

The Arkansas Register



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TABLE OF CONTENTS

ATTORNEY GENERAL

Opinions 4

RULES AND REGULATIONS 9

INSURANCE DEPARTMENT

Orders 13

LEGISLATIVE AUDIT

Orders 14

Charlie Daniels
Secretary of State
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THE ARKANSAS REGISTER

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ATTORNEY GENERAL OPINIONS

Opinion No.:2003-285

Petrus, Benny C.
State Representative

RE: Should federal Wetland Reserve Program property be assessed for ad valorem purposes at its use value, or at current market value, or should the Assessment Coordination Department establish a new category for land put in this program? **RESPONSE:** The answer will depend upon the facts regarding a particular tract of property, including the language of the relevant warranty easement deed, any attendant conservation plan and the actual use of the property in question. This type property falls through the cracks of current assessment procedures. If not primarily used for agricultural, pasture or timber land, it should not be valued at its "use value" pursuant to procedures for that type of property. It is possible depending upon the facts, that it should be valued under Ark. Const. Art. 16, sec. 5 at "current market value," but there is apparently no current valuation method to determine the current market value of such property. Administrative or legislative clarification may be indicated.

Opinion No.:2003-305

Prater, Sandra
State Representative

RE: When internal investigations that are completed result in suspension or termination, are they to be treated as personnel files or investigated files? Q2) If someone files an FOIA request, should the file be released without getting permission of the affected employee? **ANSWER:** Q1) Regardless of the outcome of the investigation of an employee's job performance, the records are generally not personnel records, but rather constitute employee evaluation or job performance records, the release of which is governed by A.C.A. 25-19-105 (c) (1). Q2) The employee's permission is not required. Instead, there is a notification requirement. See 25-19-105(c) and Opinion 97-008.

Opinion No.:2003-312

Pickett, Betty
State Representative

RE: What restrictions may a city place on a cemetery established exclusively for family use on land owned and operated by the family within city limits? Q2) If a city requires a family cemetery to have perpetual care or permanent maintenance, does that conflict with ACA 20-17-1003(a)(3)? **ANSWER:** There is no general authority for a city to place restrictions on a cemetery that is properly registered (see A.C.A. 20-17-903), and that is owned and operated by a family exclusively for its own use. Authority for any such "restrictions" would likely have to be found either in 14-54-802 (regulating burial of the dead), or the city's police power. Q2) "Yes." A.C.A. 20-17-1003 (a) (3) exempts a family cemetery from the requirements of the Cemetery Act.

Opinion No.:2003-313

Bradford, Jay
State Representative

RE: Can an officer issue a handicapped-parking citation on a uniform traffic citation with the operator of the vehicle being present? **RESPONSE:** Yes.

Opinion No.:2003-314

Bradford, Jay
State Representative

RE: (1) Can a city of the first class contract out the service of summons for criminal and traffic cases? If so, can the city still collect the authorized fee for service of the summons and charge it back to the defendant? (2) If subpoenas for these same cases are served by off-duty officers as independent contractors, can the fee for service of subpoenas be collected by the police department and charged back to the defendant? **RESPONSE:** (1) Yes,

ATTORNEY GENERAL OPINIONS

provided that the city contracts with an authorized person. See Rule 4(c), Ark. Rules Civ. P. The city can collect the fee from the defendant. (2) Yes.

Opinion No.:2003-318

Stone, Gail H.
Exec. Dir., APERS

RE: Is it constitutional for Acts 1374 and 1375 of 2003 to unilaterally separate municipal and district court clerks from their existing local retirement plans and place them in APERS? **RESPONSE:** These acts raise constitutional concerns as applied to clerks who will have already vested in their local systems as of January 1, 2005. Act 1375 could be deemed to violate the prohibition against impairment of contracts.

Opinion No.:2003-321

Madison, Sue
State Senator

RE: Under current Arkansas law, is it unconstitutional for a state university to provide any type of benefits to a domestic partner of a university employee, and do the same laws apply to private universities in Arkansas? **RESPONSE:** It is impossible to answer in a general fashion. There is nothing in the Arkansas Constitution addressing this issue specifically. One Arkansas statute touches upon it. See ACA 9-11-208(d). Any determination of the lawfulness of the action described would require reference to a particular policy or practice and any relevant law pertaining to the provision of that particular benefit by that particular institution. See opinion for full analysis.

Opinion No.:2003-322

Scroggin, Preston
State Representative

RE: Is the language of A.C.A. 5-66-103, which requires

sheriffs and deputy sheriffs to immediately proceed to a gambling house and arrest certain persons upon being informed of such, constitutionally suspect? **RESPONSE:** Declined to answer in light of pending litigation. See *State v. Fontaine*, (CR- 2003-659-1 Jefferson County).

Opinion No.:2003-323

Weiss, Richard A.
Director, DF&A

RE: Q1) Is a veteran, as that term is defined by ACA 21-3-203(b), by virtue of possessing that status, automatically entitled to an employment interview with the state agency or institution of higher education to which he or she has applied? Q2) How can a state agency or institution of higher education comply with ACA 21-3-302(d)(2)? **RESPONSE:** (1) No. Veterans are entitled to certain preference in the hiring process, as explained in full in the opinion, but are not necessarily entitled to be interviewed. (2) State law does not address this question. The formulation of a system of compliance is left largely to the discretion of the hiring agency or institution.

Opinion No.:2003-324

Ferguson, Scott
Chair, Crittenden County Election

RE: How should the Election Commission determine where the St. Francis Levee Board District boundaries are drawn? Q2) What are the eligibility requirements for district directors? Q3) Who is eligible to vote in the St. Francis Levee District election? **RESPONSE:** Q1) I do not believe the Election Commission is authorized to draw boundaries in the district. In my opinion, ACA 14-123-501 only provides for determining the number of district directors to be elected in each county contained within the district based upon total county acreage within the district. Although the applicable legislation is far from clear, I believe these directors should be elected at large within each county. Q2) Although a St. Francis Levee District

ATTORNEY GENERAL OPINIONS

Director need not live within the boundaries of the levee district, he must live within the county in which he is running that contains part of the district and he must further own and have owned for at least a year prior to his election at least forty acres of taxable property within the district. See Act 17 of 1917. Q3) In order to vote in the election, one must reside in the county and own a parcel of property of any size within the district. See Act 17 of 1917. The provisions of Act 17 may implicate the provisions of the Voting Rights Act, 42 USC sec. 1971 et seq., although only a finder of fact could make this determination. I believe the classifications created by Act 17 of 1917 would in all likelihood withstand an equal protection challenge.

Opinion No.:2003-326

Rogers, Robert T. II

Pros Att'y, 19th East Judicial District

RE: Q1) May sales tax revenue generated by Carroll County Ordinance No. 2000-39 be used to acquire office space, purchase equipment, and/or to pay employees salaries for the Carroll County 911 dispatch center before construction of the jail and sheriff's office is complete? Q2) If jail tax revenue cannot be used for the 911 dispatch center, what happens to the \$300,000.00 that has already been transferred from jail tax proceeds to the 911 dispatch center? Q3) How can excess revenue generated by this sales tax be used given the ballot title? Can the excess revenue be used in any fashion for the sheriff's dept. given the ballot title? Q4) How can the jail tax revenue be used once the jail and the sheriff's department are built? **RESPONSE:** (1) I cannot answer this question definitively, because an adequate answer would require me to interpret the language of a local ordinance, a task I am not authorized to perform. (2) If a factual and legal determination is made that the tax revenues in question cannot be used for the 911 dispatch center, any amounts that have been diverted to that purpose must be refunded to the proper account. (3) Any excess revenue generated by the sales tax can only be used for "future jail expansion, capital improvements, or county roads," in accordance with the express provision of the levying

ordinance and ballot title.

Opinion No.:2003-327

Smith, Terry

State Senator

RE: Does ACA 11-4-402(b)(1) apply to municipalities? Q1b) If not, are there any other state statutes that would prevent the city from adopting a mandatory direct deposit/debit card payment of wages policy? Q2) If ACA 11-4-402(b)(1) is applicable to municipalities, would the provision of a payroll debit card to those employees who opt out of electronic direct deposit satisfy the "payment by check" requirement of ACA 11-4-402(b)(1)(B)? **ANSWER:** Q1) "No." (See Opinion 99-310). Regarding a mandatory direct deposit policy, this would be contrary to 14-59-105, which generally requires the use of prenumbered checks to disburse municipal funds, and which requires the employee's consent to the direct deposit of salary or wages.

Opinion No.:2003-330

Madison, Sue

State Senator

RE: Should all special elections for initiatives and referendums be held on the second Tuesday of the month in light of Act 1441 of 2003, or can they be set at any other time of the month? **ANSWER:** There can be no special elections for initiated measures. See Ark. Const. amendment 7 and A.C.A. 7-9-105. Regarding Act 1441, this act amended 14-14-917 (a) (4), and only applies to county referendum elections, and only in the case of a special election on a referendum petition measure (see 14-14-917 (2) and (3)), i.e., where there is a petition by the voters to refer a county measure to a vote in a special election. In that case, according to 14-14-917 (a), as amended by Act 1441, the election must be held on the second Tuesday of the month, pursuant to 7-5-103, as also amended by Act 1441.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2003-335

Higginbothom, Steve
State Senator

RE: Q1) Is the City of West Helena required to hold an election to annex a small section of property (less than one mile) adjacent to the city limits, affecting less than a dozen persons? Q2) What is the statute of limitations on challenges to an annexation that was done by ordinance of the city council? **RESPONSE:** Q1) The answer will depend upon what type of annexation is contemplated. If the annexation is sought under ACA 14-40-301 through -305, an election is required. If it is sought under ACA 14-40-601 through -608, an election is not required. Q2) It is not necessary to challenge an annexation for which an election should have been held, because such an annexation never became legally effective. Other acts of the city officials may be challengeable, depending upon the facts. The statute of limitation on such other challenges will depend entirely upon the legal theory being relied upon.

Opinion No.: 2003-347

Jordan, Shelli H. (AAMM)
Williams & Anderson PLC

RE: Request for certification of the popular name and ballot title of an initiated act to allow the medical use of marijuana in Arkansas. **RESPONSE:** Popular name and ballot title rejected due to an ambiguity in the text of the proposed measure.

Opinion No.:2003-348

Stilley, Oscar
Attorney at Law

RE: Request for certification of the popular name and

ballot title of a proposed constitutional amendment to abolish personal property taxes, income taxes, taxes on used goods, authorize the change of tax rates by initiative petition, eliminate minimum millage rates for property taxes, provide for equal distribution of state funds for public schools, provide for school choice by use of education vouchers, and for other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: 2003-351

Emigh, Barry

RE: Request for certification of the popular name and ballot title of a proposed constitutional amendment to permit the operation of bingo, raffles, state-operated lotteries and gambling. **RESPONSE:** Popular name and ballot title certified as revised.

Opinion No.: 2003-364

Peel, Richard
Attorney, Russellville School District

RE: Records custodian has requested an opinion on whether records in the forwarded personnel file are public and/or exempt from disclosure in light of a Freedom of Information Act (FOIA) request for copies of all files, records, or communications of any kind made by or between the Russellville School District, attorneys retained by the District, and any employees of the District regarding the hiring, employment, conduct or resignation of a former employee of the District. **RESPONSE:** Personnel records in the file should be released, with exempt information redacted. Evaluation records in the file, including any investigation records, should not be released because the former employee in question was not suspended or terminated.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2003-367

Niswanger, Stephen
Attorney, Williams and Anderson

RE: Request for certification of the popular name and ballot title for a proposed constitutional amendment to allow the medical use of marijuana. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: 2003-370

Bush, JoAnne H.
Chair, LOPFI Board

RE: Since the fire fighter representative or member trustee" on the LOPFI Board (see A.C.A. 24-10-201) was terminated from employment with the municipal fire department, is he disqualified from participating at the Board meeting that is scheduled before his appeal hearing before the civil service commission? **ANSWER:** No, because his discharge is not final, according to the civil service statutes (A.C.A. 24-51-308), pending the Commission's trial of the matter. He thus has not ceased to be a member of LOPFI, and consequently is not treated as having resigned from the Board. See A.C.A. 24-10-202 & 24-10-504.

Opinion No.: 2003-379

Wooldridge, Tim
State Senator

RE: Q1) In light of provisions of Ark. Const. art. 5, Sec. 38, would a simple majority vote be sufficient to pass a rate increase on the severance tax for natural gas? Q2) If the new tax is imposed based on a price per/MCF and the levy is changed so that: a) the tax is imposed solely on the producer, with the producer not being allowed to collect part of the tax from the landowner, or b) the tax is imposed solely on the producer and the producer is allowed to pass the tax upstream to the customer, would a simple majority vote be sufficient for the bill to pass? **RESPONSE:** Q1) No. A three-fourths majority or a popular vote of the electorate would be required, because the severance tax existed in 1934 at the time of the passage of Amendment 19. Q2) Although I cannot answer in the abstract without more information, these described changes do not, on the surface, appear to change the conclusion in Q. 1, because the tax burden would ultimately fall on the same taxpayers.

ADOPTED RULES AND REGULATIONS

BOARD OF EXAMINERS IN COUNSELING

Docket No.: 122.00.03--001
Effective Date: 12/14/03
Contact Person: Ann Thomas
Telephone: (870) 901-7055

Rules and Regulations

DEPARTMENT OF WORKFORCE EDUCATION

Docket No.: 172.00.03--003
Effective Date: 12/21/03
Contact Person: Peggy Wakefield
Telephone: (501) 682-1500

Policies & Procedures for Local Secondary Programs, Adult Skill Training Classes & Secondary Vocational Centers

GAME & FISH COMMISSION

Docket No.: 002.00.03--009
Effective Date: 12/6/03
Contact Person: James Goodhart
Telephone: (501) 223-6327

Commercial Game Bird Shooting Resort Permit Requirements; Residency Definition

HEALTH DEPARTMENT

Engineering

Docket No.: 007.18.03--001
Effective Date: 1/1/04
Contact Person: Harold Seifert
Telephone: (501) 661-2623

Rules Pertaining to Public Water Systems

Public Health

Docket No.: 007.16.03--001
Effective Date: 12/18/03
Contact Person: Iram Bakhtawar
Telephone: (501) 661-2000

Rules Pertaining to Tuberculosis Screening for Foreign Born University and College Students ***

HIGHER EDUCATION

Financial Aid

Docket No.: 008.10.03--003
Effective Date: 11/27/03
Contact Person: Judy McAinsh
Telephone: (501) 371-2025

Arkansas Health Education Grant Program (ARHEG) ***

ADOPTED RULES AND REGULATIONS

HIGHWAY & TRANSPORTATION

Docket No.: 001.01.03--001
Effective Date: 12/25/03
Contact Person: Jeff Ingram
Telephone: (501) 569-2088

Amendment to Policy for Erection of Specific Service Signs (Logos)

HUMAN SERVICES

Medical Services

Docket No.: 016.06.03--026
Effective Date: 1/1/04
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

Official Notice DMS-2003-YY-6

Docket No.: 016.06.03--037
Effective Date: 11/24/03
Contact Person: Betty Reed
Telephone: (501) 682-8363

Emergency Rule: Official Notice DMS-2003-O-11, DMS-2003-G-6, DMS-2003-II-10, DMS-2003-L-11, DMS-2003-KK-14, DMS-2003-Q-9, DMS-2003-R-16, DMS-2003-OO-10

Docket No.: 016.06.03--038
Effective Date: 11/26/03
Contact Person: Tommy Wingard
Telephone: (501) 682-8117

Emergency Rule: Plans and Specifications - Level II Assisted Living

Docket No.: 016.06.03--042
Effective Date: 1/1/04
Contact Person: Betty Reed
Telephone: (501) 682-8363

Official Notice DMS-2003-A-2, DMS-2003-O-7, DMS-2003-II-6, DMS-2003-L-8, DMS-2003-SS-2, DMS-2003-KK-9, DMS-2003-R-12, DMS-2003-OO-7

Administrative Services

Docket No.: 016.14.03--016
Effective Date: 12/13/03
Contact Person: Bill Tyler
Telephone: (501) 682-9631

DHS Contract Manual for Professional / Consultant Service Contracts and Grants

MOTOR VEHICLE COMMISSION

Docket No.: 063.00.03--001
Effective Date: 11/28/03
Contact Person: John Chappelle
Telephone: (501) 682-1428

Limitation of Sales of New Motor Vehicles -- Rule 5: Specialty Vehicles

ADOPTED RULES AND REGULATIONS

POLLUTION CONTROL & ECOLOGY

Administration

Docket No.: 014.08.03--003
Effective Date: 12/11/03
Contact Person: Jennifer Tucker
Telephone: (501) 682-0883

Regulation No. 6 - State Administration of the National Pollutant Discharge Elimination System (NPDES)

Hazardous Waste

Docket No.: 014.09.03--002
Effective Date: 12/6/03
Contact Person: Mike Bates
Telephone: (501) 682-0960

Regulation No. 30 - Arkansas Remedial Action Trust Fund Hazardous Substances Site Priority List

Docket No.: 014.09.03--003
Effective Date: 12/6/03
Contact Person: Mike Bates
Telephone: (501) 682-0831

Regulation No. 23 - Hazardous Waste Management -- 2003 Annual Update

SOIL & WATER CONSERVATION COMMISSION

Docket No.: 138.00.03--002
Effective Date: 11/29/03
Contact Person: Edward Swaim
Telephone: (501) 682-3965

Title XVIII - Floodplain Administrator Accreditation Program

STATE CHIEF INFORMATION OFFICER

Docket No.: 200.00.03--002
Effective Date: 12/19/03
Contact Person: Gary Underwood
Telephone: (501) 682-3636

User Logon Passwords

Docket No.: 200.00.03--003
Effective Date: 12/19/03
Contact Person: Gary Underwood
Telephone: (501) 682-3636

Virus Scanning on the State Network

Docket No.: 200.00.03--004
Effective Date: 12/19/03
Contact Person: Gary Underwood
Telephone: (501) 682-3636

Warning Banner for State IT Systems

ADOPTED RULES AND REGULATIONS

STATE MEDICAL BOARD

Docket No.: 060.00.03--002
Effective Date: 11/28/03
Contact Person: William Trice, III
Telephone: (501) 372-4144

**Amendment to Regulation 16,
Paragraph 7 -- Physicians: HIV
(Human Immunodeficiency Virus), HBV
(Hepatitis B Virus) and HCV (Hepatitis
C Virus)**

TOBACCO SETTLEMENT COMMISSION

Docket No.: 197.00.03--001
Effective Date: 12/6/03
Contact Person: Chiquita Munir
Telephone: (501) 683-0074

**Bylaws of the Arkansas Tobacco
Settlement Commission**



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 Notices were filed with the Arkansas Register during the past filing period for placement in this edition.**

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