

Opinion No. 2012-027

May 25, 2012

The Honorable Mary L. Slinkard
State Representative
10422 Virden Lane
Gravette, Arkansas 72736-9631

Dear Representative Slinkard:

You have requested my opinion on several questions concerning the election of the Northwest Arkansas Community College (NWACC) board. As background for your specific questions, you state:

The NWACC community college district (the “NWACC District”) is comprised of the Rogers School District and the Bentonville School District. The nine members of the NWACC Board are currently elected on staggered terms – three positions are elected every two years. Six members of the NWACC Board are currently elected at-large from the Rogers School District, and three members of the NWACC Board are currently elected at-large from the Bentonville School District. The members of the NWACC Board are elected at the annual school elections rather than general elections. *See Ark. Code Ann. § 6-61-520(b)(2).*¹

¹ Subsection 6-61-520(b) (Supp. 2011) states in relevant part:

(1) All members shall be elected for terms of six (6) years by the qualified electors of the community college district at the general election immediately preceding the expiration of the expiring terms, and the newly elected members shall take office on January 1 next following the date of their election.

(2)(A) However, *the election shall be held at the annual school election if the community college district is composed solely of one (1) or two (2) entire school districts, other than any portion of the school district that is in another county, and whose boundary is*

Based on information recently provided by the Northwest Arkansas Regional Planning Commission, the 2010 federal decennial census indicates that the NWACC District now has a ten percent or greater population of one racial minority (i.e., approximately 17% Hispanic within the NWACC District). *See* Ark. Code Ann. A.C.A. § 6-61-529(c).²

It is likely (and assume for purposes of your opinion) that division of the NWACC District into nine zones for NWACC Board election purposes will create at least one voting zone with twenty percent or greater population of one racial minority. *See* Ark. Code Ann. § 6-61-529(d).³ It is also likely (and assume for purposes of your opinion) that if the NWACC District were divided into nine zones for NWACC Board election purposes, two current NWACC Board members would be located within the same zone.

Against this background, and acting on the assumption that the NWACC District is divided into nine zones pursuant to A.C.A. § 6-61-529(c), you ask:

1. Do current members of the NWACC Board continue to serve for the remainder of their respective terms?
2. Will all NWACC Board members for the new zones initially be elected at the general election or at the annual school election?
3. If the NWACC Board members are initially elected at the general election pursuant to Ark. Code Ann. § 6-61-529(c), are

contiguous with that portion of the school district that is located in the county in which the community college is located.

(Emphasis added.)

² Subsection 6-61-529(c) (Repl. 2003) requires the election of a community college district board by single-member zones if the district has a ten percent or greater population in any one racial minority, as reported by the most recent federal decennial census.

³ Subsection 6-61-529(d) states that “[i]f division into zones for election purposes would not create a voting zone with twenty percent (20%) or greater population in any one (1) racial minority, the district shall be exempt from subsection (c) of this section.”

subsequent elections at the annual school election pursuant to Ark. Code Ann. § 6-61-520(b)(2)?

4. Are all nine members of the NWACC Board for the new zones elected at the first election (general/school) following the initial division into zones or do their respective terms remain staggered?
5. What happens if two or more current NWACC Board members reside in the same zone?
6. Are NWACC Board members for the new zones elected exclusively by voters within their respective zones or are they elected at-large from the NWACC District?

RESPONSE

The answer to your first question is “no,” in my opinion. As explained further below, it seems clear that all members of the Board must run, even if their terms have not expired. In response to your second question and third questions, it appears that both the initial election and subsequent elections will be held at the general election, in accordance with the plain language of A.C.A. § 6-61-529(c). It is my opinion in response to your fourth question that the terms remain staggered. With regard to the circumstances set forth in your fifth question, if both members wish to serve on the new Board, then in my opinion they will both have to run as candidates for election from that zone. It is my opinion in response to your sixth question that the members are elected by the voters in their respective zones.

DISCUSSION

Your questions are governed by A.C.A. § 6-61-529 (Repl. 2003), which is the codification of Act 1349 of 1995, as amended by Act 1366 of 2001.⁴ It will be helpful to set out the relevant provisions of Act 1349 of 1995 before elaborating

⁴ The 2001 act added subsection (d), set out in footnote 3 above, establishing an exception for instances in which zoning the district would not create at least one zone with twenty percent or greater population of one racial minority. Because you have asked me to assume that this exception is inapplicable, I will not discuss it any further.

on the above responses.⁵ The act required each local community college board to choose, within sixty days of the effective date of the act, whether it would continue as a board whose members are elected, or whether it would become a newly constituted board whose members are appointed by the Governor.⁶ If a board chose to continue as an elected board, then the act established certain election procedures as follows for districts with a 10% or greater minority population:

(c) If the local community college board chooses to remain an elected board, beginning with the 1996 general election, the qualified electors of a community college district having a ten percent (10%) or greater population in any one (1) racial minority, as reported by the most recent federal decennial census information, shall elect the members of the local board as follows, utilizing selection procedures in compliance with the federal Voting Rights Act of 1965, as amended:

(1) At least ninety (90) days before the election, the local board shall, with approval of the county board of election commissioners of any county in which the community college is located, divide the district into nine (9) zones, or the local board may, by resolution, utilize existing quorum court districts.⁷

(A) Zones shall have substantially equal population, with boundaries based on the most recent available federal decennial census information;

(B) A candidate for election from a zone or a quorum court district must be a qualified elector and a resident of the zone or district.

(2)(A) Except as provided in subsection (d) of this section, a board member shall serve a six-year term.

⁵ I have attached a copy of the act for your convenience.

⁶ A.C.A. § 6-61-529(a)(1). At the time of the 1995 act's adoption, the members of a local board were elected pursuant to A.C.A. § 6-61-520, which was enacted in 1977 as part of the Comprehensive Post-Secondary Education Act. *See* Acts 1977, No. 560, § 10.

⁷ *See* Op. Att'y Gen. 95-143 regarding the use of quorum court districts for the election of board members.

(B) A term shall commence after the county court declares the results of the election by an order entered of record and on January 1 next following the date of the election.

(d) At the first meeting of a new local board, the members shall establish initial terms by lot so that, to the extent possible, an equal number of positions are filled every two (2) years and not more than five (5) members' terms expire every two (2) years.

(e)(1) After each federal decennial census and at least ninety (90) days before the general election, the local board shall, with approval of the county board of election commissioners of any county in which the community college is located, divide the district into nine (9) zones, or the local board may, by resolution, utilize quorum court districts. The zones or quorum court districts shall be based on the most recent federal decennial census information and be substantially equal in population.

(2) At the general election following the rezoning, a new local board shall be elected in accordance with procedures set forth in this section.

I have set out the text of Act 1349 of 1995, rather than A.C.A. § 6-61-529, because some provisions of the act were not included in the codification, and I believe several of your questions are governed by the omitted language. As reflected in the A.C.R.C. Notes to A.C.A. § 6-61-529, the codification does not include the above introductory language to (c)(2)(A) found in the 1995 act: "Except as provided in subsection (d) of this section, a board member shall serve a six (6) year term."⁸ Nor does the codification include the above subsection (d) regarding staggered terms. There is no explanation for these omissions. However, as the Arkansas Court of Appeals has noted, "[t]he fact that [a] provision is not codified does not deprive it of the force of law. The absence of a portion of an act in the statutes does not indicate that the act is invalid."⁹ It is therefore my opinion that

⁸ Acts 1995, No. 1349, § 1.

⁹ *Carter v. Green*, 67 Ark. App. 367, 371, 1 S.W.3d 449 (1999) (citing *Hinchey v. Thomasson*, 292 Ark. 1, 727 S.W.2d 836 (1987)). See also Sutherland Statutory Construction § 28:4 (7th ed. 2011).

the language of the original act in all likelihood retains the full force of law even if it is not codified.¹⁰

Having set out the controlling law, I can now proceed to address your specific questions.

Question 1 - Do current members of the NWACC Board continue to serve for the remainder of their respective terms?

It must be concluded that the answer to this question is “no” because the 1995 legislation is clear in requiring an election for a new board if the decennial census information indicates that the district has a ten percent or greater population in any one racial minority. Subsections (d) and (e)(2) above plainly refer to a “new local board.” In accordance with the law’s unambiguous requirement that a new board be elected following zoning, I must conclude that the current members of the Board cannot serve out the remainder of their previous terms. I believe they must instead run for re-election.¹¹

Question 2 - Will all NWACC Board members for the new zones initially be elected at the general election or at the annual school election?

I believe it is clear from subsection (c) of Act 1349 of 1995, set out above, that the election will be held at the general election. Because the NWACC Board chose, pursuant to Act 1349 of 1995, to remain an elected board, the members must, “beginning with the 1996 *general election*,”¹² be elected from single-member zones if the qualified electors of the district have a 10% or greater population in any one racial minority.¹³ The Board remains governed by A.C.A. § 6-61-520(b)(2)(a)’s annual school election requirement until such time as the stated

¹⁰ Cf. Op. Att’y Gen. 2004-333 (regarding the language of another act that was only mentioned in the Publisher’s Notes to the codified version).

¹¹ Cf. Op. Att’y Gen. 2002-194 (opining that the virtually identical language of A.C.A. § 6-13-631, applicable to school districts having a 10% or greater minority population, “is clear in requiring an election for an entirely new school board.”). Accord Op. Att’y Gen. Nos. 2003-252.

¹² See also A.C.A. § 6-61-529(c)(1).

¹³ Accord Op. Att’y Gen. 96-369 at 4 (opining that “the election requirements in [A.C.A. § 6-61-529(c)] apply to any local board (1) that chooses to remain elected and (2) that is located in a district in which the qualified electors ... have a ten percent or greater population in any one racial minority....”)

racial minority requirements are satisfied.¹⁴ But as stated by my predecessor: “[T]he General Assembly has provided two methods for the election of local boards; section 6-61-529(c) is applicable if the racial minority requirements of that section are satisfied and § 6-61-520 is applicable if the racial minority requirements are not satisfied.”¹⁵

In short, once A.C.A. § 6-61-529 becomes applicable, the Board members must, in my opinion, be elected at the general election as provided in that statute.

Question 3 - If the NWACC Board members are initially elected at the general election pursuant to Ark. Code Ann. § 6-61-529(c), are subsequent elections at the annual school election pursuant to Ark. Code Ann. § 6-61-520(b)(2)?

The answer to this question is in all likelihood “no,” in my opinion. According to subsection (c) of Act 1349, this 1995 law will apply “beginning with the 1996 general election” if the law’s racial minority requirements are met.¹⁶ There is no reference to any election other than the general election.¹⁷ This indicates that elections held in the interim between the decennial censuses will be conducted at the general election.

I believe it also bears noting that although A.C.A. § 6-61-520 obviously provides for the members’ election at the annual school election, the statute is specific in referring to the election as one held under the authority of Section 6-61-520: “For those elections held at the annual school election *under subsection (b)(2)(A) of this section...*”¹⁸ There is no statute other than subsection 6-61-520(b)(2)(A) that

¹⁴ See n. 1, *supra* (setting out language of subsection 6-61-520(b)(2)).

¹⁵ Op. 96-369 at 7.

¹⁶ A.C.A. § 6-61-529(c)(1).

¹⁷ The zoning requirement is a decennial one, to occur after the results of each federal decennial census, after which a new board is to be elected “[a]t the *general election* following the rezoning[.]” A.C.A. § 6-61-529(c)(3)(B) (emphasis added). Cf. Op. Att’y Gen. 2001-189 (opining with regard to A.C.A. § 6-13-631—the comparable statute applicable to school districts—that absent an exemption allowed under that statute, a district that already has single-member zones in place pursuant to the 1990 federal decennial census is required to re-zone into districts with substantially equal population based upon the most recent census information.); Op. Att’y Gen. 2001-176 (concluding that school board members stand for re-election pursuant to A.C.A. § 6-13-631 following re-zoning even if their terms have not expired.)

¹⁸ A.C.A. § 6-61-520(b)(2)(B)(i). See also *id.* at (ii). Subsection (b)(2)(A) of Section 6-61-520 is the provision requiring the election of community college board members at the annual school election “if the ... district is composed solely of one (1) or two (2) entire school districts....” See n. 1, *supra*.

provides for election of community college board members at the annual school election. This makes it difficult to conclude that the annual school election requirement applies once A.C.A. § 6-61-529 is applicable. I am constrained instead to point out that there is simply no basis, in either Section 6-61-520 or Section 6-61-529, for concluding that subsequent elections will be held at the annual school election once zoning occurs pursuant to Section 6-61-529 as a result of meeting the racial minority requirements. The legislature could have added language to Section 6-61-529 had that been the intent. Of course, the statute can be prospectively amended to that effect. But I am compelled to conclude at this point that subsequent elections will be held at the general election once Section 6-61-529 is applicable.

Question 4 - Are all nine members of the NWACC Board for the new zones elected at the first election (general/school) following the initial division into zones or do their respective terms remain staggered?

The above subsection (d) of Act 1349 of 1995 clearly provides for the staggering of initial terms by lot: “At the first meeting of a new local board, the members shall establish initial terms by lot....” My predecessor did not elaborate upon this uncodified provision of the 1995 act when opining that once a census demonstrates that the racial minority percentage is met, a community college district will be subject thereafter to A.C.A. § 6-61-529(c).¹⁹ But he did note it.²⁰ According to the also unmodified subsection (c)(2)(A) of the 1995 act, the provision for staggered terms is an exception to the 6-year term provision: “Except as provided in subsection (d) of this section, a board member shall serve a six-year term.” Given my opinion, expressed above, that these provisions remain effective notwithstanding that they were not codified, it is my conclusion that the new Board members will determine the lengths of their respective terms by drawing lots following the election of a new Board by zones.

Question 5 - What happens if two or more current NWACC Board members reside in the same zone?

As explained above in response to your first question, it must be concluded that all members of the Board are required to run, even if their terms have not expired.

¹⁹ Op. Att’y Gen. 96-369, *supra* at n. 12.

²⁰ *Id.* at n. 1.

Thus, if both members wish to serve on the new Board, then in my opinion they will both have to run as candidates for election from that zone.

Question 6 - Are NWACC Board members for the new zones elected exclusively by voters within their respective zones or are they elected at-large from the NWACC District?

In my opinion, the members are elected by the voters in their respective zones. I believe this plainly follows from subsection (c)(1)(B) of Act 1349 of 1995, wherein it refers to the election of a candidate “from a zone:” “A candidate for election *from a zone* ... must be a qualified elector and a resident of the zone....” (Emphasis added.)²¹ This language clearly reflects the fact that following the division of the NWACC District into single-member zones, Board members will be elected by the voters within the respective zones.²² The 1995 legislation requires the creation of zones so as to comply with the federal Voting Rights Act.²³ This federal law requires that minorities be afforded access to proportional representation.²⁴ The election of candidates from single-member zones is the preferred plan in this respect.²⁵

²¹ A.C.A. § 6-61-529(c)(1)(B). It should perhaps also be noted that election by zone is a continuing requirement once section 6-61-529 becomes applicable: “At the general election following the rezoning, a new local board shall be elected in accordance with procedures set forth in this section.” *Id.* at (c)(3)(B).

²² *See, e.g., Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004) (a Voting Rights Act case in which the minority plaintiffs sought to establish a claim notwithstanding that they were not sufficiently numerous to form a voting majority in any single-member district, wherein the court noted: “The single-member district “is the smallest political unit from which representatives are elected.” [Citation omitted.] *In these districts, one candidate is elected to represent voters in the district.* By contrast, in multimember districts, “two or more legislators [are] elected at large by the voters of the district.” [Citation omitted.]). *Id.* at n. 8 (emphasis added); *Conway School Dist. v. Wilhoit*, 854 F.Supp. 1430, 1435 (E.D.Ark.,1994) (noting that the comparable statute for school districts—A.C.A. § 6–13–631— “states in its basic provisions the clear preference of the Arkansas General Assembly for single-member zones as opposed to at-large voting....”)

²³ A.C.A. § 6-61-529(c)(1) (requiring that members be elected “utilizing selection procedures in compliance with the federal Voting Rights Act of 1965.”)

²⁴ Op. Att’y Gen. 2009-110.

²⁵ *See Growe v. Emison*, 507 U.S. 25 (1993).

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Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion,
which I hereby approve.

Sincerely,

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Attorney General

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Enclosure