

Opinion No. 2014-001

February 26, 2014

The Honorable Ken Bragg
State Representative
63 Pinecrest Circle
Sheridan, Arkansas 72150-9704

Dear Representative Bragg:

You have asked for my opinion on an issue that is essentially a question of statutory interpretation. I have paraphrased your background information as follows:

Arkansas Code section 14-42-206(a) states that the city council may, by resolution, request that “the county party committees of the recognized political parties” conduct party primaries for municipal offices. But section 7-2-201(b)(1), which is more recent, states that “political party primary elections shall be conducted by the county board of election commissioners.”

With this background in mind, you essentially ask two questions, which I have paraphrased as follows:

1. At least part of section 14-42-206(a) seems to have been impliedly amended by section 7-7-201(b). If a city council uses the original language of section 14-42-206(a) in its resolution, is that resolution ineffective?
2. Is a resolution enacted under section 14-42-206(a) binding, given that it is a “request” by “resolution”?

RESPONSE

In my opinion, the answer to your first question is that section 7-7-201(b)(1) operates as an implied repeal/amendment of section 14-42-206(a). Likewise, the former impliedly modifies (repeals/amends) any resolution adopted under and compliant with section 14-42-206(a). Regarding question two, it is my opinion that the resolution is not a request to non-city entities that they consider whether the city should have partisan primaries. Rather, for the reasons explained below, it is my opinion that the resolution reflects the city council's decision to hold partisan primaries; and it is a directive to initiate the necessary procedures for holding party primaries.

DISCUSSION

Question 1: At least part of section 14-42-206(a) seems to have been impliedly amended by section 7-7-201(b). If a city council uses the original language of section 14-42-206(a) in its resolution, is that resolution ineffective?

Section 14-42-206(a) grants the city council the authority to initiate the process leading to a political-party primary for municipal offices. According to the statute, that process is initiated when the city council passes a resolution that "request[s] the county party committees...to conduct party primaries for municipal offices for the forthcoming year." But section 7-7-201(b)(1) states that "within each county, the political party primary elections shall be conducted by" the *county board of election commissioners* (CBEC). As the more recent of the two statutes, section 7-7-201(b)(1)'s provisions control.¹ This is known as "repeal by implication." Thus, the city council retains the authority to initiate the process leading to the political-party primary. But the entity that "conducts" the partisan primary is the CBEC, not the political parties themselves.

So how does the repeal by implication at the statutory level affect a resolution passed under the authority of section 14-42-206(a)? A standard principle of law is

¹ The relevant portions of section 7-7-201(b)(1) were added by Act 901 of 1995, whereas the relevant portions of section 14-42-206(a) were added by Act 59 of 1991. While various parts of section 14-42-206 have been modified since 1995, none of those modifications have affected subsection -206(a), which is the only one at issue in this opinion. These non-relevant modifications do not affect the repeal-by-implication analysis. See *Citizens to Establish a Reform Party in Arkansas v. Priest*, 325 Ark. 257, 265, 926 S.W.2d 432, 437 (1996) ("When an act amends the law, portions of the law that are not amended but simply retained are not thought of as new enactments.").

that a repeal (whether in part or in whole) of a statute under which an ordinance was enacted also impliedly repeals the ordinance.² As noted above, section 14-42-206(a) was impliedly repealed, but only in part. Thus, any resolution passed in reliance upon section 14-42-206(a) will also be impliedly repealed in the same manner and to the same degree.

It is therefore my opinion that the resolution is not rendered void or ineffective merely because of the partial statutory repeal. The resolution will be impliedly modified in the same way as the statute on which it was based.

Question 2: Is a resolution enacted under section 14-42-206(a) binding, given that it is a “request” by “resolution”?

The concern behind your first question is whether, in light of the statutory repeal by implication, the resolution is legally effective. But the concern behind your second question goes to the nature of the resolution’s effect. That is, your second question posits two reasons why you think the resolution is non-binding. In my opinion, neither reason provides good grounds to think that the resolution is non-binding.

First, you say that a resolution (as opposed to an ordinance) “is not binding law.” And given that section 14-42-206 only authorizes the city council to pass a “resolution,” the resulting resolution does not bind anyone. Legislative bodies typically memorialize their actions in one of two legal instruments: resolutions and ordinances.³ Resolutions can have the same legal force as ordinances, especially if

² See 6 McQuillin Mun. Corp. § 21:42 (3d ed.) (“[T]he repeal of a statute under which an ordinance was enacted impliedly repeals the ordinance....”). Because section 14-42-206(a) has only been *partially* repealed, any resolution passed under and in compliance with section 14-42-206(a) will also be modified to the extent of its authorizing statute.

³ *Kruzich v. West Memphis Utility Commission*, 257 Ark. 187, 191, 515 S.W.2d 71, 73 (1974) (quoting *McQuillin on Municipal Corporations*, “A resolution in effect encompasses all actions of the municipal body other than ordinances. Whether the municipal body should do a particular thing by resolution or ordinance depends upon the forms to be observed in doing the thing.”); 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 286; 1A *Sutherland Statutory Construction* § 30:3 (7th ed.) (“A municipal resolution, like a legislative resolution, is less formal than a statute or ordinance and usually relates to temporary or administrative matters....It is not necessary that the action be called an ‘ordinance,’ for the name is immaterial. If the regulation is permanent and it has been enacted in the requisite manner, it will be enforced as an ordinance.”).

the legislature requires a given action be accomplished by a resolution.⁴ The legislature often requires certain binding action be effected by resolution.⁵ Thus, the mere fact that section 14-42-206(a) is described as a resolution does not mean that it is non-binding.

The second reason you offer to support the assertion that the resolution is non-binding is that, under section 14-42-206, the resolution merely “requests” that party primaries be conducted. Thus, you say, the request can be freely declined. This view presumably follows from a literal interpretation of the word “request” as implying discretion in the one to whom the request is directed. But, in my opinion, the “request” under section 14-42-206(a) cannot reasonably be read to imply that the recipient of that request has the authority to decide whether the partisan primaries will be conducted. For such a view (*a*) fails to read the term “request” in its wider context and (*b*) leads to an absurd consequence. Courts read statutes as a whole and “will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent.”⁶

The idea that the recipient of a request under section 14-42-206(a)(1) has discretion to deny it fails to read the request in its broader context. Section 14-42-206(a)(1) establishes the procedure that the city council employs to initiate the process leading to a political-party primary: “The city...council..., by resolution..., may request the county party committees...to conduct party primaries for municipal offices for the forthcoming year.” As explained in response to your first question, section 7-7-201(b)(1) impliedly modifies any resolution passed under section 14-42-206(a) such that the resolution would be read as referring to the county board of election commissioners (CBEC).

⁴ See the authorities cited in note 3.

⁵ See, e.g., A.C.A. § 7-5-301(c)(1) (Supp. 2013) (“The quorum court of each county shall choose **by resolution** a voting system containing voting machines or electronic vote tabulating devices or both...for use in all elections....”); A.C.A. § 7-5-806(g) (Repl. 2011) (“The committee shall report the facts to two (2) houses, and the day shall be fixed **by joint resolution** for the meeting of the two (2) houses to decide the context, on which decision the yeas and nays shall be taken....”); A.C.A. § 14-42-403 (Repl. 2013) (“The governing body of a city may, **by resolution**, appoint, remove, and appoint successors to the position of director of the department of public safety, who shall be the chief executive officer of the department.”). (All emphases added.)

⁶ *McMillan v. Live Nation Entertainment, Inc.*, 2012 Ark. 166, 12, 401 S.W.3d 473, 480.

Section -206(a)(2) makes clear that the resolution is akin to municipal law in the sense that it remains continuously in force: “The resolution shall remain in effect for the subsequent elections unless revoked by the city...council.”⁷ The view that the resolution is merely a request for the CBEC to decide whether the city would hold partisan primaries fails to take into account the fact that -206(a)(2) gives the resolution a continuing character. Nothing in -206(a)(2) indicates that the “request” is continually renewed at each election cycle. Rather, the clear implication of the text is that the council’s adoption of the resolution reflects the council’s decision to hold partisan primaries. That decision remains in effect for all subsequent municipal elections unless a later council repeals the resolution.

Therefore, the “request” contemplated by section 14-42-206(a) is analogous to the type of “request” contemplated by the Arkansas Freedom of Information Act (FOIA). Under the FOIA, a person obtains public records by making “a request to the custodian to inspect, copy, or receive copies of public records.”⁸ The custodian is not free to “decline the request.” On the contrary, the request generates certain legal obligations. Likewise, in my opinion, the “request” under section 14-42-206(a) cannot reasonably be viewed as the type of request that is open to being flatly declined.

If one were to read section 14-42-206(a)’s request language as implying that the CBEC can decide whether to hold partisan primaries, an absurd consequence follows: the CBEC would be required to make a uniquely municipal decision. Courts have been clear that there are several interests served by partisan primaries: (1) minimizing voter confusion, (2) protecting the public from frivolous or fraudulent candidates, and (3) maximizing the probability that the winning candidate will have received a majority of the popular vote.⁹ It is a uniquely municipal question whether a particular city at a particular time needs these interests to be advanced. There is no indication anywhere in the Arkansas Code that the CBEC is vested with the authority to weigh the needs of a given city to individually determine whether the city needs these interests advanced during a given election cycle.

⁷ A.C.A. § 14-42-206(a)(2).

⁸ A.C.A. § 25-19-105(a)(2)(A) (Supp. 2013).

⁹ *E.g., Republican Party of Ark. v. Faulkner County, Ark.*, 49 F.3d 1289, 1299 (8th Cir. 1995).

In summary, the two reasons offered do not constitute good grounds to think that a resolution passed pursuant to section 14-42-206 is non-binding. The mere fact that it is a “resolution” is not dispositive. Nor can the statute’s reference to the council’s “request” reasonably be interpreted as implying discretion to decide whether party primaries will be held. For such a view fails to take into account the continuing nature of the council’s action and leads to an absurd consequence.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

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