



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**LESLIE RUTLEDGE**

Opinion No. 2015-050

July 17, 2015

Richard W. Davies, Executive Director  
Arkansas Department of Parks & Tourism  
# 1 Capitol Mall, Room 4A-900  
Little Rock, AR 72201

Dear Mr. Davies:

This is in response to your request for my opinion regarding what appears to be conflicting language in the statutes concerning the appointment process for the Director of the Arkansas Department of Parks and Tourism.

As background for your questions you state:

[Section 7(2) of] Act 38 of 1971, which reorganized state government, transferred, by a type 4 transfer, all functions, powers and duties of the State Parks, Recreation and Travel Commission to the Department of Parks and Tourism.

[Ark. Code Ann.] § 25-2-107(a)(2), concerning type 4 transfers, provides that "The Director of the department, institution, or other agency shall be nominated by the board or commission or governing body of the transferred department, institution, or other agency subject to confirmation by the Governor. The director shall serve at the pleasure of the Governor;" and

[Ark. Code Ann.] § 25-13-101(b) and (c) state that "The executive head of the department shall be the Director of the Department of Parks and Tourism. The Director shall be appointed by the Governor with the consent of the Senate and shall serve at the pleasure of the Governor. The department shall consist of those divisions which constituted the State Parks, Recreation and Travel Commission as of

July 1, 1971, and any other divisions which may be created by law and placed under the department.

In light of the foregoing, you ask which statute should be followed—Ark. Code Ann. § 25-2-107, requiring the State Parks, Recreation and Travel Commission to nominate the director of the department subject to approval by the Governor, or Ark. Code Ann. § 25-13-101, which requires the Governor to appoint the director with the consent of the Senate.

## **RESPONSE**

In my opinion, pursuant to established rules of statutory construction, all the relevant statutes regarding the hiring of a director of the Department of Parks and Tourism can be read together in a harmonious way, and none of the statutes at issue need take precedence over the others.

## **DISCUSSION**

In addition to the two statutes you mentioned in your question, we must also consider a third statute: Ark. Code Ann. § 15-11-205 (Repl. 2009), which grants the State Parks, Recreation and Travel Commission (“the Commission”) the authority, with the approval of the Governor, to “employ” a director of the Department of Parks and Tourism. In my opinion, a court would read the three statutes harmoniously so that no statute need take precedence over the others.

The General Assembly created the State Parks, Recreation and Travel Commission in 1955<sup>1</sup> and granted it certain powers. Those powers included the authority to “employ” a director of what is now called the Department of Parks and Tourism, with the approval of the Governor.<sup>2</sup> In 1971, the legislature enacted Act 38, which reorganized the executive department of state government.<sup>3</sup> As part of this reorganization, section 2 of that act established four types of transfers of

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<sup>1</sup> Acts 1955, No. 330 (codified at Ark. Code Ann. § 15-11-201 *et seq.* (Repl. 2009 and Supp. 2013)).

<sup>2</sup> Ark. Code Ann. § 15-11-205(a) (Repl. 2009).

<sup>3</sup> The two Code sections you reference in your question, Ark. Code Ann. §§ 25-2-107 and 25-13-101, were actually separate sections of Act 38 of 1971.

then-existing state agencies or their duties into other existing or newly created principal departments.<sup>4</sup>

A type 4 transfer, now codified at Ark. Code Ann. § 25-2-107(a), applies to a department or agency that is governed by a board, commission, or other governing body. Under a type 4 transfer, the transferred agency's governing body retains all of the statutory duties and authority it had prior to transfer.<sup>5</sup> In addition, under a type 4 transfer, such governing body nominates its own department director, who must be confirmed by the Governor and who serves at the pleasure of the Governor.<sup>6</sup>

In section 7 of Act 38, however, the General Assembly specifically created the Department of Parks and Tourism. Section 7(2) of the act transferred "the functions, powers and duties" of the State Parks, Recreation and Travel Commission to the new Department of Parks and Tourism by a type 4 transfer.<sup>7</sup> But, section 7(1) of the act, now codified at Ark. Code Ann. § 25-13-101(b), states that the director of the Department of Parks and Tourism is to be appointed by the Governor with the consent of the Senate and serves at the pleasure of the Governor.<sup>8</sup>

Thus, we have an apparent statutory conflict regarding the director's hiring. On the one hand, Ark. Code Ann. § 15-11-205(a) grants the Commission the authority to employ a director, with the Governor's approval; and those powers were retained when the Commission was transferred by a type 4 transfer to the Department of Parks and Tourism. Moreover, Ark. Code Ann. § 25-2-107(a)(2), regarding type 4 transfers in general, states that a governing body of a transferred agency nominates its department director, subject to confirmation by the Governor. On the other hand, Ark. Code Ann. § 25-13-101(b) is specific with respect to the Department of Parks and Tourism. That statute authorizes the Governor to appoint the director, with the consent of the Senate.

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<sup>4</sup> See Acts 1971, No. 38, § 2 (codified at Ark. Code Ann. §§ 25-2-104 through -107 (Repl. 2014)).

<sup>5</sup> See Ark. Code Ann. § 25-2-107(a) (Repl. 2014).

<sup>6</sup> *Id.*

<sup>7</sup> See Acts 1971, No. 38, at § 7(2) (uncodified).

<sup>8</sup> See Ark. Code Ann. § 25-13-101(b) (Repl. 2014).

Established principles of statutory construction help resolve this apparent conflict. Those principles require that all statutes involving the same subject matter<sup>9</sup> be construed together and made to stand if capable of being reconciled.<sup>10</sup> Applying these precepts to this situation, I believe a court likely would decide that the three statutes are *in pari materia* and can be read in a harmonious fashion with respect to the hiring of a director for the Department of Parks and Tourism.

In looking at all three statutes, we find a commonality in each—the Governor has a role, either as the final authority in approving or confirming<sup>11</sup> the Commission’s employment or nomination<sup>12</sup> of a director, or as the person responsible for appointing a director of the Department of Parks and Tourism, subject to the consent of the Senate. This last scenario, under Ark. Code Ann. § 25-13-101(b), is the only one of the three that eliminates the Commission’s role in the selection of a director and gives a role to the Senate.

To achieve a harmonious reading of the three statutes at issue, in my opinion, the Commission may nominate a person to be director or submit a roster of potential candidates to the Governor. The Governor in turn would then either confirm (or not) the Commission’s nominee or approve one of the nominees the Commission submitted. This series of events would accomplish to the extent practicable both the Commission’s and the Governor’s roles under Ark. Code Ann. §§ 15-11-

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<sup>9</sup> Statutes involving the same subject matter are said to be, in Latin, *in pari materia*.

<sup>10</sup> See *City of Fort Smith v. Tate*, 311 Ark. 405, 410, 844 S.W.2d 356, 359 (1993). Also, the rule that statutes *in pari materia* must be construed together applies even if the statutes in question have been enacted at different times and contain no reference to one another. Nor does it matter that the statutes are found in different chapters of the Code and under different headings. See 82 C.J.S. *Statutes* § 477 (2015).

<sup>11</sup> These words are synonymous, as the definitions of “approve” and “confirm” contain the other word or a form of the other word (“approve” meaning “to confirm authoritatively,” and “confirm” meaning “to give formal approval to”). See *Black’s Law Dictionary* 123, 362 (Brian A. Garner, ed., 10th ed., West 2014).

<sup>12</sup> While Ark. Code Ann. § 15-11-205(a) states that the Commission “shall employ” a Parks and Tourism director and Ark. Code Ann. § 25-2-107(a)(2) regarding type 4 agency transfers in general states that an agency director “shall be nominated” by the agency’s governing body, in my opinion, a court likely would view these actions as materially the same, as neither action is final and conclusive because both require the ultimate approval or confirmation of the Governor, see note 11 *supra*. But see note 13 *infra*.

205(a) and 25-2-107(a)(2).<sup>13</sup> This person approved or selected by the Governor would then become the Governor's nominee, whose name would then be sent to the Senate for its consent, thereby fulfilling the requirements of Ark. Code Ann. § 25-13-101(b).

Assistant Attorney General Ray Pierce prepared this opinion, which I hereby approve.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

LR/RP:cyh

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<sup>13</sup> One potential conflict between these two statutes relates to who has the authority to *dismiss* the director. The former statute, Ark. Code Ann. § 15-11-205(a), enacted in 1955, states that the Commission “shall employ” a director. That statute, though, is silent as to who has the power to discharge the director. The word “employ” in its ordinary and accepted understanding implies the authority to terminate a person’s employment. However, the latter statute, Ark. Code Ann. § 25-2-107(a)(2), along with Ark. Code Ann. § 25-13-101(b), enacted in 1971, expressly state that the director serves at the pleasure of the Governor. In such a case, a court, in my opinion, would likely conclude that this one implied power of the Commission under Ark. Code Ann. § 15-11-205(a), if it existed at all, was repealed by implication by the other two more specific statutes adopted later in time. *See Daniels v. City of Fort Smith*, 268 Ark. 157, 164, 594 S.W.2d 238, 242 (1980).