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OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

February 11, 1985

OPINION NO., . 85-33

The Honorable John W. Parkerson
State Representative
State Capitol
Little Rock, Arkansas 72201

HAND DELIVERED

Dear Representative Parkerson:

You have requested an opinion from our Office about the following question:

Is the Arkansas Department of Pollution Control and Ecology subject in whole or in part to the Administrative Procedure Act (Ark. Stat. Ann. §5-701 to 5-715.3) (1976 & Supp. 1983)).

The answer to your question requires an interpretation of Ark. Stat. Ann. §5-701(a) (Supp. 1983), and its predecessor, with respect to the Pollution Control Commission and the subsequent creation of the Department of Pollution Control and Ecology.

By Act 434 of 1967 an exemption to the Administrative Procedure Act was granted to the Arkansas Pollution Control Commission. In 1971, Act 38, §8 created the Department of Pollution Control and Ecology and transferred the "functions, powers and duties" of the Pollution Control Commission "by a type 4 transfer" to this Department. Ark. Stat. Ann. §5-908 (1976).

A "type 4" transfer is described in Ark. Stat. Ann. §5-902(4) (1976) and it is helpful to examine the pertinent provisions of this statute:

Under this Act, a type 4 transfer means the transferring of all or part of an existing department, institution, or other agency to a principal department established by this Act. When all or part of any department, institution, or other agency is transferred to a principal department under a type 4 transfer, the board or commission or other governing body of the transferred department, institution, or other agency is retained and shall continue to exercise its statutory authority, powers, duties and functions, except that any rules, regulations, and standards issued by such boards, commission or other governing body shall be subject to written approval by the Governor. (Emphasis Added.)

Accordingly, when the Commission was transferred to the newly created Department of Pollution Control and Ecology in 1971, it retained its statutory exemption to the Administrative Procedure Act.

The fact that this exemption did not transfer to the Department is clear from the language of §5-701 that "'Agency' means each board, commission, department, officer, or other authority of the government of the State of Arkansas, whether or not within or subject to review by another agency." (Emphasis Added). Furthermore, an analogous situation was examined by the Arkansas Supreme Court in Arkansas Dept. of Labor v. Amercian Employment Agency, 257 Ark. 509, 517 S.W.2d 949 (1975) in which that Department contended that §5-701 exempted it from the Administrative Procedure Act. The response by the Court:

It is in error. The Employment Security Division of the Arkansas Department of Labor is specifically exempted, by neither the Department of Labor nor the Commissioner of Labor is. We can neither extend the exemption to them, nor can we find any Legislative intent to extend the exemption beyond the agencies carefully and specifically enumerated.

Id. at 257 Ark. 513-14, 517 S.W.2d 951.

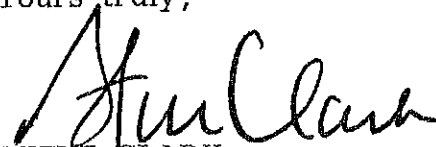
It is also important to note that the Legislature amended §5-701 in 1979 by Act 324, §15, but retained the language exempting the Pollution Control Commission and did not mention the Department of Pollution Control and Ecology.

Accordingly, it is the opinion of this Office that the Department of Pollution Control and Ecology is wholly subject to the Administrative Procedure Act.

Our research indicates that various regulations currently followed by the Arkansas Department of Pollution Control and Ecology, i.e. Regulation 8, closely parallel the Administrative Procedure Act providing for notice to parties, etc.

The foregoing opinion, which I hereby approve, was prepared by Chief Deputy Attorney General Rodney Parham.

Yours truly,


STEVE CLARK
Attorney General

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