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ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-263

Bright, Stephen
State Representative

RE:In light of the provisions of A.C.A. 26-26-1202(a)(1), which states that “each separate parcel of real property shall be valued at its true market value in money, excluding the value of crops growing thereon,” should the Pulaski County Assessor’s Office, in determining the value of low-income housing that utilizes federal income tax credits, use market abstracted rental rates, expenses and capitalization rates to estimate “market value,” or should the assessor use contract rental rates, actual expenses and built-up capitalization rates and estimate “leased fee values?” If the latter, should the value of the federal tax credits be considered in determining current market value? **RESPONSE:** The law on this issue is unclear in Arkansas. The courts of several other states have addressed the issue and do not agree on the outcome. Most courts agree that the contract rental rates should be used, but the courts differ sharply on whether to also include the value of the federal tax credits in determining value. Legislative or judicial clarification is necessary to determine the outcome.

Opinion No.: 2004-266

Haak, David M.
State Representative

RE:Assuming Texas law would so allow, would A.C.A. 25-20-101 et seq. authorize an interlocal cooperative agreement for mutual assistance in law enforcement between the Texarkana, Texas and Texarkana, Arkansas police departments? Q2) If so, would the Texas police officers have the same law enforcement authority as the Arkansas police officers while the Texas police officers were present in Texarkana, Arkansas? **RESPONSE:** Q1) Yes. So long as Texas law does not dictate otherwise, nothing would preclude the two cities from agreeing to cooperate in law enforcement. Q2) Although the law is not entirely clear on this matter, I do not believe that an Arkansas

city could by interlocal agreement authorize the officers of a Texas city to make arrests in Arkansas without specific statutory authority in Arkansas or without obtaining the certification required under A.C.A. 12-9-106 (Repl. 1999).

Opinion No.: 2004-276

Hendren, Kim
State Senator

RE:Is Section 3 of Act 38 of the First Extraordinary Session of 2003 (A.C.A. 26-51-207) in violation of Article 4, Section 2, or any other provision, of the Arkansas Constitution? **ANSWER:** No. The act is presumed constitutional and there is no clear basis for a constitutional challenge. The act levies an income tax surcharge, to be reduced or to expire after January 1, 2005, depending upon revenue projections in the budget estimates prepared by the Director of the Department of Finance and Administration. This does not constitute an unlawful delegation of legislative power, in violation of the separation of powers doctrine. Rather, it is a lawful exercise of the legislature’s authority to enact a law and provide for operation under it to depend upon a contingency or condition.

Opinion No.: 2004-277

Scroggin, Preston
State Representative

RE:Does the jail commissary have authority to purchase phone cards using commissary funds and then sell the cards to prisoners for a profit to support the commissary? Q2) Can the profits derived from the sale of the phone cards be transferred to other funds, i.e., the County General Fund to support the Sheriff’s office? **RESPONSE:** 1) Yes. 2)The funds can be used to support the Sheriff’s office, but are deposited in the county treasury to the credit of the “sheriff’s office fund” and the “sheriff’s office communications facility and equipment fund,”not the “county general fund.” See 12-41-105.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-279

Bradford, Jay
State Representative

RE:Is there anything in the attached hunting ordinance (Sec. 14-27 of the Code of Ordinance of the City of Pine Bluff) that would prohibit the city or the Arkansas Game and Fish Commission from enforcing it? **RESPONSE:** Although it is within the powers of a city to prohibit the unsafe discharge of firearms within its boundaries (as in Sec. 14-26 of the City Code), this type of legitimate municipal regulation may not be expressed as a prohibition against hunting. The exclusive power to regulate hunting and the taking of game has been granted to the Arkansas Game and Fish Commission. See 14-54-1104. Section 14-27 of the City Code is problematic and outside the authority of the City in this regard. See opinion for full discussion.

Opinion No.: 2004-280

Boozman, Fay W., M.D.
Director, AR Department of Health

RE:In compliance with a Legislative Audit request under ACA 10-4-106(c)(1) for a list of employee grievances filed during a specific two-year period, should the Department (ADH) release these records assuming that they constitute evaluation/job performance records in which there has not been a suspension or termination? Q2) Assuming that these grievance records contain, among other things, sensitive medical information regarding possible disabilities of employees and subsequent concerns regarding accommodations, can these records be released in light of the fact that the ADH is a covered entity for purposes of confidentiality? Q3) Given the above information, can these records be released without violating the privacy and confidentiality of employees? Q4) If it is determined that grievance records can be released, is the ADH required to give notice to affected employees pursuant to ACA 25-19-105(c)(3)(A)? **ANSWER:** Q. 1, 2 and 3) Legislative

audit has access to the records regardless of their confidential nature under the FOIA. (25-19-105 (c)(1)). Additionally, even if the State Health Dept. is a covered entity under the federal law, the privacy regulations under HIPAA are inapplicable because the grievance records in question are employer records and thus do not constitute "protected health information" under HIPAA. Assuming that there was no suspension or termination decision as to the employees in question, the records will not be available to the public after Audit completes its report. See A.C.A. 10-4-115. Q.4) No. The FOIA's notice requirement with respect to evaluation records is inapplicable when Leg Audit accesses records pursuant to A.C.A. 10-4-106.

Opinion No.: 2004-282

Blair, Buddy
State Representative

RE:In a city administrator form of government, can a city director who has resigned, been fired, or otherwise dismissed by the remaining city directors and a vacancy declared under ACA 14-48-120(K), and then appointed to complete the unexpired term of the position, seek re-election for that same position? **RESPONSE:** Yes.

Opinion No.: 2004-286

Wooldridge, Tim
State Senator

RE:Does the Village Creek Drainage Commission have representative responsibility to those people who live and work near the Highway 63 bypass (south of Hoxie) in requiring the Arkansas Highway Department to add drainage structure or verifying that a flooding situation exists? Q2) Can the Drainage District and the Highway Department, together or individually, legally take land or an easement on land to use to drain one section of land without first proving beyond a doubt that it will not cause flooding or damage to

ATTORNEY GENERAL OPINIONS

another area? RESPONSE: Q1) Yes. However, I question the assumption that a drainage district commission has the authority to direct the Arkansas Highway Department to make any kind of improvement. A.C.A. 14-121-402 and -403. Q2) Yes. A.C.A. 14-121-402 and 27-67-311.

Opinion No.: 2004-290

Hutchinson, Jeremy
State Representative

RE:If funds are collected and/or donated to a city firefighter's association that is not a legally registered nonprofit organization and said funds are placed in the association's bank account using the city's tax ID number without authorization, does the balance of the funds in the closed account (after the association disbands) become city property? Q2) Is the city responsible for disclosing this account for tax purposes since the firefighter's association illegally used the city tax ID number? RESPONSE: 1) The funds do not automatically become city property, but they might, under certain circumstances be transferred to the city under ACA sec. 4-28-509. The city should consult its counsel for advice as to the particular circumstances. 2) This question of federal law should be addressed to the city's normal tax counsel.

Opinion No.: 2004-293

Hendren, Kim
State Senator

RE:Can two or more sponsors consolidate their petitions [to incorporate Bella Vista as a first class city] and submit them to the county clerk as one petition? Q2) If the answer to q1 is "yes," would the combined petitions be legal? ANSWER: Probably not, where there are different "agents" for the petitioning groups who are authorized by statute to act for the

respective petitioners. See A.C.A. 14-38-101, 14-38-103, 14-38-106.

Opinion No.: 2004-296

Williams, John R.
Attorney at Law

RE:Request for approval of an interlocal cooperation agreement between the cities of Booneville and Waldron for the acquisition, construction, equipping, financing, operation and maintenance of a water impoundment reservoir and creation of the Upper Petit Jean Impoundment Board to oversee the project. RESPONSE: The legislation authorizing this agreement, A.C.A. 14- 234-501 through -517, is self-sufficient and does not require the Attorney General's approval.

Opinion No.: 2004-298

Trusty, Sharon
State Senator

RE:Is a person who retired as a city police officer on April 1, 1988, returned to full-time city employment on June 7, 2001, and retired from city employment on April 30, 2003, eligible for city retirement benefits? ANSWER: There are insufficient facts to undertake the necessary analysis. See generally, however, Op. 2001-224.

Opinion No.: 2004-299

Emigh, Barry

RE:Request for certification of the popular name and ballot title for a proposed constitutional amendment permitting a state lottery, bingo, raffles and gambling. RESPONSE: Rejected due to ambiguities in the text of the proposal.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-304

Broadway, Shane
State Senator

RE:If the newly constructed Saline County Airport is annexed by the City of Bryant, does the exception set forth in ACA 14-363-204(a)(2) take the authority for promulgation, administration and enforcement of airport zoning regulations from the City of Bryant and vest that authority in the Saline County Airport Commission? **RESPONSE:** Yes. The statute is unambiguous in providing that the Commission has zoning authority under these circumstances. The question of whether the airport is annexed by the City of Bryant is immaterial.

Opinion No.: 2004-314

Alexander, David B.
Revenue Legal Counsel, DF&A

RE:Is the decision of the custodian of records to treat a job application from an unsuccessful applicant, who is currently employed in another state agency, as a personnel record consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:**

Even though legislative or judicial clarification may be necessary to definitively resolve the matter, it is my opinion that DF&A may legitimately treat the job application of an employee of another state agency no differently than an application for promotion or transfer within the agency.

Opinion No.: 2004-316

Huckabee, Mike
Governor

RE:In the consideration of complaints against poll workers, or even in the consideration of a complaint of any type, is the Pulaski County Election Commission bound to follow the provisions of Title 7 of the Arkansas Code, specifically, ACA 7-4-118? Q2) What procedural and substantive due process rights are poll workers entitled to in order to ensure their rights are protected in the event that allegations are wholly baseless? **RESPONSE:** ACA 7-4-118 does not apply to the actions of county boards of election commissioners. But see ACA 7-1-109. Q2) Assuming state action and a constitutionally protected interest, they are entitled to notice and an opportunity to respond. See opinion for full analysis.

ADOPTED RULES AND REGULATIONS

EDUCATION DEPARTMENT

Office of Accountability

Docket No.: 005.19.04--007
Effective Date: 10/28/04
Contact Person: Dr. Frank Servedio
Telephone: (501) 682-5535

ADE 196 - Rules Governing Non-Traditional Teacher Licensure

Docket No.: 005.19.04--008
Effective Date: 11/19/04
Contact Person: Dr. Frank Servedio
Telephone: (501) 682-5535

ADE 197 - Rules Governing Highly Qualified Teachers Pursuant to the No Child Left Behind Act of 2001

School Improvement & Restructuring

Docket No.: 005.22.04--002
Effective Date: 11/19/04
Contact Person: Ann Biggers
Telephone: (501) 682-4224

ADE 198 - Rules Governing Advanced Placement Courses in the Four Core Areas in High School

FINANCE & ADMINISTRATION

Revenue Division

Docket No.: 006.05.04--007
Effective Date: 11/15/04
Contact Person: John Theis
Telephone: (501) 682-7000

Regulation 2004-6 -- Refunds of Tax Erroneously Paid

GAME & FISH COMMISSION

Docket No.: 002.00.04--010
Effective Date: 11/7/04
Contact Person: James Goodhart
Telephone: (501) 682-6327

Creel Change and Commercial Fishing Season on Lake Chicot; 2005 Spring Turkey Seasons Approvals; 2004 - 2005 Waterfowl Hunting Regulations Re-Approval

HEALTH DEPARTMENT

Environmental Health Services

Docket No.: 007.04.04--002
Effective Date: 4/18/05
Contact Person: Bill Teer
Telephone: (501) 661-2573

Rules Pertaining to Retail Food Establishments

HUMAN SERVICES

Medical Services

Docket No.: 016.06.04--050
Effective Date: 11/7/04
Contact Person: Will Taylor
Telephone: (501) 682-8362

State Plan Amendment #2004-011 & Official Notice DMS-2004-L-13, DMS-2004-CA-3, DMS-2004-Z-2, DMS-2004-R-11

ADOPTED RULES AND REGULATIONS

Docket No.: 016.06.04--053
Effective Date: 11/13/04
Contact Person: Renita Honorable
Telephone: (501) 682-8577

State Plan Transmittal #2004-012 & Official Notice DMS-2004-W-3 -- Smoking Cessation

Docket No.: 016.06.04--064
Effective Date: 12/1/04
Contact Person: Betty Reed
Telephone: (501) 682-8363

Official Notice DMS-2004-A-6; DMS-2004-HH-2, DMS-2004-L-15, DMS-2004-R-15 -- CPT Procedure Code 43843 Made Non-Payable

Docket No.: 016.06.04--065
Effective Date: 12/1/04
Contact Person: Nikki Wade
Telephone: (501) 682-8859

Prosthetics Update #60

Docket No.: 016.06.04--067
Effective Date: 12/1/04
Contact Person: Betty Reed
Telephone: (501) 682-8363

ARKids First-B Update #16

Office of Chief Counsel

Docket No.: 016.18.04--001
Effective Date: 12/15/04
Contact Person: Joe Franklin
Telephone: (501) 682-9631

DHS Policy 1066 - Performance-Based Contracting Policy

LABOR DEPARTMENT

Wage & Hour Division

Docket No.: 010.10.04--001
Effective Date: 11/10/04
Contact Person: Cindy Uhrynawycz
Telephone: (501) 682-4501

Emergency Rule: Regulation 1.101 - Definitions

REHABILITATION SERVICES

Docket No.: 165.00.04--003
Effective Date: 11/18/04
Contact Person: Dale Turrentine
Telephone: (501) 296-1620

Arkansas Kidney Disease Commission Rules

Docket No.: 165.00.04--004
Effective Date: 11/25/04
Contact Person: Dale Turrentine
Telephone: (501) 296-1620

ADOPTED RULES AND REGULATIONS

Procedure Manual on Financial Resource
Instructions (RS-16) -- Amendment to
Appendix E

PHARMACY BOARD

Docket No.: 070.00.04--006
Effective Date: 11/18/04
Contact Person: Charles Campbell
Telephone: (501) 682-0190

Regulation 4 - Pharmacy

Docket No.: 070.00.04--007
Effective Date: 11/18/04
Contact Person: Charles Campbell
Telephone: (501) 682-0190

Regulation 2 - Pharmacists

PUBLIC EMPLOYEES RETIREMENT SYSTEM

Docket No.: 075.00.04--001
Effective Date: 11/19/04
Contact Person: Michele Williams
Telephone: (501) 682-7853

Arkansas District Judges Retirement System (ADJRS) Board of Trustee Regulations

*** **Correction** -- Liquefied Petroleum Gas
Board rule #003.08.04-001 was mistakenly
NOT listed in October Register. It was filed
with the Arkansas Register as final rule on
10/10/04.



INSURANCE DEPARTMENT

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

ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency	Period Covered
Arkansas State Board of Cosmetology	6/30/03
Arkansas Teacher Retirement System	6/30/03
Arkansas Game and Fish Commission	6/30/03
Department of Workforce Education	6/30/03
Arkansas Building Authority	6/30/03
Department of Finance and Administration - Revenue Division - Office of Motor Vehicle	6/30/03
Arkansas Department of Economic Development	6/30/03
Arkansas Educational Television Commission	6/30/04
Arkansas Educational Telecommunications Network Foundation (Private)	6/30/04
Arkansas Student Loan Authority (Private)	6/30/04
Arkansas State Medical Board (Private)	6/30/04
Deaf and Hearing Impaired - Telecommunications Services Corporation (Private)	6/30/03
Counseling Clinic, Inc. (Private)	6/30/03
Community Counseling Services, Inc.	6/30/03

ORDERS AND NOTICES

Little Rock Community Mental Health Center, Inc. (Private)	6/30/04
Northeast Arkansas Community Mental Health Center, Inc. (Private)	6/30/03
Northeast Arkansas Community Mental Health Center, Inc. (Private)	6/30/04
Professional Counseling Associates, Inc. (Private)	6/30/04
South Arkansas Regional Health Center, Inc. (Private)	6/30/04
Southeast Arkansas Behavioral Healthcare System, Inc. (Private)	6/30/04
State Crime Laboratory	6/30/03
Arkansas Department of Environmental Quality	6/30/03
Hearing Instrument Dispensers - Two-Year Period Ended	6/30/04
Arkansas History Commission - Two-Year Period Ended	6/30/04
Arkansas Livestock and Poultry Commission	6/30/03
Arkansas State Board of Massage Therapy Two-Year Period Ended	6/30/03

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