

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

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

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THE ARKANSAS REGISTER

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ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-095

Wood, Jeff
State Representative

RE: Can impact fees generated by A.C.A. 14-56-103 be used in conjunction with funds from Tax Incremental Financing (TIF) to retire a bond issue? **ANSWER:** Generally, yes, under the assumption that this question contemplates a contribution of the impact fee to retire previously issued redevelopment bonds that are secured by the TIF pursuant to Ark. const. Amendment 78, and also assuming that the bonds were issued to construct improvements that are provided for in the development impact fee ordinance. (NOTE: If TIF bonds are secured by a pledge of impact fees, a question may arise regarding the applicability of Ark. Const. amendment 65 (the revenue bond amendment)). Public facilities for which impact fees may be assessed could be included as part of a redevelopment project that is financed through a tax increment bond issue.

Opinion No.: 2004-114

Weiss, Richard
Director, DF&A

RE: Would a contract to teach during the spring semester qualify as "continu[ing] the employment" so that a legislator could teach during the spring semester without violating the restrictions in ACA 21-1-402(a)(1)? **ANSWER:** If the subsequent contract is for essentially the same employment, then "yes." The question is whether the legislator (who was employed by a state university as an adjunct faculty member at the time of his or her election) will "continue" prior employment so as to fall within the exception to the state employment prohibition applicable to elected constitutional officers.

Opinion No.: 2004-124

Luker, Jim
State Senator

RE: If a public school has unintentionally underpaid an employee over a period of years and has discovered and corrected this error, how many years in the past must the district compensate the underpaid employee? **ANSWER:** This will be highly dependent upon the particular facts, and thus cannot be definitively decided in an opinion from this office. Generally speaking, a five (5) year statute of limitations applies to obligations under written contract (A.C.A. 16-56-111), and three (3) years for oral contracts (16-56-105).

Opinion No.: 2004-125

Gillespie, Jeff
State Representative

RE: Is it legal for someone to file for Justice of the Peace if they do not reside in the district they will have jurisdiction over when they filed for office? **RESPONSE:** Assuming by "reside in" you mean "maintain one's domicile in," the answer to this question is "no." However, if no one challenges the candidate's eligibility and he is subsequently elected to office, he will serve as a de facto officer whose actions will be valid until his office is declared vacant by the quorum court or a circuit court. A.C.A 14-14-1309.

Opinion No.: 2004-127

Higginbotham, Steve
State Senator

RE: Does the Palestine Municipal Water Department have authority to hold the home owner of

ATTORNEY GENERAL OPINIONS

rental property responsible for a delinquent water bill of a former tenant in light of the fact that the account was never in the name of the owner of the property during the delinquency period? RESPONSE: In all likelihood "no" in the absence of a statute authorizing such liability or a lien on the premises.

Opinion No.: 2004-128

Baker, Gilbert
State Senator

RE: Does the appeals process set forth in A.C.A. 14-172-212, pertaining to Historic Districts, preclude a city council from adding language to its adopting ordinance allowing optional mediation as an alternative to a court appeal? ANSWER: An aggrieved applicant maintains his right to appeal a decision of the historic district commission, regardless of any mediation procedure. Generally, however, mediation would not be contrary to 14-172-212.

Opinion No.: 2004-130

McCune, Marc
Pros. Att'y, 21st Judicial District

RE: Does the Crawford County Quorum Court have the legal right to draft an ordinance that would authorize an election, so the voters of Crawford County have the opportunity to determine Justice of the Peace salaries, within Arkansas statutory limitations, in Crawford County? Q2) Does the Quorum Court have the legal right to draft an ordinance which would authorize an election, so the voters of Crawford County have the opportunity to vote to prohibit health insurance benefits for the office of Justice of the Peace in Crawford County? RESPONSE: In my opinion the quorum court may not submit a proposed ordinance to the people. The quorum court's power is restricted to referring ordinances that it has already adopted to the people for their approval or rejection. See ACA 14-14-905(f)(1). This conclusion, however, does not mean that the people could not initiate measures such as these under Amendment 7.

Opinion No.: 2004-132

Huckabee, Mike
Governor

RE: Q1) In light of the fact that the U.S. Bureau of Prisons and the U.S. Dept. of Justice has acquired an additional 545 acres of land adjacent to the existing Federal Correctional Institution at Forrest City, Arkansas, has the State of Arkansas already ceded concurrent jurisdiction over this newly acquired land to the United States through A.C.A. 22-7-226 (Repl. 2004), or does the state still have to comply with 22-7-102 or any other statute in order to successfully cede concurrent jurisdiction to the United States? Q2) Which, if any, of the steps set out in 22-7-102 must be followed in this instance to effect the transfer of concurrent jurisdiction over the newly acquired land to the United States? RESPONSE: Q1) Yes, the State has already ceded concurrent jurisdiction. The cession will be effective only when the United States provides notice of acceptance. Q2) The United States must give notice of acceptance, but given that the State has already ceded jurisdiction, the Governor need not consult the AG or submit the transaction to the General Assembly for approval.

Opinion No.: 2004-144

Roebuck, Tommy G.
State Representative

RE: Q1) Is it legal for the City of Caddo Valley to use city funds to maintain or improve a private drive owned by the Mayor? Q2) Is it legal for the citizens of Caddo Valley to request that the Mayor repay city funds that were spent on this private drive? RESPONSE: Q1) No. See Ark. Const., Art. 16, 13. However, numerous factual matters will impact the issue of whether a violation has occurred. Q2) Nothing in the law would prohibit a request for repayment. In addition, if an illegal use of city funds has occurred, Art. 16, 13 authorizes citizens to seek repayment.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-146

Lavery, Randy
State Senator

RE: If a county or municipality issues revenue bonds as a conduit bond issuer for a nonprofit corporation and the bonds are guaranteed by only the revenues produced by the project for which the bonds are issued and are not guaranteed by taxes or other assets of the county or municipality, must these revenue bond issues be included as an indebtedness of the county on the report required to be prepared by the county clerk pursuant to the provisions of ACA 14-21-102? **RESPONSE:** Although the answer is not entirely clear, it is my opinion, based on the commonly accepted meaning of the term "bonded indebtedness," that these bond issues need not be included in the annual financial report.

Opinion No.: 2004-148

Jones, Steven B.
State Representative

RE: In light of the provisions of A.C.A. 18-16-101 (the "failure to vacate" statute), is it the Attorney General's contention that the judge must force the tenants to leave? Q2) If the answer to q1 is "yes," what is the time period in which they need to leave? Q3) Does the Act allow landlords to go to a municipal court rather than a circuit court for an eviction? **ANSWER:** Q. 1: No. This is not an eviction statute. Rather, it authorizes the criminal prosecution of tenants who fail to pay rent when due and who hold over after receiving a written ten-day notice from their landlord to vacate the premises. Eviction is a civil remedy that may be pursued under 18-60-301 to -312, the unlawful detainer statutes. No response to Q.2 is necessary. Q3: District courts currently lack jurisdiction to address issues involving possession to real property. See 16-17-206. See also 18-60-306 and 18-60-307 (proceedings are in circuit court in unlawful detainer actions).

Opinion No.: 2004-150

Hill, Jim
State Senator

RE: In light of the conclusions reached in Op. 94-264, which may be contrary to the actions taken by the Howard County Quorum Court in dissolving the Howard County Memorial Hospital Board of Governors and leasing the hospital facilities to a third party, should the quorum court re-establish a county hospital board of governors to oversee the interests of the County in the leased property? **RESPONSE:** Yes. The board is required by law and has an on-going oversight responsibility. See ACA 14-263-105(b)

Opinion No.: 2004-151

Fields, Faith A., MSN, RN
Exec Dir, AR State Board of Nursing

RE: Q1) Pursuant to Att'y Gen. Op. 2000-185 which states, "the permissible scope of practice of EMTs and paramedics can be gleaned from the definition of "emergency medical services," does the 1981 definition define this scope or the newly created definition passed by the legislature in 1999, which is now ACA 20-13-202, define the EMT/paramedic scope of practice? Q2) Pursuant to Att'y Gen. Op. 2000-185 which states, "[i]t is my opinion . . . That 'certification' of EMTs and paramedics is not equivalent to 'licensure' . . .," does the AG Opinion 2004-063 now change the AG's earlier opinion contained in Op. 2000-185 in regard to certification versus licensure? If so, what statutory authority was utilized as the basis for the change in opinion? Q3) Pursuant to Op. 95-278 which states, "[i]t is my opinion that an unlicensed person may not administer prescription medications of any kind in any situation where the administration of medications occurs as a result of the fact that the unlicensed person has been held out to the public as being licensed and qualified to administer medications. It is my opinion that this prohibition is effective even in situations where the unlicensed person is under the supervision of a licensed person[,]" is the Attorney General now changing his opinion to allow medication

ATTORNEY GENERAL OPINIONS

administration by EMT/paramedics in an inpatient setting if allowed by the hospital's medical staff? If the Attorney General is now changing his opinion, what criteria is used in making that determination? RESPONSE: This is a request for reconsideration of Op. No. 2004-063. I have fully considered the matter and decline to revise the views expressed in that opinion.

Opinion No.: **2004-153**

Emigh, Barry Lee

RE: Request for certification of the popular name and ballot title for a proposed constitutional amendment permitting the operation of bingo, raffles, state-operated lotteries and gambling. RESPONSE: Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: **2004-155**

Hickinbotham, Boyd
State Representative

RE: Does a fire improvement district have authority to sponsor bingo as a fundraiser? RESPONSE: Not if it involves playing for a chance to win money or a prize. Such an activity would violate the criminal gambling statutes, and may also violate the constitutional prohibition of lotteries.

Opinion No.: **2004-156**

Milligan, Jimmy "Red"
State Representative

RE: Q1) Is the Marion County Transfer Station's solid waste permit system subject to the act? Q2) If it is subject to the act, is this act constitutional as applied to governmental entities, i.e., can the state require cities and counties to collect a sales tax for the state and remit same to the state? Q3) If the above is constitutional, what office in the county is

responsible for the collection and remittance of said tax, and what penalties could be imposed on a county for failing to comply with the statute? RESPONSE: Q1) This question must be presented to DF&A. See Gross Receipts Tax Regulations GR-75 and GR-76. Q2) Yes. There is nothing about the application of this Act to local governments that conflicts with any provision of the constitution. Q3) State law does not address the question of which arm of local government must collect and remit on behalf of the local government. This is a matter left to the discretion of the local government itself. Specific requirements and penalties are set forth at ACA 26-52-501 et seq.

Opinion No.: **2004-160**

Easley, Eddy R.
Pros Att'y, 7th Judicial District

RE: Q1) Is there any constitutional or statutory provision that would prohibit a sitting member of the General Assembly from being employed as Director of the drug task force? Q2) Would it matter whether the person was an employee of a county, municipality or prosecutor's office? RESPONSE: There is no constitutional or statutory prohibition. However, the federal Hatch Act may prohibit the individual from running for re-election.

Opinion No.: **2004-162**

Weiss, Richard A.
Director, DF&A

RE: Q1) Would the position of drug force coordination be state employment prohibited to a sitting legislator by provisions of A.C.A. 21-1-402? Q2) Would the employment of a state legislator in a position financed by federal funds be a violation of the federal Hatch Act? RESPONSE: Q1) No. Q2) The Hatch Act would not prohibit the legislator from taking the position, but it may prohibit him from running for re-election. The applicability of the Hatch Act must be determined by the appropriate federal authorities.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-167

Erf, Jeff

RE: Was the records custodian's decision to withhold specific details of the Fayetteville Public School superintendent's benefit package consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** I cannot answer definitively, having not seen the records. Generally, however, records reflecting the compensation of a public official, including records showing that the official receives insurance coverage and the amount paid for that coverage, are releasable. Records reflecting personal details about that coverage, such as whether dependents are covered, and the amount deducted from the official's compensation for coverage, are not releasable.

Opinion No.: 2004-169

Horn, Barbara
State Representative

RE: Do provisions of A.C.A. 19-4-1401 et seq. apply in instances where a construction management agreement is utilized to negotiate work involving school districts and contracts under \$5,000,000.00? **RESPONSE:** Construction management agreements for school projects are governed by ACA 19-11-801 et seq. Those provisions require that such contracts be negotiated rather than bid.

Opinion No.: 2004-172

Pratt, Jamie
Pros. Att'y, 13th Judicial District

RE: The following questions have been posed in response to two FOIA requests made to the Dallas County Medical Center and Home Care Agency: Q1) To the extent that either request asks for something other than specific, individually identifiable records (i.e., data that might be compiled from several of such records), is such part of the request invalid? Q2)

Which, if any, of the records requested are considered "public"; that is, statutorily required to be kept? Q3) Are any of the records requested potentially exempted from disclosure pursuant to ACA 25-19-105(b)(9)(A)? If so, what, if any, is the proper legal inquiry through which one could ascertain whether disclosure of the particular records would "give advantage to competitors or bidders"? **RESPONSE:** I must decline to respond because this matter is the subject of pending litigation.

Opinion No.: 2004-174

Stitz, Paula G.
Chair, Sex Offender Assessment

RE: When does Act 21 of the 2d Extraordinary Session of the 84th General Assembly go into effect? **RESPONSE:** June 3, 2004.

Opinion No.: 2004-176

Horn, Barbara
State Senator

RE: Is it legal for a construction manager to execute an At Risk Construction Management Agreement for a public entity, such as a school district? **RESPONSE:** More factual information is needed to give an adequate analysis of this issue.

Opinion No.: 2004-178

Behnke, Trenton L.
TFC, Arkansas State Police

RE: Is the decision of the custodian of records to release the personnel files, training files and internal affairs files in response to a Freedom of Information Act (FOIA) request, with redactions as provided by statute, consistent with provisions of the FOIA? **RESPONSE:** The applicable tests for release of the various types of records in these files are reviewed.

ADOPTED RULES AND REGULATIONS

DEPARTMENT OF WORKFORCE EDUCATION

Docket No.: 172.00.04--002
Effective Date: 6/18/04
Contact Person: Peggy Wakefield
Telephone: (501) 682-1500

Special Policies and Procedures Relating to Secondary Area Centers

EDUCATION DEPARTMENT

Attorney's Office

Docket No.: 005.23.04--001
Effective Date: 6/21/04
Contact Person: Tripp Walter
Telephone: (501) 683-0087

ADE 173: Rules Governing the guidelines, Procedures and Enforcement of the Arkansas Opportunity Public School Choice Act

Early Childhood

Docket No.: 005.24.04--001
Effective Date: 6/21/04
Contact Person: Kathy Stegall
Telephone: (501) 682-9699

ADE 174: Rules Governing the Arkansas Better Chance Program

Financial Services

Docket No.: 005.04.04--005
Effective Date: 6/21/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 168: Rules Governing School District Audits Not Conducted by Legislative Audit

Docket No.: 005.04.04--012
Effective Date: 6/21/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 171: Repeal of Rules Implementing Act 2 of 1994 as Amended by Act 1228 of 1995

General Education Division

Docket No.: 005.15.04--002
Effective Date: 6/21/04
Contact Person: Tripp Walter
Telephone: (501) 683-0087

ADE 172: Rules Governing the Requirement of a Criminal Background Check for the Employment of Personnel in School Districts

ADOPTED RULES AND REGULATIONS

Office of Accountability

Docket No.: 005.19.04--002
Effective Date: 6/21/04
Contact Person: Annette Barnes
Telephone: (501) 682-4393

ADE 169: Rules Governing Arkansas Mandatory Attendance Requirements for Students in Grades 9-12

Docket No.: 005.19.04--006
Effective Date: 6/21/04
Contact Person: Ron Tolson
Telephone: (501) 682-4342

ADE 170: Rules Governing Teacher Licensure by Reciprocity

Technical Assistance

Docket No.: 005.25.04--002
Effective Date: 6/21/04
Contact Person: Jim Boardman
Telephone: (501) 371-5005

ADE 167: Rules to Ensure the Availability of Efficient Scheduling of Courses Offered by Public Schools Through Distance Learning Technologies

Transportation

Docket No.: 005.17.04--001
Effective Date: 6/21/04
Contact Person: Mike Simmons
Telephone: (501) 682-4264

ADE 175: Rules for the Specifications Governing School Bus Design

FINANCE & ADMINISTRATION

Revenue Division

Docket No.: 006.05.04--001
Effective Date: 6/9/04
Contact Person: John Theis
Telephone: (501) 682-7000

Regulation 2004-1: Additional Services Subject to Tax Beginning July 1, 2004

GAME & FISH COMMISSION

Docket No.: 002.00.04--005
Effective Date: 6/5/04
Contact Person: James Goodhart
Telephone: (501) 223-6327

2004-2005 Squirrel Seasons

HEALTH DEPARTMENT

Radiation Control & Emergency Management

Docket No.: 007.14.04--001
Effective Date: 6/25/04
Contact Person: Bernard Bevill
Telephone: (501) 661-2301

Revisions to Rules Pertaining to Radiologic Technology Licensure

ADOPTED RULES AND REGULATIONS

HUMAN SERVICES

Administrative Services

Docket No.: 016.14.04--002
Effective Date: 8/10/04
Contact Person: Joe Franklin
Telephone: (501) 682-9631

DHS 1052 - Administrative Procedure, Rules Promulgation

Children & Family Services

Docket No.: 016.15.04--001
Effective Date: 6/18/04
Contact Person: Vivian Jackson
Telephone: (501) 682-1577

FSP Manual and CFS-300, CFS-310, CFS-312A, CFS-312B, CFS-428B, CFS-6024, PUB-52 and PUB-357

County Operations

Docket No.: 016.20.04--004
Effective Date: 7/1/04
Contact Person: Linda Greer
Telephone: (501) 682-8257

MS 12100 - 12470 -- Medicaid Coverage of Alien Pregnant Women

Medical Services

Docket No.: 016.06.04--025
Effective Date: 7/1/04
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

Inpatient Psychiatric Services for Under Age 21 Update Transmittal #53

Docket No.: 016.06.04--026
Effective Date: 7/1/04
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

ElderChoices Update Transmittal #43

Docket No.: 016.06.04--028
Effective Date: 7/1/04
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

Hearing Services Update Transmittal #45

Docket No.: 016.06.04--030
Effective Date: 7/1/04
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

ARKids First-B Provider Manual Update Transmittal #15

Docket No.: 016.06.04--042
Effective Date: 7/1/04
Contact Person: Will Taylor
Telephone: (501) 682-8362

Emergency Rule: Arkansas State Plan Amendment #2004-009 and Personal Care Update Transmittal #56

ADOPTED RULES AND REGULATIONS

Residential Contractors Committee

Docket No.: 184.00.04--001
Effective Date: 7/1/04
Contact Person: Gregory Crow
Telephone: (501) 372-4661

**224-25-5-14 -- Display of Name and
License Number**

Docket No.: 184.00.04--002
Effective Date: 7/1/04
Contact Person: Gregory Crow
Telephone: (501) 372-4661

**224-25-5-10 -- Complaints &
Investigations**



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 June 1 , 2004

Agency	Period Covered
Department of Health	6/30/03
Department of Finance and Administration - Racing Division	6/30/02
State Board of Election Commissioners - Two-Year Period Ended	6/30/03
Martin Luther King, Jr. Commission - Two-Year Period Ended	6/30/03
Arkansas State Board of Optometry - Two-Year Period Ended	6/30/03
Arkansas Psychology Board - Two-Year Period Ended	6/30/03
State Securities Department - Two-Year Period Ended	6/30/03
Arkansas Cemetery Board - Two-Year Period Ended	6/30/03
Arkansas Towing and Recovery Board - Two-Year Period Ended	6/30/03
Department of Veterans Affairs - Two-Year Period Ended	6/30/03
Veterinary Medical Examining Board - Two-Year Period Ended	6/30/03
East Arkansas Community College	6/30/03
South Arkansas Community College	6/30/03
Great Rivers Technical Institute	6/30/03
Riverside Vocational Technical School	6/30/03

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