

Opinion No. 2013-145

February 26, 2013

The Honorable Davy Carter
Speaker of the House
350 State Capitol
500 Woodlane Avenue
Little Rock, Arkansas 72201-1037

Dear Speaker Carter:

This is my opinion on your 12 sets of questions about a 2011 law (the “Act”)¹ that requires any water system supplying 5,000 or more “persons” to fluoridate water if “funds sufficient to pay capital start-up costs for fluoridation equipment . . . have become available from any source other than tax revenue or service revenue regularly collected” by the system.

Delta Dental of Arkansas Foundation (“Delta”) provides funds for fluoridation equipment under a grants program operated in cooperation with the Department of Health.² It is my understanding that the Department has examined the Delta grants program and concluded that funds offered thereunder are “available” within the meaning of that word as used in the Act. The Act provides in essence that a system supplying 5,000 or more people must fluoridate once funds are available for start-up costs. The law does not require, and the Department does not take the view,³ that a system must accept money from Delta or any other particular source. The

¹ Act 197 of 2011, codified at A.C.A. § 20-7-136 (Supp. 2013). The General Assembly specified the Act’s placement in Arkansas Code chapter 7, “State Board of Health-Department of Health,” of title 20, “Public Health and Welfare.”

² See generally Arkansas Department of Health Engineering Section, *Fluoridation Questions & Answers*, available at <http://www.healthy.arkansas.gov/aboutADH/RulesRegs/QAFluoridation.pdf>.

³ See *id.*

Department's position is merely that funds are available from Delta – a source other than taxes or regular service revenues – and therefore that the statutory condition to the fluoridation requirement has been met.

Question 1 – A.C.A. § 20-7-136 applies to “water systems” that supply water to “five thousand (5,000) persons or more”. For a rural water provider, is this five thousand (5,000) person threshold calculated by the number of residential accounts a system services or by an estimated number of people being served by through those accounts? If not by meter count, how is the five thousand (5,000) person census determined? Are all commercial water accounts excluded from any such calculation?

Given the public health context, it seems clear that “persons” refers to human beings, not accounts.

The Act does not say how to count people supplied. I take that as tacit legislative authorization to use any reasonable counting method. I understand that the Department has a general counting rule and recognizes other approaches when local conditions warrant.

I assume that systems potentially subject to the Act generally do not supply significant numbers of people *only* through commercial accounts. Thus it is my opinion that systems generally may ignore commercial accounts when counting people supplied. I understand that the Department takes the same view.

Question 2 – A water system that is required to fluoridate under this section is not required to fluoridate “until funds sufficient to pay capital start-up costs for fluoridation equipment for the system have become available from any source other than tax revenue or service revenue regularly collected...” Who determines what amount of monies meet the requirement of those “funds sufficient to pay capital start-up costs”? Can a non-governmental and/or non-profit entity be given this authority under the statute? Are the “capital start-up costs” defined by actual costs incurred for installation or can the funding availability be limited to a pre-construction estimate?

In my opinion, each system that supplies 5,000 or more people must determine the amount of money necessary “to pay capital start-up costs for fluoridation

equipment for the system” The Act provides that “[a] licensed civil engineer recognized or employed by the [Department] . . . shall determine . . . whether the capital start-up costs claimed . . . are reasonable.” The latter provision is premised on someone’s having already determined and stated (“claimed”) the system’s start-up costs. In my view, the Act implicitly recognizes that the system itself is best situated to make the determination and claim and requires it to do so.

In my opinion, the Act does not prohibit a system from retaining a third party to determine its start-up costs.

The Act contemplates that cost determination and claim will precede equipment purchase and installation. In my opinion, it accordingly requires determination and claim of estimated, not actual, start-up costs.

Question 3 – Can an organization similar to Delta Dental of Arkansas Foundation (“Delta Dental”) choose and compensate a licensed civil engineer to make the determinations provided under Section (d)(2) on behalf of the Arkansas Department of Health? If so, by what specific authority does Delta Dental acquire and/or hold this authority?

The Act provides that “[a] licensed civil engineer recognized or employed by the [Department] . . . shall determine . . . whether the capital start-up costs claimed . . . are reasonable.” It clearly provides that the engineer need only be “recognized” by the Department, which in my opinion implies that he may be chosen and compensated by a third party.

The engineer’s authority to determine whether claimed start-up costs are reasonable is acquired and held by the Act’s own terms, following his recognition or employment by the Department. In my opinion, contrary to the premise of the last part of your question, a third party compensating the engineer does not acquire or hold any authority under the Act.

Question 4 – Pursuant to a fluoridation grant application submitted by a water service provider, Delta Dental has presented the water provider the attached⁴ “Grant Agreement” which “stipulates the conditions under which these funds

⁴ Your request for my opinion did not include any attachments.

are being granted”. A.C.A. § 20-7-136(d)(1) plainly provides for “capital start-up costs” but does not provide for conditioned or restricted funds. Do the conditioned grant funds made available by Delta Dental satisfy the “available funds” provision of A.C.A. § 20-7-136(d)(1). Does this administrative approval by Delta Dental of the grant application then allow for a water service provider to be compelled by the Arkansas Department of Health to accept those conditioned monies and to then meet the fluoridation requirement of A.C.A. § 20-7-136?

Question 5 – Can the Arkansas Department of Health effectively force the water service provider to accept the funds and its conditions, from Delta Dental under threat of violation of A.C.A. § 20-7-136 (by declaring that the conditioned funds are “available” under the statute)? If the water service provider does not wish to accept the conditioned and restricted funds from Delta Dental, what can be done to the water provider by either the State of Arkansas, through its various enforcement departments, or Delta Dental?

Question 7 – Delta Dental has included an 18 month deadline to complete the project, regardless of weather or other legitimate time affecting delays. Is the ability to place these types of funding restrictions included within A.C.A. § 20-7-136? If the project were to take longer than 18 months and Delta Dental declared a default on the Grant Agreement, could the water service provider be deemed in violation of the statute if funds were rescinded and the project was unable to be completed?

Question 10 – Is the funding restriction that threatens the recovery of these grant monies by Delta Dental in the event that the water service provider discontinues fluoridation within ten years of the date of the Grant Agreement within the authority of A.C.A. § 20-7-136? What if Act 197 of 2011 and A.C.A. § 20-7-136 was repealed by the Arkansas Legislature or deemed to be unconstitutional by the Arkansas Supreme Court?

Question 11 – Are funds that are approved by a non-governmental entity, subject to conditions and restrictions, and that are subject to refund demands deemed “available” for purposes of A.C.A. § 20-7-136(d)(1).

Question 12 – Is a water service provider legally obligated to accept funds from Delta Dental? Is it proper for the Arkansas Department of Health to force water system providers to apply for and accept Delta Dental monies (and the accompanying conditions and restrictions) under threat of “enforcement actions”, threat of “administrative procedures” and threat of “hearings before the Arkansas Board of Health”? If so, what recourse does the Arkansas Department of Health have in the event that a water system does not apply to Delta Dental, or any other non-governmental entity, or chooses not to accept what they may deem as unreasonable conditions and restrictions, pursuant to A.C.A. § 20-7-136 or any other enforcement authority?

All of these questions primarily concern whether funds offered under the Delta grants program are “available” within the meaning of that word as used in the Act and, if so, whether systems are required to accept those funds or to fluoridate even if they are not required to accept them.

It is my understanding that the Department has examined the Delta grants program, including the terms and conditions on which grants are made, and determined that funds offered thereunder are “available” within the meaning of that word as used in the Act. An administrative body’s interpretation of a statute it is charged with administering is given considerable deference and will not be overturned unless clearly wrong.⁵ I cannot say that the Department’s interpretation is clearly or even likely wrong in this instance.

In my view, the Act provides in essence that systems supplying 5,000 or more people must fluoridate their water once a determination has been made that funds are available. The Act does not, however, require a system to accept money from Delta or any other source in particular.

Whether a system is “effectively force[d]” to accept funds from Delta is a subjective inquiry. Money’s availability from one source does not prohibit a system from seeking it from another source, and nothing in the law requires a system to accept money from Delta or any other source in particular.

⁵ See, e.g., *Brookshire v. Adcock*, 2009 Ark. 207, 307 S.W.3d 22.

In my opinion, the Act does not empower any third party, including Delta, to take any action against a system. Any state enforcement action against a system would presumably be for failing to fluoridate its water, not for refusing to accept money from any particular source. In that regard, a Department publication states:

The [Department's] Engineering Section has an existing enforcement policy and will utilize that policy to seek compliance with the fluoridation regulations. The policy utilizes progressive enforcement measures beginning with a Notice of Violation but which can also include monetary penalties assessed by the Board of Health.⁶

In my opinion, were a grant rescinded, the amounts to have been granted would prove to be no longer available. In my opinion, the Act implies that each system supplying 5,000 or more people must continue to use its reasonable best efforts to obtain amounts – other than tax or service revenues – sufficient to pay start-up costs. A system would not, in my opinion, be deemed to be in violation of the Act while it was unable to do so, provided it continued to use its reasonable best efforts.

The Act does not, in my opinion, prohibit a system from agreeing to refund grant money upon the system's cessation of fluoridation. I would not, however, expect the Act's repeal or judicial invalidation to require a system to discontinue fluoridation and thus become subject to the refund obligation you describe. It is my understanding that some systems fluoridated their water before the Act's enactment.

Question 6 – In referencing the specific conditions of the Delta Dental grant funds (as evidencing in the attachment⁷), the award is for a specific amount of funds “up to but not to exceed” said amount. The amount approved is an engineer’s estimate. What if the actual cost of the equipment and labor associated with fluoridation implementation exceeds this amount? Would the Grantee (water service provider) then be required to use any available source of

⁶ Arkansas Department of Health Engineering Section, *Fluoridation Questions & Answers*, available at <http://www.healthy.arkansas.gov/aboutADH/RulesRegs/QAFluoridation.pdf>.

⁷ Your request for my opinion did not include any attachments.

income, most likely service revenues, to make up for the insufficient funds and complete the project? If so, would the water service provider then be subject to scrutiny by its customers as acting in direct violation of A.C.A. § 20-7-136? If not, would a water service provider be in violation of the A.C.A. § 20-7-136 if the pre-construction estimate was insufficient to complete the project, and the water service provider was not able to find the additional, appropriate funding, nor able to complete the fluoridation project?

In my opinion, were actual start-up costs to exceed amounts available, the system would not be obligated to fluoridate until adequate funds became available.

In my opinion, a system may not use “tax revenue or service revenue regularly collected” to pay start-up costs.

As stated above, it is my opinion that the Act implies that a system must continue to use its reasonable best efforts to obtain – from sources other than tax or service revenues – amounts sufficient to pay start-up costs. A system would not, in my opinion, be deemed to be in violation of the Act while it was unable to do so, provided it continued to use its reasonable best efforts.

Question 8 – In the event of a technical violation of A.C.A. § 20-7-136 (and more specifically, the rules subsequently adopted by the State Board of Health), what could Delta Dental do to a water service provider under either the statute or the Grant Agreement?

In my opinion, the Act does not empower a third party like Delta to take any action against a system. A party’s rights and obligations under a contract are of course set forth in and governed by the contract. I do not have a copy of any contract relating to the Act. Even if I did, this office follows a policy of not interpreting contracts in opinions except as required by statute.⁸

Question 9 – Does A.C.A. § 20-7-136 allow or provide for a non-governmental and non-regulatory entity such as Delta Dental to audit and approve fund distribution, and review plan and specification changes, for this project?

⁸ See, e.g., Op. Att’y Gen. 2012-127, 2011-030.

The Honorable Davy Carter
Speaker of the House
Opinion No. 2013-145
Page 8

The Act does not empower any third party take such actions. Neither, in my opinion, does it prohibit a system from entering into a contract that may provide for a counterparty or third party to take such actions.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:JMB/cyh