225

OPINION NO.: 2002-202

Creekmore, Mike
State Representative

RE: Can a neighborhood be held liable for placing a "Slow Down Children at Play" sign in their neighborhood? RESPONSE: I cannot answer this question because it seeks legal advice on behalf of a private organization. The city attorney should be able to provide counsel as to whether the placement of any such sign accords with city ordinances.

OPINION NO.: 2002-209

Harkey, John Norman
Circuit Judge

RE: In light of the provisions of art. 5, sec. 10 of the Arkansas Constitution, can a member of the Arkansas House of Representatives simultaneously serve as a city attorney for an incorporated town in Arkansas? ANSWER: No, the election of a sitting member of the House of Representatives as city attorney of an incorporated town violates art. 5, sec. 10.

ATTORNEY GENERAL OPINIONS

OPINION NO.: 2002-226

Carpenter, Thomas M.
Office of the City Attorney

RE: Request for approval of an interlocal cooperation agreement between the Little Rock Air Force Base and the City of Little Rock for the purpose of securing to each the benefits of mutual aid in fire protection and hazardous materials incident response. **RE-SPONSE:** Approved



ADOPTED RULES AND REGULATIONS

ARKANSAS TEACHER RETIREMENT

Docket No.: 088.00.02--002
Effective Date: 7/24/02
Contact Person: Tammy Medlock
Telephone: (501) 682-1827

Policies, Rules and Regulations

BOARD OF OPTOMETRY

Docket No.: 069.00.02--003
Effective Date: 8/31/02
Contact Person: Howard Flippin
Telephone: (501) 268-4351

Article VI: Section 1; new addition of Subsection Q - Unprofessional Conduct

GAME & FISH COMMISSION

Docket No.: 002.00.02--007
Effective Date: 8/7/02 & 8/17/02
Contact Person: James Goodhart
Telephone: (501) 223-6327

2002-2003 Early Season Migratory Bird and WMD Hunting Season and Code; Emergency Order/Code - Prohibition of Snakehead

HUMAN SERVICES *Administrative Services*

Docket No.: 016.14.02--008
Effective Date: 9/30/02
Contact Person: Bill Tyler
Telephone: (501) 682-9631

DHS 1050 - Charges for Copying Documents

Medical Services

Docket No.: 016.06.02--030
Effective Date: 8/1/02
Contact Person: Tommy Wingard
Telephone: (501) 682-6117

Regulations for the Licensure of Assisted Living Long Term Care Facilities - Level 1

Docket No.: 016.06.02--031
Effective Date: 8/1/02
Contact Person: Binnie Alberius
Telephone: (501) 682-8361

State Plan Transmittal #2001-042

Children & Family Services

Docket No.: 016.15.02--004
Effective Date: 8/16/02
Contact Person: Vivian Jackson
Telephone: (501) 682-1577

ADOPTED RULES AND REGULATIONS

Rule pertaining to Title IV-E Medicaid Eligibility and the "Feed the Kids" program -- Policy Manual revised to reflect the automation of the eligibility process via CHRIS; CFS-594, CFS-595 and PUB-399

POLLUTION CONTROL & ECOLOGY

Hazardous Waste

Docket No.: 014.09.02--003
Effective Date: 8/2/02
Contact Person: Mike Bates
Telephone: (501) 682-0831

Amendment to Regulation 23: Hazardous Waste Management

Docket No.: 014.09.02--004
Effective Date: 8/2/02
Contact Person: Mike Bates
Telephone: (501) 682-0831

Regulation No. 29 - Brownfields Redevelopment - 2002 Update

POST PRISON TRANSFER BOARD

Docket No.: 158.00.02--001
Effective Date: 8/19/02
Contact Person: Leroy Brownlee
Telephone: (501) 682-0831

Policies and Procedures

WATER WELL CONSTRUCTION COMMISSION

Docket No.: 096.00.02--001
Effective Date: 7/26/02
Contact Person: A. Mark Bennett, III
Telephone: (501) 682-3965

Emergency Rule: 3.9.1E -- Renewal of Annual License 2002-2003

INSURANCE DEPARTMENT

***** No Insurance Orders were filed with the *Arkansas Register* during the past filing period for placement in this edition.**

ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency

Period Covered

***** No Legislative Audit Reports were filed with the *Arkansas Register* during the past filing period for placement in this edition.**

Secretary of State
Arkansas Register Division
State Capitol Building, Room 026
Little Rock, AR 72201-1094

***** **2002** subscriptions to the *ARKANSAS REGISTER* will be sold on a “CALENDAR YEAR” basis (January through December) only. To subscribe to the *ARKANSAS REGISTER* complete the following form and mail to the address given above.

_____ I would like to subscribe to the *ARKANSAS REGISTER* for the **2002** year (January through December) at the price of **\$40** per subscription.

_____ I would like to order the following copies of the *ARKANSAS REGISTER* at \$3.50 per copy.

Volume: _____ **Issue:** _____

Name: _____

Address: _____

City: _____ **State:** _____ **Zip:** _____

Contact Person: _____ **Phone No.:** () _____

The *ARKANSAS REGISTER*, an official publication of the State of Arkansas, is published monthly with a cumulative index published annually. Subscribe to the *ARKANSAS REGISTER* by completing the form above and mailing it to the address given on the form. Make all checks payable to the *ARKANSAS REGISTER*.

ARKANSAS REGISTER

Published by:

Secretary of State

FROM: Secretary of State
Arkansas Register Division
State Capitol, Room 026
Little Rock, AR 72201-1094

Presorted Standard
U.S. Postage
PAID
Little Rock, AR 72201
Permit No. 2855