



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

STEVE CLARK
ATTORNEY GENERAL

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December 3, 1985

OPINION NO. 85-216

Mr. Marcus Halbrook, Director
Arkansas Legislative Council
Room 315
State Capitol
Little Rock, Arkansas 72201

HAND DELIVERED

Dear Mr. Halbrook:

This official opinion responds to two questions recently posed by the Arkansas Legislative Council, as follows:

1. Whether Act 493 of 1985 authorizes individual members of the Study Commission to issue subpoenas of witnesses, or the production of books, documents, or records, without conferring with, or obtaining the approval of the Commission.
2. Whether Act 493 of 1985 grants the subpoena power to the Commission, to be exercised in behalf of the Commission by its Secretary or by its designated member only when the issuance of any such subpoena is approved and authorized by a vote of the Commission.

Act 493 of 1985 (hereinafter the "Act") establishes a State Constitutional Boards and Commissions Management Audit and Review Study Commission (hereinafter the "Commission"), to, inter alia, review contracting, purchasing, accounting and internal auditing procedures, operations, organizational structures and income sources of the Arkansas State Highway and Transportation Department, the Arkansas Game and Fish Commission and various constitutional boards and commissions.

Once the Commission has been duly appointed and organized and its members have taken an oath of office, it shall constitute a "body politic" under which aegis it shall perform the duties provided in the Act. Act 493, Section One. A "body politic" may be defined as a people considered as a collective unit. Webster's Ninth Collegiate Dictionary 165 (9th ed. 1983).

In each substantive section of the Act, the Commission itself is directed or authorized to accomplish specific things. The Commission is allowed to (1) promulgate its own

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rules of procedure (2) contract with management consultants (3) to request copies of audits prepared by Legislative Audit (4) to make its proceedings open (5) emphasize analysis of allocation of personnel and resources, etc. (6) conduct review of specific organizational practices and (7) to hold hearings on matters in question.

A review of each of the Act's substantive provisions reveals that the Commission is directed by the Legislature to carry out its functions as the body politic which is established in the Act itself.

Section Seven of Act 493 of 1985 provides that the presentation of evidence by witnesses and documentary production at hearings may be required. In event of disobedience to a subpoena or other process, the Commission may invoke the aid of the Pulaski County Circuit Court. The Court then shall issue an order for appearance or production before said Commission. Section Eight correspondingly provides that the Commission may cause depositions to be taken.

Finally, Section Nine, at issue in your request, states:

Subpoenas of witnesses shall be issued by the Secretary or any member of the Commission and shall be served as provided by law for the service of other subpoenas or may, upon request of the Chairman, be served by officers of the Arkansas State Police. The failure or refusal of any witness to appear before the Commission, or to produce any books, records or documents required by the Study Commission for inspection of the Study Commission or the refusal to answer any questions presented by the Study Commission, shall constitute a misdemeanor punishable by a fine of not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00)... (Emphasis added.)

Of course, the Legislature has the authority to confer power to determine facts upon which the operation of a statute depends to executive commissions or administrative agencies. Terrell v. Loomis, 218 Ark. 296, 300, 235 S.W.2d 961 (1951); State v. Martin & Lipe, 134 Ark. 420, 426, 204 S.W. 622 (1918). In order that they may determine facts, such bodies may be authorized to hold hearings and require the attendance of witnesses and/or the production of documents by subpoena. McMann v. Engel, 16 F.Supp. 446, 447 (2 D.C.N.Y. 1936), aff'd 89 F.2d 377, cert. den. 301 U.S. 684, 57 S.Ct. 785, 81 L.Ed. 1342 (1936).

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Before the question of issuance of subpoenas can be addressed, we must discuss whether the Arkansas Legislature validly conferred subpoena power upon the Commission.

Fundamentally, the intent of the Legislature in enacting any act must be given primary attention and if the end to be accomplished can be effectuated without torturing the language of the Act, it must be so construed. In Act 493, clearly the Legislature intended that the Commission have subpoena power. We reach that conclusion by the following:

1. Section Seven, as mentioned previously, states:

In all hearings and proceedings before said Commission, the evidence of witnesses and production of documentary evidence may be required at any designated place of hearing . . . (Emphasis added).

2. Sections Seven and Nine proceed to describe the manner in which compliance can be obtained by the Commission to subpoenas which have been issued.

However, no specific grant of authority to issue subpoenas is contained in Act 493. Unlike the grant given the Attorney General, Ark. Stat. Ann. §12-725 (Repl. 1979) which provides the "Attorney General shall have the right to subpoena" or that given to the prosecuting attorneys, Ark. Stat. Ann. §43-801 (Repl. 1977) which states "The prosecuting attorneys and their deputies shall have authority to issue subpoenas", no such specific language exists in Act 493. Therefore, we have reviewed the intent of the Legislature and the language of the Act and correlated this to relevant case law.

Case law in Arkansas primarily deals with the issuance of subpoenas by prosecuting attorneys under the authority of Amendment 21 to the Arkansas Constitution of 1874 and Ark. Stat. Ann. §43-801 (Repl. 1977). In those cases, the Arkansas Supreme Court and a federal district court of the Eastern District of Arkansas have construed such authority narrowly. See, e.g., State ex rel Streett v. Stell, 254 Ark. 656, 495 S.W.2d 846 (1973); Taylor v. State, 220 Ark. 953, 251 S.W.2d 588 (1952); Gill v. State, 242 Ark. 797, 251 S.W.2d 269 (1967); Duckett v. State, 268 Ark. 687 (Ark. App. 1980), 600 S.W.2d 18; and Pollard v. Roberts, 283 F.Supp. 248 (E.D. Ark. 1968) aff'd per curiam 393 U.S. 14 (1968).

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These cases state that although subpoena power is clearly granted to prosecutors, this authority must be used judiciously and according to the clear dictates of the Legislature.

This theme is reiterated in Andrews v. Nevada State Board of Cosmetology, 467 P.2d 96 (Nev. 1970) where the Nevada Supreme Court denied the authority of the Nevada Board of Cosmetology to issue subpoenas it set out several general principles at pages 96-97 of its opinion:

1. An administrative agency (or legislatively authorized commission) has no general or common law power, but only such powers as have been conferred by law expressly or by implication. (Citations omitted). (Emphasis added).
2. Official powers of an agency cannot be assumed . . . and the grant of authority to an agency must be clear.

Thus, since in this case the Nevada Legislature had given no such specific grant, no power to subpoena existed.

Certainly, the United States Supreme Court has held that the authority to issue subpoenas must be narrowly construed and cannot be delegated from one official to his staff or to others without authorization. See, Cudahy Packing Co. v. Holland, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed 2d 895 (1942); Lowell Sun Co. v. Fleming, 120 F.2d 213, (1st Cir. 1941) aff'd 315 U.S. 784 (1942).

And, in Application of Combs, 237 N.Y.S.2d 857 (N.Y. Sup. Ct. 1963), a New York Judge ruled that the County Executive of Nassau County had no such subpoena authority granted nor was it necessarily incidental to his job.

But, in the Andrews case as noted by the underlined language above and in Combs, supra, both the Nevada and New York courts recognized that some powers exist by implication. A test to determine this fact is found in Combs, supra, at 862:

Such implied powers have been held to be (1) those necessarily arising or fairly implied from, or incident to, powers expressly granted and (2) those which are not simply convenient but indispensable to the declared objectives and purposes of such powers.

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Here, on the one hand, subpoena power must be necessarily implied for operation of Sections Seven and Nine of Act 493, but not for the operation of the remaining parts of the Act.

In Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324, 1330 (1931), the United States Supreme Court held that an agency's powers could not be extended beyond necessary implication of its grant. Finally, in Prescott v. U.S., 731 F.2d 1388, 1392 (9th Cir. 1984). A case which relied on Andrews, supra, the Ninth Circuit Court of Appeals held that the Nevada Industrial Commission had only such powers as expressly conferred or implied.

It can be convincingly argued that subpoena powers for the Commission established by Act 493 have been at least impliedly granted. Further, a test for fair administration of issuance of subpoenas is found in Pollard, supra, at 256. There, the Federal District Court found:

Generally speaking the test of the validity and enforceability of an administrative subpoena is threefold: (1) Did the officer or agency act within its jurisdiction in issuing the subpoena? (2) Is the subpoena sufficiently specific with respect to the materials sought to be disclosed? (3) Is the information or data sought "reasonably relevant" to the end which the investigating officer or agency is seeking to achieve? Citing United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1949); Oklahoma Press Publishing v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1945); and Adams v. Federal Trade Commission, 296 F.2d 861 (8th Cir. 1960).

Therefore, under current precedent safeguards are present as to subpoena issuance.

Balancing all these factors, my opinion is that the apparent authority for the Commission to issue subpoenas exists, however, should an agency whose documents or employees are subpoenaed wish to challenge such authority, a Motion to Quash would be the appropriate route to establish, by court decision, whether such authority may be validly implied from the language of Act 493.

Since we assume that such authority exists, we proceed to answer the two questions you posed in your request.

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All parts of an Act must be construed together to give effect as a whole in accordance with the Legislature's intent. Little Rock Crate & Basket Co. v. Young, 284 Ark. 295, 589 S.W.2d 388 (1984); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), cert den. 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981). The exact language at issue before the Council and the Attorney General is the following:

Subpoenas of witnesses shall be issued by the Secretary or any member of the Commission . . .

In addition to other authorities cited, we have reviewed two cases specifically directed to our attention in this regard. In a lengthy discussion, the United States Supreme Court in McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 587-595 (1927), found that in order to effectuate legislation, Congress had the authority to order the presentation of witnesses and documents through subpoena. Id. at 595.

Pollard v. Roberts, supra, involved an action to enjoin attempts to enforce subpoenas issued by a prosecuting attorney to obtain lists identifying political party contributors. The federal district court, through Judge Henley (now a member of the Eighth Circuit Court of Appeals), stated at page 255:

[I]t may be conceded that in the present day the power of government, whether federal or state, to use the subpoena power in connection with investigations of suspected law violations is a broad one . . .

As the Court further notes, however, at page 256:

[T]he use of the subpoena power must not be unreasonable or fundamentally unfair . . .

Of course, the subpoena power to be utilized by the Commission under Act 493 must similarly be reasonably used and subpoenas must be reasonably related to the purposes for which the Commission was created, i.e. management audits. Protection is also found in the Act at Section Eleven which states:

Nothing in this Act shall be deemed or construed to confer upon the Study Commission or any of its members any authority to act in any manner that interferes with the duties and responsibilities of the respective

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constitutional boards and commissions and with the various institutions, departments and programs under their respective control.

Based on our case review, construction of the Act as a whole to give it the effect of legislative intent and the presumption of validity attendant to each provision of the Act, it is my opinion that Act 493 apparently grants subpoena power to the Commission. Such power is to be exercised on behalf of the body by the Secretary or his or her designated member when the subpoena is authorized by the Commission. Therefore, the answer to your first question is "no" and the answer to your second question is "yes".

The foregoing opinion, which I hereby approve, was prepared by Special Counsel to the Attorney General R. B. Friedlander.

Sincerely,


STEVE CLARK
Attorney General

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