



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-017

April 29, 2015

The Honorable Bryan King
State Senator
871 CR 814
Green Forest, Arkansas 72638

Dear Senator King:

I am writing in response to your request for an opinion on several questions regarding the fluoridation of public water. You provide the following background for your questions:

This matter is in regards to the fluoridation of public water and the Arkansas Department of Health Rules and Regulations Pertaining to Public Water Systems, especially Section VII Operation, Paragraph G.”

You ask the following six questions:

1. Is the Arkansas Department of Health (ADH) responsible for ensuring that public water suppliers follow the rules and regulations pertaining to public water systems?
2. If the answer to Question 1 is “yes,” is the ADH responsible for deciding which rules and regulations are enforced?
3. Is the ADH required by law to make sure that all rules and regulations are followed by the water operators?

4. If the ADH is not performing its job requirements by not enforcing all rules and regulations pertaining to its department, whose responsibility is it to hold it accountable to follow the law?
5. Could an elected official or resident of the State of Arkansas file a redress of grievances if all laws, rules and regulations are not followed?
6. Who is responsible for ensuring that the ADH complies with the law and is performing protocol?

RESPONSE

The answer to Question 1 is “yes.” If Question 2 is asking whether the Department has discretion to selectively enforce regulations, then the answer is “no.” The answer to Question 3 is “yes.” The answer to Questions 4 and 6 is twofold. Within the Department, public employees and the agency head are responsible to ensure that the Department fulfills its legal obligations. Outside the Department, all persons who have been injured by a state agency’s alleged inaction are authorized to file suit under the Administrative Procedures Act, specifically A.C.A. § 25-15-214. The answer to Question 5 is that the Arkansas citizen, if injured by the agency’s alleged inaction, could file a lawsuit under the Administrative Procedures Act.

DISCUSSION

Because several questions overlap, I will group them by topic instead of addressing them sequentially.

Question 1: Is the Arkansas Department of Health (ADH) responsible for ensuring that public water suppliers follow the rules and regulations pertaining to public water systems?

Question 3: Is the ADH required by law to make sure that all rules and regulations are followed by the water operators?

The answer to both questions is “yes.” The General Assembly has tasked the State Board of Health with adopting regulations relating to fluoridation:

The State Board of Health shall adopt rules relating to the fluoridation of water systems that shall include without limitation:

- (1) Permissible concentrations of fluoride to be maintained by a water system; and
- (2) Requirements and procedures for maintaining permissible concentrations of fluoride including without limitation:
 - (A) Necessary equipment;
 - (B) Recordkeeping;
 - (C) Reporting; and
 - (D) Testing.¹

Question 2: If the answer to Question 1 is “yes,” is the ADH responsible for deciding which rules and regulations are enforced?

If this question is asking whether ADH has the authority to selectively enforce applicable statutes and regulations, then the answer is “no.” There are many bases for this conclusion. One such basis is A.C.A. § 25-15-214, which makes it illegal for an agency to “unlawfully, *unreasonably, or capriciously* fail, refuse, or delay to act” in any “case of rule making or adjudication.” (Emphases added.)

Question 4: If the ADH is not performing their job requirements by not enforcing all rules and regulations pertaining to their department, whose responsibility is it to hold them accountable to follow the law?

Question 6: Who is responsible for ensuring that the ADH complies with the law and is performing protocol?

The answer to Questions 4 and 6 is twofold. Within the Department, public employees and the agency head are responsible along with the Board for ensuring

¹ A.C.A. § 20-7-136(c) (Repl. 2014). This statute speaks about the authority of the “State Board of Health.” The Board’s regulations are implemented by the Arkansas Department of Health.

that the Department fulfills its legal obligations.² Outside the Department, all persons who have been injured by the Department's alleged inaction are authorized to file suit under the Administrative Procedures Act, specifically A.C.A. § 25-15-214.

Question 5: Could an elected official or resident of the State of Arkansas file a redress of grievances if all laws, rules and regulations are not followed?

As noted above, citizens are authorized by statute to sue for injuries caused by an agency's alleged inaction. This might, in some sense, be considered a "redress of grievances." But, technically, "filing a redress of grievances" would not be a recognized way to challenge any alleged inaction.

The term "redress of grievances" is found in the First Amendment to the U.S. Constitution: "Congress shall make no law...abridging...the right of the people peaceably to assemble, **and to petition the Government for a redress of grievances.**" (Emphasis added.) A similar provision is found in Article 2, section 4 of the Arkansas Constitution: "The right of the people peaceably to assemble to consult for the common good, and to petition, by address or remonstrance, the government, or any department thereof, shall never be abridged." Though the right to petition was originally distinct from the rights of speech and assembly,³ the right to petition has now "almost completely collapsed into freedom of speech."⁴

² See generally A.C.A. §§ 20-7-101 to -109 (Repl. 2014) (as amended by Act 1100 of 2015).

³ David Bernstein, *Freedom of Assembly and Petition*, The Heritage Guide to the Constitution, 316-317 (2005) ("[A]n analysis of the text and background of the First Amendment suggests that the petition and assembly rights have independent scope. Before it was explicitly recognized in the Constitution, the right to petition had a long-standing Anglo-American pedigree as a right independent of general free speech and press rights.").

⁴ *Id.* at 316 ("The Magna Carta first formally recognized the right to petition the king...By the late seventeenth century, petitions were the public's primary means of communicating with government officials and were directed to all levels of government...Petitioning naturally spread to the American colonies...[where the colonial] assemblies, following English tradition, treated petitions seriously and often referred to them in their committees for further action. Petitions were not always granted, but they were always answered...[Later, w]hen considering the Bill of Rights, Congress approved the right to petition with little controversy...Congress initially took petitions very seriously, following the tradition of their colonial forebears...The right to petition...became less important as modern democratic politics gradually replaced petitioning and

Under contemporary jurisprudence, the right to petition is mostly considered a right to associate with other groups or persons to collectively express certain views.⁵

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

Sincerely,



Leslie Rutledge
Attorney General

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public protests as the primary means for constituents to express their views to their representatives.”); *see also* Gregory A. Mark, *The Vestigial Constitution: History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153 (1998).

⁵ *See generally* *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hague v. CIO*, 307 U.S. 496 (1939).