



STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

STEVE CLARK
ATTORNEY GENERAL

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OPINION NO. 85-201

September 27, 1985

Marlin B. Jackson
Bank Commissioner
Arkansas State Bank Department
Tower Building-Suite 500
323 Center Street
Little Rock, AR 72201-2613

RE: Request for official opinion concerning branch bank applications

Dear Mr. Jackson:

I am in receipt of your recent letter in which you asked for an urgent response to the following questions:

1. Whether the Arkansas State Bank Commissioner is required to approve or disapprove a protested branch bank application before referring the matter on to the State Banking Board for a hearing?
2. Whether or not additional objections can be perfected after the ten day statutory period has elapsed under Ark. Stat. Ann. §67-360 (1985 Cum. Supp.) if a party has previously filed an objection letter.

In answer to your first question, Ark. Stat. Ann. §67-360 (1985 Cum. Supp.), gives the Bank Commissioner the discretion to refer an application to the State Banking Board without the necessity of making a decision of granting or denying the application. Ark. Stat. Ann. §67-360 provides that:

"The Bank Commissioner shall have the authority to approve application of State chartered banks to establish a full service branch, if he shall find upon investigation that the establishment of such branch is economically feasible and will serve the public convenience and necessity."

This statute also sets out several guidelines which the Bank Commissioner must follow in order to determine whether or not a branch office can be established. When construing a statute the primary objective is to carry out the legislative intent which is determined primarily from the language of the Act. Thompson v. Younts, 669 S.W.2d 471, 282

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Ark. 524 (1984).

The purpose and intent of Ark. Stat. Ann. §67-360 can be determined by looking at Act 607 of 1985, which is codified in the aforementioned statute. Section 4 of Act 607 of 1985 states:

Section 4. It is hereby found and determined by the General Assembly of the State of Arkansas that the present procedures for the granting or denying of applications of state banks for branch offices are subject to burdensome delays and expense in contrast to the expeditious procedures of the Comptroller of the Currency applicable to national banks. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

It is an established rule, in construing a statute that the intention of the legislature and the meaning of the law ought to be ascertained by viewing the whole and every part of the Act. Commercial Printing Co. v. Rush, 261 Ark. 468, 549 S.W.2d 790 (1977). Also as a matter of statutory construction when there is no ambiguity in the statute, the courts must give effect to the clear and plain wording. In this case, Ark. Stat. Ann. §67-360 provides that:

"the Commissioner (State Banking Commissioner) may, in his discretion, refer an application to the State Banking Board for a hearing and/or a decision." (emphasis added).

Thus, a question arises as to whether or not the terms "and/or" are used in the conjunctive or disjunctive sense. There has been a great laxity in the use of the terms "and/or", and courts have generally said that the words are interchangeable if consistent with the legislative intent. Hines v. Mills, 187 Ark. 465, 60 S.W.2d 181 (1933).

It is clear the main purpose and intent of Section 4 of Act 607 of 1985 is to overcome the burdensome delays and expense, and to expedite the procedures in determining whether or not the branch bank application will be approved or disapproved. Furthermore, as a matter of right the decision of the Bank Commissioner can be appealed to the State Banking Board by filing a written notice of appeal stating the

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basis therefore within fifteen (15) days of the receipt of a written decision of the Banking Commissioner. A decision to expedite the opinion of the Board by referring the application directly to the Board would only accelerate the process and, therefore, would be consistent with the intent and purpose of this Act.

Therefore, the terms "and/or" in Ark. Stat. Ann. §67-360 must be construed as the disjunctive "or" in order to meet the legislative intent and purpose clearly expressed in Act 607 of 1985. Additionally, if this section were interpreted differently it would make the terms, "in his discretion", in the above quoted section meaningless, since the Commissioner would be mandated to make a decision on all applications and he would no longer have any discretion. In summation, the plain wording of Ark. Stat. Ann. §67-360 (1985 Supp.) gives the Bank Commissioner discretion to refer an application to the State Banking Board without prior approval or denial.

In answer to your second question Ark. Stat. Ann. §67-360 (1985 Cum. Supp.) provides:

The Bank Commissioner shall require the sponsors of a branch bank application to pay a filing fee of not less than Five Hundred Dollars (\$500) [or such larger amount not exceeding Two Thousand Five Hundred Dollars (\$2,500) as may be set by regulation] to defray the expense of a branch bank investigation. Notice of the filing of such application shall first be given by the Commissioner to every other bank in the city or town in which the branch applicant bank is located and to any other bank which the Commissioner determines might be adversely affected by establishment of the proposed branch. Such notice shall be given by mail. The Commissioner shall require that all objections to an application to establish a branch office shall be submitted in writing detailing such objections within ten (10) days of the date the notice of an application was mailed. A bank filing an objection to a branch bank application shall be required to pay a fee of not less than One Hundred Dollars (\$100) [or such larger amount not exceeding Five Hundred Dollars (\$500) as may be set by regulation]. An adjudicatory hearing shall not be required. (emphasis added)

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As the above statute indicates the time to file objections begins to run from the date that notice of an application is mailed by the Commissioner. In this instance you have provided this office a letter of notice from the Commission dated July 29, 1985. The statute states that all objections to an application must be submitted within ten (10) days of the date the notice from the Commissioner was mailed. As a general rule of statutory construction courts will exclude the first day of the period and include the last day when computing time. Sutherland Statutory Construction, 4th Ed. Vol. 2, §33.12 (1973).

Additionally, periods of time more than a week are generally construed to include Sundays in the absence of a statutory provision to the contrary. Sutherland Statutory Construction, id. Conversely, when the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, or legal holidays are excluded. Arkansas Rules of Civil Procedure, Rule 6, (July 1, 1979). Therefore, counting from the day notice was sent in this case, July 29, 1985, the final day to file an objection would have been August 8, 1985. The objection submitted by letter of August 1, 1985 which you have enclosed would be timely. Consequently, any objection submitted after August 8, 1985 would not be a timely objection. The ten (10) day requirement under §63-360 appears to be a mandatory time period in which to submit all objections. Ark. Stat. Ann. §67-360 mandates that the Commissioner shall require all objections submitted in writing within ten (10) days. Although the term "shall" can in some instances be construed as the equivalent of "may", generally "shall" is considered mandatory. Arkansas State Highway Commission v. Mabry, 229 Ark. 261, 315 S.W.2d 900 (1958).

Additionally, the legislature did not manifest any intention in Ark. Stat. Ann. §67-360 to indicate "shall" was to be the equivalent of "may". In fact, legislative intent reflects that importance was placed on expediting the branch bank application process and not extending the ten (10) day period.

In conclusion, since there is no apparent ambiguity in Ark. Stat. Ann. §67-360 (1985 Cum. Supp.), the ten (10) day requirement for all objections must be construed as mandatory, and any objections made after ten (10) days of the

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notice (August 8, 1985) should not be considered timely.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Rick D. Hogan.

Sincerely,

STEVE CLARK
Attorney General

jsc:RDH:dc