Opinion No. 2011-166

April 3, 2012

The Honorable Ed Garner
State Representative
4 Pinehurst Way
Maumelle, Arkansas 72113-6122

Dear Representative Garner:

You have asked for my opinion on the following questions related to solid waste management districts:

1. Whether a solid waste management district may require a scale even though it is a more restrictive regulation than ADEQ [the Arkansas Department of Environmental Quality] requires?

2. Whether the rules and regulations of a solid waste management district, if not properly adopted, are enforceable.

3. May a solid waste management district adopt emergency rules and regulations in a meeting where a quorum is not present to vote on the adoption?

4. If the rules and regulations are unenforceable, is it proper or required to refund any fees collected under the invalid rules and regulations?

5. Is it a conflict of interest for a person to serve as a director of a solid waste management district and concurrently serve as a director of sanitation for another city with which the solid waste management district has a working relationship?

RESPONSE

For the reasons explained below, the answer to question one is unclear. I take your second question to be asked with reference to the Arkansas Administrative Procedures Act (APA), to which the Board is (at least partly) subject. The APA states that if an entity fails to "substantially comply" with the APA's rules when the entity tries to take some official action, then the action is void. So the answer to your second question depends on the factual question whether the Board "substantially complied" with the applicable provisions of the APA. The answer to your third question is "no." I cannot definitively respond to your fourth and fifth questions because they invite me to engage in factual analysis, which I am not authorized or equipped to do when issuing opinions.

DISCUSSION

Question 1: Whether a solid waste management district may require a scale even though it is a more restrictive regulation than ADEQ requires?

The issue underlying this question is whether a landfill operator can choose to measure solid waste by either volume or weight when calculating the fee owed to the regional solid waste management district ("District") under A.C.A. § 8-6-714. In my opinion, the answer to this question does not turn directly on what ADEQ requires because those requirements apply only to the fees that must be paid *to ADEQ* pursuant to A.C.A. §§ 8-6-601 *et seq*.[1]

Instead, the relevant question, in my opinion, is whether the applicable *statutes*, authorize Districts to require that landfills obtain and use scales to measure solid waste by weight.[2] I have addressed the latter question at length in Attorney

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[1] Your background facts indicate your questions are asked with reference to Class 4 landfills. This class of landfill is not required, by statute or by ADEQ regulation, to obtain and use scales. Likewise, there are no state-wide regulations from ADEQ or the Arkansas Pollution Control and Ecology Commission that give an agency interpretation on whether Districts can require all landfills to obtain and use scales.

[2] I recognize that, under A.C.A. § 8-6-712(b), Districts cannot pass regulations that are more restrictive than "state law." But, in my opinion, this statute is irrelevant to the issue at hand, which turns entirely on the meaning of A.C.A. § 8-6-714. If the latter statute authorizes Districts to require the use of scales, then plainly such a requirement would not be more restrictive than state law. But if Districts lack the authority to require the use of scales under section 8-6-714,

General Opinion 2011-162, which I have enclosed for your convenience. As explained in that Opinion, this question hinges on an ambiguous phrase in A.C.A. § 8-6-714(c)(2). For the reasons stated in that opinion, I cannot resolve the ambiguity. Legislative clarification is warranted.

Question 2: Whether the rules and regulations of a solid waste management district, if not properly adopted, are enforceable.

Given the background facts attached to your request, I assume that by "not properly adopted" you mean "not adopted in accordance with the provisions of the Administrative Procedures Act (APA), which is codified at A.C.A. § 25-15-201 *et seq*." The legislature has required Boards to follow at least some rules established by the APA: "The regional solid waste management boards have the following powers and duties ... [t]o adopt rules under the Arkansas Administrative Procedures Act, § 25-15-201 *et seq*., as are reasonably necessary to assure public notice and participation in any findings or rulings of the boards and to administer the duties of the boards[.]"[3]

If Boards do not "substantially comply" with the APA's provisions for public notice, then the attempted Board action is invalid: "No rule adopted after June 30, 1967, is valid unless adopted and filed in substantial compliance with this rule."[4] Whether a given Board action does in fact "substantially comply" with the APA's public notice provisions is a question of fact. Therefore, in answer to your question, if the Board action fails to "substantially comply," then it is unenforceable. If the Board action does "substantially comply," then it is enforceable.

Question 3: May a solid waste management district adopt emergency rules and regulations in a meeting where a quorum is not present to vote on the adoption?

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then a District that attempted to do so would be acting outside the scope of its authority. The inquiry would not turn to what subsection 8-6-712(b) requires.

[3] A.C.A. § 8-6-704(a)(6) (Repl. 2011). See also Op. Att'y Gen. 2011-073, explaining that Boards are subject to the APA.

[4] A.C.A. § 25-15-204(f) (Supp. 2011).

No. The legislature appears to have required that the presence of a quorum is a necessary (but not sufficient) condition for any Board action to be valid:

> (5)(A) A majority of the membership of the board in person or represented by proxy shall constitute a quorum.
>
> (B) A majority vote of those members present shall be required for any action of the board.[5]

Question 4: If the rules and regulations are unenforceable, is it proper or required to refund any fees collected under the invalid rules and regulations?

By "proper or required" I assume you mean "legally required." This question, which assumes that the District regulations are invalid and, therefore, unenforceable, asks whether, given that assumption, the District would be required by law to refund the fees paid by landfill operators. I am not able to address this question because it can only be fully addressed by an appropriate fact finder who can consider all the facts and legal arguments that could be marshaled in favor of or against a refund. Such an inquiry is not within the scope of an opinion from this office.

Question 5: Is it a conflict of interest for a person to serve as a director of a solid waste management district and concurrently serve as a director of sanitation for another city with which the solid waste management district has a working relationship?

I do not have enough facts to definitively say whether this scenario qualifies as a conflict of interest. To conclusively respond to your question, an appropriate fact finder would have to find the applicable facts, and apply the law to those facts. While I am not equipped or authorized to find those facts, I can explain some of the relevant law.

Conflicts of interest that would preclude dual service can arise under the constitution, statutes, or the common-law doctrine of incompatibility.[6] I have not

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[5] A.C.A. § 8-6-703(c)(5) (Repl. 2011).

[6] *E.g.*, Op. Att'y Gen. 2008-143.

located any constitutional prohibitions on the same person simultaneously serving as Director of a District and as director of sanitation for a city within that District.

In addition to assessing the constitution, one would also need to analyze whether any statutes prohibit the situation you posit. While I cannot definitively conclude that any statute prohibits the scenario you describe—because conflicts of interest are heavily fact dependant and must be analyzed on a case-by-case basis[7]—one would need to analyze whether A.C.A. § 14-42-107(b)(1) (Supp. 2011) applies:

> (b)(1) No alderman, council member, official, or municipal employee shall be interested, directly or indirectly, in the profits of any contract for furnishing supplies, equipment, or services to the municipality unless the governing body of the city has enacted an ordinance specifically permitting aldermen, council members, officials, or municipal employees to conduct business with the city and prescribing the extent of this authority.

This subsection states that (*a*) a certain set of persons (*b*) cannot be interested, directly or indirectly, in certain kinds of contracts, (*c*) unless the city has enacted an enabling ordinance. The person you reference clearly is in the set of persons covered by the statute because, in the capacity of city sanitation director, the person is a "municipal employee." The next question is whether the city sanitation director's simultaneous service as a Director of the District makes that person "interested, directly or indirectly, in the profits of any contract for furnishing supplies, equipment, or services to the municipality[.]" This is a question of fact that can only be resolved by an appropriate fact finder. If the answer to this question is "yes," then the next question is whether the city has enacted the kind of ordinance contemplated above. You have not indicated whether such an ordinance exists. If it does exist, then there is no conflict of interest. If it does not exist, then there is a conflict of interest.

In addition to the possible application of some statutes, some local ordinances may raise various obstacles relevant to your question. For example, some local ordinances might prohibit outside employment while serving as sanitation director. Local ordinances would need to be consulted to complete the analysis of whether any legislative action prohibits the situation you posit.

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[7] *E.g.*, Op. Att'y Gen. 2009-004.

The third category of conflict that might prohibit this simultaneous service is the common-law doctrine of incompatibility. The touchstone when analyzing a common-law incompatibility issue is whether one position is subordinate to the other.[8]

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

Dustin McDaniel
Attorney General

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Enclosure

[8] *E.g.*, Op. Att'y Gen. 2008-143.