

Opinion No. 2011-130

December 20, 2011

The Honorable John Walker
State Representative
1723 Broadway Street
Little Rock, AR 72206-1220

Dear Representative Walker:

I am writing in response to your request for my opinion on the following questions:

1. Under A.C.A. 14-169-208, what is required to be in a notice and what is considered to be notice of an appointment or reappointment given to a governing body of a city?
2. Under A.C.A. 14-169-208, when a sitting commissioner is reappointed by a housing authority's Board of Commissioners for an additional term, written notice of that reappointment is given to the governing body of a city before his/her current term expires and the governing body of a city acts to confirm or reject the appointment, does the governing body of the city's 45 calendar day time frame to confirm or reject begin to run upon receipt of written notice?
3. Under A.C.A. 14-169-208, if a governing body of a city customarily and routinely accepts notice of an appointment or reappointment of a commissioner by the housing authority's Board of Commissioners before the term expires and acts accordingly, does that set a precedent on when notice can be given?
4. Under A.C.A. 14-169-208, if a certificate of the appointment or reappointment is filed and stamped by the clerk of the governing body of a city, does that automatically confirm the appointment or reappointment of the commissioner?

RESPONSE

With respect to your first question, the Arkansas Code contains no requirement of notice by a mayor of his initial appointments of commissioners to serve on a newly formed city housing authority. As regards the appointment or reappointment of successor commissioners, which seems to be the object of your concern, the statute referenced in your question requires that the commission provide the city's governing body with written notice of its provisional selection of an appointee. The statute appears to require no more than that the referenced written notice inform the governing body of the selection. With respect to your second question, the statute mandates that the commission provisionally appoint a successor commissioner only when a sitting commissioner's term has expired or a vacancy otherwise occurs. The statute neither authorizes the commission to make an earlier provisional reappointment nor obligates the city's governing body to act on notification of such a premature reappointment. Given that there could be no notification of a valid provisional reappointment under these circumstances, the question of when the 45-day period for the city's governing body to affirm or reject the reappointment might begin to run would be moot. Given my response to your second question, in my opinion, the answer to your third question is "no." I do not believe a city's governing body might by custom and practice adopt a procedure that is expressly contrary to the dictates of the Arkansas Code. Moreover, I do not believe the concept of ratification would serve to legitimize such a departure from legislative mandates. With respect to your fourth question, it is unclear which entity – the commission or the city's governing body – should file the certificate of the appointment referenced in the statute. The statute appears to contemplate, however, that no such certificate shall issue until the governing body has either expressly or constructively approved the commission's action. As regards such a provisional appointment or reappointment, I believe a certificate is not ripe for filing with the clerk, thereby confirming that the appointment or reappointment is "due and proper," until the city's governing body has approved a timely submission of the commission's provisional choice to fill the vacancy.

Question 1: Under A.C.A. 14-169-208, what is required to be in a notice and what is considered to be notice of an appointment or reappointment given to a governing body of a city?

The legislation at issue¹ deals with the appointment and reappointment of local housing authority commissioners. The statute provides that the mayor shall appoint initial city housing authority commissioners.² With regard to initial appointments, the statute contains no provision regarding the mayor's notice to the municipal governing body.

The pertinent provisions regarding the appointment or reappointment of successor housing authority commissioners, which appears to be the focus of your concern, provide as follows:

(c)(2)(B)(i) When the term of office of a commissioner expires or other vacancy occurs in the commissioners of an authority, the commissioners shall appoint a successor to fill the vacancy, subject to confirmation by the municipal or county governing body.

(ii) If the commissioners fail to appoint a successor within forty-five (45) calendar days from the date a commissioner's term expires or other vacancy occurs, the governing body shall appoint a successor.

(C)(i) If the governing body fails to confirm or reject the commissioner's appointment within forty-five (45) calendar days *after receiving written notice* of the appointment, the appointment shall be deemed confirmed and the governing body shall have no power to act on the appointment thereafter.

(ii) If the governing body rejects such appointment within forty-five (45) calendar days after receiving written notice of the appointment, the commissioners shall within thirty (30) calendar days after receiving written notice of such rejection appoint another person to fill the vacancy.

(iii) If the commissioners fail to make the appointment within the thirty-day period, the governing body shall appoint a successor.

¹ A.C.A. § 14-169-208 (Repl. 1998) (hereinafter, the statute).

² *Id.* at § (a)(2)(A).

(3) A commissioner shall hold office until his successor has been appointed and has qualified.³

(Emphasis added.)

As reflected in subsection (c)(2)(C) of the statute, a city's governing body is entitled to *written notification* of a provisional appointment before the 45-day period will begin to run during which the governing body may confirm or reject a housing commission's provisional selection of a successor commissioner. With regard to the question of what constitutes notice of a commission's provisional appointment or reappointment of a successor commissioner, the requisite condition is simply a writing announcing the commission's action. Although the statute contains no express conditions regarding the substance of the notice, the term "written notice of the appointment" seems to be self-explanatory, requiring at a minimum no more than an announcement of whom the commission has selected.

Question 2: Under A.C.A. 14-169-208, when a sitting commissioner is reappointed by a housing authority's Board of Commissioners for an additional term, written notice of that reappointment is given to the governing body of a city before his/her current term expires and the governing body of a city acts to confirm or reject the appointment, does the governing body of the city's 45 calendar day time frame to confirm or reject begin to run upon receipt of written notice?

In my opinion, under the hypothetical circumstances you have recited, the 45-day time period would not begin to run at all, since no valid notice of reappointment had issued.

A scenario of the sort you have posited would run afoul of the unambiguous provision of the statute authorizing a housing authority commission provisionally to appoint a successor commissioner only after the sitting commissioner's term has expired or a vacancy occurs for some other reason. The operative statutory provision is the above quoted subsection (c)(2)(B)(i), which unequivocally declares that "[w]hen the term of office of a commissioner expires or other vacancy occurs in the commissioners of an authority, ***the commissioners shall appoint a successor*** to fill the vacancy, subject to confirmation by the municipal or county governing body" (emphases added). Nothing in this subsection or any

³ *Id.* at § (c)(2).

other provision of the Code authorizes a housing authority commission provisionally to reappoint a sitting commissioner before the commissioner's current term has expired.⁴

Given the untimeliness of the written notice referenced in your question, I believe the city's governing body could – and, perhaps, might be obliged to – decline acting upon the notice of reappointment as ineffective because it was prematurely filed.⁵ Neither the statute nor any court decision, however, directly addresses the legal effects of a governing body's approving a premature commission appointment or reappointment.

Question 3: Under A.C.A. 14-169-208, if a governing body of a city customarily and routinely accepts notice of an appointment or reappointment of a commissioner by the housing authority's Board of Commissioners before the term expires and acts accordingly, does that set a precedent on when notice can be given?

I believe a reviewing court would answer this question in the negative. In my opinion, a city's governing body cannot by custom and practice alter the legislatively established procedure for the appointment or reappointment of housing authority commissioners. A housing authority commission is not invested with authority to flout legislatively imposed schedule restrictions simply because a city's governing body has in the past overlooked such procedural indiscretions.

⁴ I appreciate that this provision necessarily creates a period during which no appointed and confirmed successor would be authorized to serve in the vacant seat. I am obliged, however, to construe the statute just as reads, giving the words their ordinary and usually accepted meaning in common language. *Edwards v. State*, 347 Ark. 364, 64 S.W.3d 706 (2002). Nothing is taken as intended that is not clearly expressed. *State ex rel. Sargent v. Lewis*, 335 Ark. 188, 979 S.W.2d 894 (1998). Given the unequivocal terms of the statute, it appears inevitable that a commissioner whose term has expired will hold over in the position until his or her successor has been provisionally appointed by the commission and approved by the city's governing body. See Op. Att'y Gen. No. 96-054 (opining that a sitting member whose term has expired will hold over in the position until his or her successor has been appointed and confirmed). The legislature has provided for this circumstance in subsection (c)(3) of the statute, which dictates that a commissioner shall hold office until his successor has been appointed and has qualified.

⁵ I have included the conditional "might be obliged to" in recognition of the fact that the city's governing body might be precluded from acting upon a provisional appointment that, given the terms of the statute, may be no more than a legal nullity. As regards the governing body's possible ability to ratify a commission's action under these circumstances, see my response to the following question.

Subsection (c)(2)(B)(i) of the statute is unequivocal in declaring that, until a sitting commissioner's term expires or other vacancy occurs, a housing commission cannot provisionally appoint or reappoint a member. It follows that a city's governing body cannot approve a premature appointment or reappointment to a currently occupied seat. Although the legislative proscription against in-term appointments or reappointments might be problematic in that it requires the sitting commissioner to hold over in office until his or her successor is appointed and confirmed,⁶ any inconvenience caused by this procedure must be remedied by the legislature – if it indeed considers this situation problematic⁷ – not by the custom or practice of the commission and the city's governing body.

One issue raised by your question is the possible application of the doctrine of ratification, which one of my predecessors, in likewise considering the authority of a city's governing body, summarized as follows:

It is well-established that a municipal corporation may ratify the unauthorized acts of its officers which are within the scope of the corporate powers. *See generally Day v. City of Malvern*, 195 Ark. 804, 807, 114 S.W.2d 459 (1938); *Lykes v. City of Texarkana*, 223 Ark. 287, 265 S.W.2d 539 (1954); *McQuillin Mun. Corp.* § 13.47 (3rd ed.). Although a city council cannot legally confirm or ratify *ultra vires* acts (beyond the scope of authority) or acts under a void law, it can generally ratify what it could previously have lawfully authorized. *McQuillin, supra*.⁸

The operative term in the passage just quoted is within the scope of the corporate powers. The statute clearly locates within the scope of such powers the governing body's authority to approve a timely provisional commission appointment or reappointment. However, nothing in the Code suggests that a city's governing body could lawfully authorize, much less be bound to follow an ongoing practice of authorizing, any replacement commissioner to fill a currently occupied seat.⁹

⁶ *See* discussion in note 4, *supra*.

⁷ In this regard, the legislature might reasonably have concluded that any potential inconvenience of the sort discussed in my text might be offset by the benefit of a sitting member's deliberating without being distracted by concerns regarding his reappointment or replacement in office.

⁸ Op. Att'y Gen. No. 91-289.

⁹ The premise underlying the doctrine of ratification appears to be that whereas a city's governing body can ratify after the fact an action that would have been valid had it initially been taken with the requisite

Without dwelling on the question of whether a governing body might ratify a commission's single, aberrant appointment or reappointment (an issue not raised directly in your question), I will opine that a governing body's customary and routine practice of purportedly ratifying such commission actions could never bind the council to follow suit in the future. Simply put, an aberrant local custom and practice cannot trump an unambiguous procedure set forth in state law.

Question 4: Under A.C.A. 14-169-208, if a certificate of the appointment or reappointment is filed and stamped by the clerk of the governing body of a city, does that automatically confirm the appointment or reappointment of the commissioner?

In my opinion, A.C.A. § 14-169-208 reflects a legislative intention to foreclose challenges to the propriety of a commissioner's appointment or reappointment once a valid certificate of the appointment or reappointment has been filed with the city clerk. Concluding as much, however, does not resolve the related questions of when a certificate should properly be filed – i.e., when the conditions for certification have been met – and what entity – the commission or the city's governing body – should file the certificate.

As I have just indicated, the statute *is* clear in directing that a properly filed certificate of appointment or reappointment be deemed conclusively to establish the propriety of the appointment or reappointment:

(d)(1) A certificate of the appointment or reappointment of any commissioner shall be filed with the clerk of the governing body.

(2) The certificate shall be conclusive evidence of the due and proper appointment of the commissioner.

This subdivision leaves unresolved, however, the questions of who should file such a certificate and under what circumstances. In attempting to resolve these questions, I am guided by various principles of statutory construction. First, the cardinal rule is to give full effect to the will of the legislature.¹⁰ A statute is

approval, the governing body cannot ratify an action that it could not have undertaken or approved in the first instance.

¹⁰ *Flowers v. Norris*, 347 Ark. 760, 765, 68 S.W.3d 289, 292 (2002) (It is . . . axiomatic that in statutory interpretation matters, we are first and foremost concerned with ascertaining the intent of the General Assembly.) (citing *State v. Havens*, 337 Ark. 161, 987 S.W.2d 686 (1999)).

construed just as it reads, giving the words their ordinary and usually accepted meaning in common language.¹¹ Nothing is taken as intended that is not clearly expressed.¹² In addition, legislative enactments that are alleged to be in conflict must be reconciled, read together in a harmonious manner, and each given effect, if possible.¹³ Also, in determining legislative intent, each section of the statute is to be read in the light of every other section, and the object and purposes of the act are to be considered.¹⁴ In determining legislative intent in order to construe an act, the reason and spirit of the act should take precedence over the letter of the act, where adherence to the letter of the act would result in an absurdity or would defeat the plain purpose of the law.¹⁵ We construe the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible.¹⁶ When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction.¹⁷ When the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject.¹⁸

In considering the statute in its entirety, I am struck by one irreducible procedural and substantive fact. Although subsection (d) indicates that a certificate may be filed upon the “appointment or reappointment” of successor commissioners – terms that in isolation might be read as denoting only the commission’s *provisional* appointment of its members – the legislature has clearly mandated that an appointment by the commission be subject to confirmation by the

¹¹ *Edwards v. State*, 347 Ark. 364, 64 S.W.3d 706 (2002).

¹² *State ex rel. Sargent v. Lewis*, 335 Ark. 188, 979 S.W.2d 894 (1998).

¹³ *Gritts v. State*, 315 Ark. 1, 864 S.W.2d 859 (1993); *City of Fort Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993).

¹⁴ *Chism v. Phelps*, 228 Ark. 936, 939, 311 S.W.2d 297 (1958); citing *Berry v. Sale*, 184 Ark. 655, 43 S.W.2d 225 (1931).

¹⁵ *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

¹⁶ *Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm’n*, 342 Ark. 591, 29 S.W.3d 730 (2000).

¹⁷ *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003).

¹⁸ *Id.*

municipal or county governing body.¹⁹ The commission's appointment of a successor is not final, then, until the city's governing body has either approved it or failed to act on the appointment within 45 days of receiving written notice.²⁰

In my opinion, the above quoted subsection (d)(2) of the statute, which provides that "[t]he certificate [of appointment] shall be conclusive evidence of the due and proper appointment of the commissioner," must be read in light of the statutory provision establishing the commission's appointments as necessarily provisional. Given that a commissioner's appointment or reappointment is not final until the city's governing body, having been advised of the appointment in writing, has either approved it or fails to act thereon within 45 days, it would clearly be inappropriate to conclude that the commission could file a certificate constituting conclusive evidence of its due and proper appointment before the 45 days had run. It would be absurd, and hence unacceptable, to suggest that the commission could file a certificate of appointment during this period and thereby foreclose the governing body council from rejecting the commission's provisional decision. In my opinion, then, the proper date for filing the certificate, whether the certificate be filed by the commission or the city council, is after the city council has either approved the appointment or failed to act thereon within 45 days of its receipt of written notice of the commission's action.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

¹⁹ A.C.A. § 14-169-208(c)(2)(B)(i).

²⁰ *Id.* at § (c)(2)(C)(i) (declaring the city council's failure to act within this time period a constructive approval of the appointment).