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OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

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July 10, 1985

Opinion No. 85-160

Mr. Steve N. Wilson
Director
Arkansas Game and Fish Commission
No. 2 Natural Resources Drive
Little Rock, AR 72205

Dear Mr. Wilson:

This official opinion is written in response to your request of May 30, 1985, in which you pose the following questions, as paraphrased:

1. (Is) the Arkansas Game and Fish Commission a Constitutional Department operating outside the authority of the Legislature and its Subdivisions, except for those legislative functions expressly reserved in Amendment 35 to the Constitution?
2. (Is) the Arkansas Game and Fish Commission exempt from Act 876 of 1973 as amended by Act 875 of 1977; Act 368 of 1979; Act 833 of 1979 and Act 365 of 1985 by the language of the Act itself and are these Acts constitutional in light of Amendment 35?

In your eleven page opinion request, you indicate that the Game and Fish Commission believes the answer to the first question is "yes" and that the agency research indicates it is not subject to Act 876 of 1973, as amended.

Amendment 35 to the Arkansas Constitution created the Game and Fish Commission. Section 8 outlines powers and responsibilities of the Commission, stating:

The fees, monies or funds arising from all sources by the operation and transaction of the said Commission and from the application and administration of the laws and regulations pertaining to birds, games, fish and wildlife resources of the State . . . shall be expended by the Commission for the control, management, restoration, conversation and regulation of . . . wildlife resources of the State, including the purchases or other acquisitions of property for said purposes and for the administration of laws pertaining thereto and for no other purposes. (Emphasis added.)

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In Opinion No. 80-118, this Office determined the Game and Fish Commission to be a "constitutional department" and thus specifically exempt from the State Purchasing Law. A lengthy discussion of the powers of the Commission are set out in that Opinion, a copy of which is attached hereto.

Cited is Arkansas Game and Fish Commission v. Stanley, 260 Ark. 176, 538 S.W.2d 533 (1976) in which the Supreme Court stated:

In considering the question of the powers of the Commission, we must first view Constitutional Amendment 35, which, of course, is an act of the ultimate sovereign, the people of Arkansas, and is subject only to constitutional, not legislative or judicial limitations.
(Emphasis added.)

As you note, Amendment 35, Section 8 preserves the Legislature's power to appropriate monies for Commission use. Additionally, Section 7 provides specific legislative authority as follows:

The Commission shall elect an Executive Secretary and other executive officers, supervisor (sic), personnel . . . whose salaries and expenditures must be submitted to the Legislature and approved . . . by an Act covering specific items in the biennial appropriation as covered by Article XVI, Section 4 of the Constitution.

Given the Commission's status as a Constitutional department, its broad powers under Amendment 35 and specific retention of certain legislative authority in that Amendment, then, we turn to specific language of Act 876 of 1973, as amended.

One of the reasons for the Commission interpretation that it is exempt from Act 876 (Ark. Stat. Ann. §13-346) is the intent clause of the Act which states as its purpose:

To establish uniformity in operating and capital budget preparations . . . by establishing certain duties, responsibilities, and functions of the Executive and Legislative Branches of State Government.

Some definition of terms is necessary. As is pointed out in your opinion request, "Executive Department" is defined as inclusive of the constitutional officers at Amendment 37, Section 1 and Amendment 56 to the Arkansas Constitution.

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The term "Executive Department" is similarly defined in the Pennsylvania Constitution, the provisions of which were at issue in Shapp v. Butera, 348 A.2d 910 (Pa. 1975). Such terms as "Department" and "Branch" were interchangeable for purposes of its discussion, the Pennsylvania Commonwealth Court held at page 925.

In Illinois Bell Telephone Co. v. Fox, 85 N.E.2d 43 (Ill. 1949), the Illinois Supreme Court declared:

The doctrine of separation of powers, . . . [n]either the legislative, executive nor the judicial department may exercise the powers properly belonging to the other two. [Citations omitted.]

Id. at 49.

The Court continued to state that an administrative agency by virtue of its function, i.e., administering and executing laws, was a member of the executive branch or department of government. The Game and Fish Commission is charged with administering and executing laws regarding control and management of wildlife resources. Amendment 35, §1 of Arkansas Constitution. Both the United States and Arkansas Constitutions recognize three branches of government; namely, executive, legislative and judicial. The Game and Fish Commission must fit within one of these categories and is thus, executive.

Certainly, Ark. Stat. Ann. §13-335 (B) which exempts the Game and Fish Commission is a valid exercise of legislative authority.

However, Ark. Stat. Ann. §13-346 (Repl. 1979) which authorizes professional services contracts, has its own definition section which states:

(1) As used in this Section, the term "State Agencies" shall include all departments, agencies, boards, commissions and institutions of higher education of the State of Arkansas. (Emphasis added.)

Section 13-346 further provides for approval of such contracts (Subsection E) and that "all contracts covered by this Section shall be filed with the Office of Accounting of Finance and Administration . . ." (Subsection F).

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Subsection G states, inter alia:

The provisions of this Section shall not be applicable to the contracts of the Arkansas State Highway and Transportation Department covered by the technical work requirements and administration controls of the Federal Highway Administration (FHWA), nor shall it be applicable to contracts let by the Arkansas State Highway and Transportation Department wherein the cost and fee are established by competitive bidding.

Clearly, §13-346 provides its own definitions of state agencies and its own specific exemptions.

The Game and Fish Commission is a department of state government (within the executive branch) and it is not exempted by §13-346(G), so it is subject to the requirements of submission of contracts to pre-audit.

Any statute which is in irreconcilable conflict with Amendment 35, §8 and Game and Fish Commission's administration of laws pursuant thereto would fail.

However, submission of contracts to pre-audit does not appear to be in irreconcilable conflict with Amendment 35. Nor is it a prohibited legislative limitation on Amendment 35.

Therefore, the answers to your questions are:

1. The Arkansas Game and Fish Commission is a constitutional department.
2. It does not operate "outside" the authority of the Legislature except when the Legislature poses an act that conflicts with Amendment 35, the constitutional amendment will take precedence.
3. The Arkansas Game and Fish Commission is not exempt from the provisions of Act 876 of 1973, as amended, and must follow the act's provisions.

A question you have raised informally should be addressed. Your question concerns whether the Legislative Council has the authority to approve or disapprove as to content professional services contracts entered into between the agency and contractors.

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The answer to the latter is "no". In that regard, please refer to Opinion No. 82-132 in which we cite significant and unquestionable precedent that it is the Legislature's task to appropriate public monies and once it has done so, "its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose." Opinion, Page Seven.

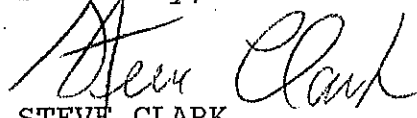
Additionally, we noted in that opinion that post-appropriation tampering by legislatures has been held an unconstitutional violation of the separation of powers doctrine in Anderson v. Lamm, 579 P.2d 620 (Colo. 1978). The Anderson case has been cited with approval a number of times since the rendering of our 1982 opinion. See, Dodge v. Dept. of Social Services, 657 P.2d 975 (Colo. App. 1983); and Alexander v. State ex. rel. Allain, 441 So.2d 1341 (Miss. 1983).

We concluded that the existence of any post-appropriation legislative involvement is constitutionally suspect. Page Nine, Opinion No. 82-132.

A legislature may exercise administrative functions incidental to the full and effective exercises of its legislative powers [See, Aiken County Bd. of Education v. Knotts, 262 S.E.2d 14,17 (S.C. 1980)]. But to approve or disapprove a contract because of its content is violative of the separation of powers doctrine.

The foregoing opinion, which I hereby approve, was prepared by Chief of Staff R. B. Friedlander.

Sincerely,


STEVE CLARK
Attorney General

JSC/RBF/mgv

Enclosures