



Arkansas
Secretary
Of State

The Arkansas Register



Volume XXVI, Number 5

November 2002

Corporate Records - Elections - Capitol Building and Grounds

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

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**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

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ATTORNEY GENERAL OPINIONS

Opinion No.: 2002-275

Melton, Don
Director, AR State Police

RE: Must the Arkansas State Police (“ASP”) and ACIC accept orders to seal and expungements of criminal records that are entered contrary to law — that is, incorrectly or incompletely? Q2) What is the Department’s liability in a situation where an order to seal or an expungement has been improperly entered, the conviction that was sealed would be a disqualifying offense to employment with that Department (DHS, DOE, etc.) and ASP issues a “no record found” letter and the subject repeats the offense that the seal order/ expungement was entered for? Q3) May the Department avoid or reduce its liability (if any is found) with a general disclaimer on the record check report that states in a general manner that all reports do not contain pending arrests, sealed or expunged convictions/orders? **RESPONSE:** Q1) I believe the ASP and ACIC must honor any and all properly issued certificates of expungement or uniform orders to seal records. In my opinion, it would be inappropriate for these administrative agencies to second-guess an expungement determination made by an authorized court or agency. However, in instances where an expungement does not remove disqualification from employment, I believe the ASP should include the fact of the expungement on its criminal background report, as opposed to reporting “no record found.” Q2) I believe the ASP would face no liability for honoring an expungement issued in proper form — i.e., in compliance with the formal requirements set forth at ACA 16-90-905 — regardless of whether the issuing authority was justified in its action. Q3) Given my response to question 2, this question is probably moot. However, I will opine that there would be no legal consequences one way or the other if the ASP were to include a general disclaimer on its criminal background reports.

Opinion No.: 2002-276

Hickinbotham, Boyd
State Representative

RE: Do provisions of Act 286 of 1967 (Sec. 2, Par. i), permit the Board of Commissioners of Cherokee Village Suburban Improve District #1 (“SID”) to do whatever they deem necessary in directing the affairs of the District? Q2) If not, what action, if any, is required to redress the situation? Q3) It appears that Act 41 of 1941 and all relating amendments are silent regarding providing free services and access to SID amenities for those individuals selected by the Board of Commissioners. Do provisions of Act 286, Sec. 2 permit such action? **RESPONSE:** Q1) o long as the SID board’s actions are in fact undertaken in the course of addressing statutorily authorized and court-approved “SID affairs,” I believe board members can indeed “do whatsoever they deem necessary.” Q2) Any interested property owner can challenge in court any board action he believes exceeds the scope of the board’s authority as set forth in A.C.A. § 14-92-201 et seq. Q3) Nothing in Act 286, § 2 authorizes providing unspecified “selected individuals” free SID services and access to SID amenities. The practice of providing such services and access would be permissible only if it benefited the SID property owners.

Opinion No.: 2002-285

Whitaker, Ruth
State Senator

RE: Q1) Does a rural water district have to supply a list of the names, addresses and telephone numbers of paying customers of the district if the information is requested by a citizen of this State? Q2) If a document listing names, addresses and telephone

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numbers of paying customers of the rural water district is not readily available, must the rural water district originate such a document in response to the request? Q3) Can the rural water district provide only the names and addresses or must they include telephone numbers if specifically requested? RESPONSE: Q1) Yes, with the possible exception of unlisted telephone numbers and unlisted addresses. A factual determination must be made as to whether any unlisted numbers or addresses rise to the level of constitutional privacy protection under McCambridge. Q2) No. ACA 25-19-105(d)(2)(C). Q3) See response to Q1.

Opinion No.: 2002-286

Hudnell, Lance
Deputy City Mgr, Hot Springs

RE: Request for approval of an interlocal cooperation agreement between Garland County, Arkansas and the City of Hot Springs for the construction, operation and maintenance of the Garland County District and Juvenile Courts Building. RESPONSE: Approved as submitted.

Opinion No.: 2002-287

Norris, Larry
Director, AR Department of Correction

RE: Pursuant to provisions of the Prison-Made Goods Act of 1967 (codified at A.C.A. 12-30-201 et seq.), do Arkansas Department of Correction Pen Stores (commissaries) have authority to purchase items manufactured by inmates in prison industries (such as t-shirts and towels) for resale to the entire inmate population? ANSWER: Yes. This would be consistent with the intent expressed in 12-30-202 and would accomplish the stated purposes. See 12-30-204 regarding authorizes purchasers. There would be no private profit, consistent with 12-30-202

Opinion No.: 2002-289

Miller, Paul
State Senator

RE: In light of the provisions governing implementation of Amend. 79, Sec (b)(1), what would be the 2003 taxable value of a parcel of land that has a full assessment value of \$15,000 in 2002 with a taxable value of \$11,000 using the ten percent cap? RESPONSE: It depends on the nature of the parcel. If the parcel is not utility or carrier real property, its taxable value in 2003 will be \$12,000. If the parcel is utility or carrier real property, its taxable value in 2003 will be \$12,100. See Ark. amend. 79.

Opinion No.: 2002-292

Roebuck, Tommy G.
State Representative

RE: Was a candidate who may have resided in either Zone 12 or Zone 13 of the Gurdon School District qualified to run for the Zone 13 school board position? RESPONSE: If the candidate lived in Zone 12, he was not qualified to run for the Zone 13 position. However, notwithstanding this conclusion, I believe he would nevertheless be a de facto member of the board until successfully challenged as ineligible. Moreover, I believe he might cure the deficiency and qualify as a de jure officer by moving into the zone following his election. I am neither equipped nor authorized to address the factual question of whether the candidate was a qualified resident of Zone 13 at the time of his election.

Opinion No.: 2002-295

Verkamp, John Paul
State Representative

RE: Do provisions of ACA 14-42-116 and/or -117

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prohibit the Greenwood City Clerk Treasurer from drawing retirement benefits from the city's pension plan while simultaneously drawing half her salary as provided by ACA 24-12-121(b)(1)? RESPONSE: The provisions of ACA 14-42-117 prohibit the clerk from drawing both benefits unless she had vested in both plans prior to the enactment of ACA 14-42-117.

Opinion No.: 2002-296

Bledsoe, Cecile
State Representative

RE: Can property be taxed if the land patent is current? Q2) Are the interpretations of the attached Supreme Court cases valid? RESPONSE: In my opinion, the state can clearly impose property tax on government property that has been conveyed to a private party by land patent. Based on the opinions expressed in your second question, I assume that your phrase "the land patent is current" refers to the practice of individuals filing documents in the land records asserting their supposed "patent" interest in property. In my opinion, such filings have no legal significance other than possibly to cloud title to property without any legal justification. I disagree with the proposition that "allodial" property of the sort referenced in Ark. Const. art. 2, sec. 28 is not subject to taxation, and I do not believe the filing of any purported "patent" can relieve a property owner of the obligation to pay property taxes.

Opinion No.: 2002-302

Shoffner, Martha
State Representative

RE: If the Newport School District is already in compliance with the federal Voting Rights Act of 1965, why is the District rezoning? RESPONSE: I cannot respond because this issue is the subject of currently pending litigation.

Opinion No.: 2002-303

Hoofman, Cliff
State Senator

RE: Based upon the facts as provided in this request regarding an aggravated robbery case scheduled to go to trial later this month, are police investigation files open to copying and inspection after an arrest but before trial? Q2) After a verdict is rendered, are police investigation files open to copying and inspection? Q3) After the appellate process is exhausted, are police investigation files open to copying and inspection? Q4) If these files are being used in another investigation, does this change your opinion as to all of the above? RESPONSE: Q1 through 3) There is no general rule that dictates the disclosure of investigative files at any given stage of judicial proceedings. Regardless of how far matters have developed, the operative inquiry under the FOIA will always be whether an investigation can fairly be characterized as "open and ongoing" — an inquiry that will always be necessarily factual and, as such, beyond the power of this office to conduct. If a finder of fact determines that an investigation remains "open and ongoing," the investigative file will be exempt from disclosure pursuant to Ark. Code Ann. § 25-19-105(b)(6). Q4) Regardless of what the status of legal activity might be with respect to a particular matter, the investigative file relating to that matter might be deemed "open and ongoing" based upon its pertinence to another or larger investigation. Again, only a finder of fact can determine whether this extended exemption from disclosure applies in any particular case.

Opinion No.: 2002-306

Clemons, Booker T.
State Representative

RE: Q1) Pursuant to Arkansas law, are individuals occupying the positions of chief of police and/or fire department considered civil servants subject to ACA

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14-51-301? Q2) If the chief positions are subject to ACA 14-51-301, could a temporary appointment as chief be restricted to 60 days as designated in 14-51-301(b) since an emergency was not declared? Q3) If the Commission should decide to fill the position from outside of the department, would the interim chief be ineligible for examination for advancement to the chief position since he did not serve at least one year in the lower rank and was terminated during his probation period pursuant to ACA 14-51-301(4)(A)(ii)? Q4) Pursuant to provisions of 14-51-301, does the Commission have the following two options that it may exercise in filling the chief's position: 1) to appoint a permanent replacement from within the ranks according to the rules and regulations; or 2) testing for the position and creating an eligibility list? Q5) If the afore stated ordinance is enacted, would the city council be infringing upon the Commission's authority to create qualifications for the positions and eligibility lists from which the Chief may make necessary appointments? Q6) Should the proposed ordinance that would eliminate the two current assistant chief positions, create four deputy chief positions, and designate that the current four captains in the department be promoted to the new deputy chief positions, be considered a promotion and not a new designation of an old position which would be usurping the authority of the chief? RESPONSE: I cannot answer Questions 1 through 4 because they raise issues that are the subject of currently pending administrative litigation. Q5-6) To the extent that an ordinance creates new positions or re-designates the ranks of particular positions in the police department, the ordinance does not infringe on the civil service commission's authority. However, to the extent that an ordinance places certain named individuals in newly created positions rather than simply re-naming the positions they already hold, the ordinance does infringe on the commission's authority.

Opinion No.: 2002-308

Emigh, Barry

RE: Request for approval of popular name and ballot title of proposed constitutional amendment

authorizing bingo and raffles by nonprofit organization, empowering the General Assembly to operate lotteries and pass legislation without assembly, and authorizing for-profit gambling as set out in the proposed amendment. RESPONSE: Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: 2002-310

Thomas, Lindbergh
State Representative

RE: Q1) Did the Dumas Advertising and Promotion Commission have authority to use A&P funds to help with the purchase of football uniforms for the Dumas High School football team? Q2) Does the City of Dumas have authority to withhold money from the Mayor's salary that a legislative audit report said should be repaid to the City by the Mayor? Q3) Do provisions of ACA 14-43-401(b)(1) give the city council of a first class city the authority to declare the office of mayor vacated if the newly elected mayor fails to come to work and perform even the basic functions of the office of mayor? Q4) Can the newly elected mayor of a first class city be removed from office upon conviction of a felony committed during a prior term and, if so, what is the procedure for obtaining this removal from office? Q5) If a court removed the mayor from office based upon the mayor's conviction of a felony, does the mayor have the right to continue serving as mayor during the appeal? RESPONSE: Q1) Yes, if the Commission determined factually that such use of the funds would encourage tourism and conventions in Dumas. Q2) I cannot answer this question without knowing more facts about the situation. Q3) State law does not authorize city councils to declare a vacancy in the elective office of mayor. The mayor must be prosecuted for nonfeasance. See ACA 14-43-109. Q4) A prior felony conviction can render a mayor ineligible under certain circumstances. Ineligibility, in turn, can provide a basis for his removal from office through quo warranto, usurpation, or illegal exaction actions. Q5) I cannot answer this question because its answer will depend on certain contingent factors.

ADOPTED RULES AND REGULATIONS

ARKANSAS REHABILITATION SERVICES

Docket No.: 165.00.02--003
Effective Date: 11/1/02
Contact Person: Sue Gaskin
Telephone: (501) 296-1620

**Arkansas Assistive Technology
Alternative Financing Program**

BOARD OF PUBLIC ACCOUNTANCY

Docket No.: 019.00.02--001
Effective Date: 11/24/02
Contact Person: James George
Telephone: (501) 682-5533

Board Rules Manual

DEPARTMENT OF CORRECTION

Docket No.: 004.00.02--003
Effective Date: 11/4/02
Contact Person: Carl Dyer
Telephone: (870) 267-6345

Sex Offender Guidelines and Procedures

GAME & FISH COMMISSION

Docket No.: 002.00.02--010
Effective Date: 11/7/02
Contact Person: James Goodhart
Telephone: (501) 223-6327

**Approved Aquaculture Species Policy;
Changes to Commercial Fishing
Regulations for 2002; Prohibition of
Wildlife Commercial Breeder / Dealer
Permits for Deer, Elk and Other Cervids**

HEALTH DEPARTMENT

Environmental Health Services

Docket No.: 007.04.02--002
Effective Date: 11/2/02
Contact Person: Robert Brech
Telephone: (501) 661-2297

**Rules and Regulations Pertaining to
Food Stores, Markets and Warehouses**

Engineering

Docket No.: 007.18.02--001
Effective Date: 11/4/02
Contact Person: Martin Nutt
Telephone: (501) 661-2504

**Rules and Regulations Pertaining to
Water Operator Licensing**

HUMAN SERVICES

Administrative Services

Docket No.: 016.14.02--009
Effective Date: 1/1/03
Contact Person: Brenda Jackson
Telephone: (501) 682-6250

**DHS Comprehensive Services Program
Plan (CSPP)**

ADOPTED RULES AND REGULATIONS

County Operations

Docket No.: 016.20.02--018
Effective Date: 1/1/03
Contact Person: Brenda Jackson
Telephone: (501) 682-6250

DHS Social Services Block Grant Program Manual

Docket No.: 016.20.02--019
Effective Date: 12/1/02
Contact Person: Linda Greer
Telephone: (501) 682-8257

Medical Services Policy MS 31100 - Tuberculosis (TB) Medicaid & DCO-133, TB Medicaid Application for Assistance

Docket No.: 016.20.02--020
Effective Date: 1/1/03
Contact Person: Linda Greer
Telephone: (501) 682-8257

Medical Services Policy MS 26200 - 26255: Assisted Living Facilities Waiver

Medical Services

Docket No.: 016.06.02--035
Effective Date: 11/10/02
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

AR 02-16 -- Attachment 2.2-A; Supplement 8b to Attachment 2.6-A; Supplement 1 to Attachment 2.6-A

Docket No.: 016.06.02--036
Effective Date: 11/10/02
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

DMS-2002-W-4 -- ARSenior Program

Docket No.: 016.06.02--037
Effective Date: 11/10/02
Contact Person: Carolyn Bradley
Telephone: (501) 682-8577

Children's Medical Services (CMS) Respite Care Provider Manual

Docket No.: 016.06.02--038
Effective Date: 12/1/02
Contact Person: Nikki Wade
Telephone: (501) 682-8859

Children's Medical Services Targeted Case Management Provider Manual

Docket No.: 016.06.02--039
Effective Date: 12/1/02
Contact Person: Betty Reed
Telephone: (501) 682-8363

Official Notice DMS-2002-W-6

PHARMACY BOARD

Docket No.: 070.00.02--002
Effective Date: 11/1/02
Contact Person: Trey Gardner
Telephone: (501) 682-0190

ADOPTED RULES AND REGULATIONS

08-00-0001 - 08-00-0014 -- Wholesale Drug Distributors of Legend / Controlled Substances

POLLUTION CONTROL & ECOLOGY

Water Pollution Control

Docket No.: 014.04.02--001
Effective Date: 10/27/02
Contact Person: Chuck Bennett
Telephone: (501) 682-0654

Regulation #2 - Establishing Water Quality Standards - Great Lakes Chemical Corporation and Albemarle Corporation

Administration

Docket No.: 014.08.02--001
Effective Date: 11/1/02
Contact Person: Jennifer Tucker
Telephone: (501) 682-0883

Emergency Rule: Regulation No. 9 -- Permit Fees Regulation

Hazardous Waste

Docket No.: 014.09.02--005
Effective Date: 11/1/02
Contact Person: Tammy Hynum
Telephone: (501) 682-0856

Emergency Rule: Regulation No. 23 (Hazardous Waste Management) - Addition of Cedar Chemical Corporation site to the Hazardous Substance Remedial Action Trust Fund Priority List

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 October 28, 2002

Agency	Period Covered
Arkansas Department of Community Correction	6/30/01
State Forestry Commission	6/30/01
Arkansas Crime Information Center	6/30/01
State Board of Collection Agencies	6/30/01
Arkansas Dietetics Licensing Board	6/30/01
State Board of Election Commissioners	6/30/01
Judicial Discipline and Disability Commission	6/30/01
Arkansas Commission on Law Enforcement Standards and Training	6/30/01
Arkansas State Board of Massage Therapy	6/30/01
Arkansas State Board of Registration for Professional Soil Classifiers	6/30/01
State Board of Registered Interior Designers	6/30/01
Social Work Licensing Board	6/30/01
Arkansas Tobacco Control Board	6/30/01
Delta Counseling Associates	6/30/01

ORDERS AND NOTICES

Ozark Counseling Services, Inc.	6/30/02
Professional Counseling Associates, Inc.	6/30/02
South Arkansas Regional Health Center, Inc.	6/30/02
Southeast Arkansas Behavioral Healthcare System	6/30/02
Southwest Arkansas Counseling and Mental Health Center, Inc.	6/30/02
Western Arkansas Planning and Development District, Inc.	6/30/02
Department of Human Services	6/30/01



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Published by:

Secretary of State

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

Presorted Standard
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