

ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 98-EC-001 Issued February 20, 1998

ISSUE:

Is there a time limit within which a "citizen complaint" must be filed with the Arkansas Ethics Commission and, if so, what is that time limit?

BRIEF ANSWER:

No. There is no such time limit contained in either the statutes over which the Arkansas Ethics Commission has jurisdiction or the Commission's own rules and regulations, and the limitations periods set forth in Ark. Code Ann. § 16-56-101 et seq. do not apply because administrative proceedings before the Commission are not "actions" within the meaning of those statutes. Even if such proceedings were "actions", the statutes in question would still be inapplicable because the enforcement of ethics laws is a matter of public interest and none of those statutes make specific reference to the Commission.

DISCUSSION:

The Arkansas Ethics Commission has the power to investigate potential violations of subchapter 2 of title 7, chapter 6 of the Arkansas Code (§ 7-6-201 et seq.), subchapter 4 of title 7, chapter 9 of the Arkansas Code (§ 7-9-401 et seq.), subchapters 4-9 of title 21, chapter 8 of the Arkansas Code (§ 21-8-401 through § 21-8-903), and subchapter 10 of title 21, chapter 8 of the Arkansas Code (§ 21-8-1001 et seq.) (hereinafter collectively referred to as the "Subchapters"). None of the Subchapters contain a provision limiting the time within which a "citizen complaint" must be filed with the Ethics Commission.

Although the Commission is vested with authority to promulgate rules and regulations to govern "procedures before the Commission, matters of Commission operations, and all disciplinary procedures and proceedings", see Ark. Code Ann. § 7-6-217 (g)(1), it has never promulgated a rule or regulation limiting the time within which a "citizen complaint" must be

filed.¹ Accordingly, neither the Subchapters nor the Commission's own rules and regulations place any limit on the time within which a "citizen complaint" must be filed.²

The next question is whether any of the limitations periods set forth in subchapter 1 of title 16, chapter 56 of the Arkansas Code (§ 16-56-101 *et seq.*), entitled "Limitations of Action", are applicable to the filing of a "citizen complaint" with the Arkansas Ethics Commission. By their own terms, those statutes only apply to "actions." The answer to the question, therefore, depends upon whether administrative proceedings before the Commission constitute "actions."

The statutes in question do not define the term "action." The Supreme Court of Arkansas has recognized, however, that the term means "a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." *In Re Subpoena of Badami*, 309 Ark. 511, 831 S.W. 2d 905 (1992).³ Because administrative proceedings before the Ethics Commission do not meet the definition of an "action", the Commission has determined that the limitations periods set forth in Ark. Code Ann. § 16-56-101 *et seq.* do not apply to the filing of a citizen complaint with the Commission.⁴

¹ Although it has been reported that the Commission has an "announced policy" of not considering matters that occurred more than three years prior to the filing of complaints, such reports are incorrect.

² It bears mentioning that there are two (2) situations under the Subchapters in which a statute of limitations appears to be applicable. As discussed below, however, both of those situations involve the commencement of judicial proceedings and not the filing of a "citizen complaint" with the Commission.

The first such situation is one in which a prosecuting attorney brings a criminal action against a person alleged to have violated certain provisions of the Subchapters. Such actions are authorized by Ark. Code Ann. § 7-6-202, Ark. Code Ann. § 7-9-403, Ark. Code Ann. § 21-8-403, and Ark. Code Ann. § 21-8-903. The offenses are either Class A misdemeanors or unclassified misdemeanors, both of which are governed by a one (1) year statute of limitations. See Ark. Code Ann. § 5-1-109 (b) (3) and Ark. Code Ann. § 5-1-107 (c).

The second situation is one in which the Ethics Commission, in accordance with Ark. Code Ann. § 7-6-217 (g) (8) (A), brings a civil action in circuit or municipal court to obtain a judgment for the amount of any fine imposed by the Commission pursuant to Ark. Code Ann. § 7-6-218 (b) (4) (B) (i)-(iii). The bringing of such a civil action would seem to be governed by Ark. Code Ann. § 16-56-108 which provides that "[a]ll actions or penal statutes where the penalty or any part thereof goes to the state...shall be commenced within two (2) years after the cause of action has accrued." A cause of action for the recovery of the amount of a fine would not "accrue", however, until the fine had been imposed by the Commission.

³ This definition comports with Rule 3 of the Arkansas Rules of Civil Procedure which provides, in pertinent part, that "[a] civil action is commenced by filing a complaint with the clerk of the proper court."

⁴ This determination is supported by the fact that a bill was introduced in the House of Representatives during the 81st General Assembly which, among other things, would have established a limitations period for the commencement of Ethics Commission proceedings. That bill, House Bill 2272, was never approved.

Even if it could be argued that administrative proceedings before the Commission were “actions”, the statutes in question would still be inapplicable because enforcement of the Subchapters is a matter of public interest and none of the limitations periods set forth in Ark. Code Ann § 16-56-101 et seq. make specific reference to the Commission. In Jensen v. Fordyce Bath House, 209 Ark. 478, 190 S.W. 2d 977 (1945), the Supreme Court of Arkansas stated:

[i]n the absence of a specific provision in that regard, there is a diversity of opinion among the authorities as to the application of general statutes of limitation to the subordinate political subdivisions of a state. In a discussion of the question in 34 Am.Jur. p. 309, it is said: ‘It has been said that the maxim “*nullum tempus occurrit regi*” is an attribute of sovereignty only, and cannot be invoked by counties or other subdivisions of the state. In many cases, probably a majority, a distinction is drawn between cases where a subordinate political subdivision or agency is seeking to enforce a right in which the public in general has an interest and those where the public has no such interest, and it is held that the statute of limitations, while applicable to the latter character of actions, cannot be interposed as a bar where the municipality is seeking to enforce the former type of action. In these decisions, the view is taken that the plaintiff, in seeking to enforce a contract right, or some right belonging to it in a propriety sense, may be defeated by the statute limitations; *but as to rights belonging to the public and pertaining purely to governmental affairs, and in respect to which the political subdivision represents the public at large of the state, the exemption in favor of sovereignty applies, and the statute of limitations does not operate as a bar.*’ [Emphasis added.]

Id. at 481, 190 S.W. 2d at 979. See also Alcorn v. Arkansas State Hospital, 236 Ark. 665, 367 S.W. 2d 737 (1963) (We are unwilling to depart from our general rule that the statute of limitations does not operate in matters where the public interest is concerned).

Based upon the foregoing authority, the Ethics Commission is firmly convinced that none of the statutes of limitations set forth in subchapter 1 of title 16, chapter 56 of the Arkansas Code (Ark. Code Ann. § 16-56-101 et seq.) apply to the filing of a “citizen complaint” with the Commission. Moreover, it is the Commission’s belief that any efforts to have a court establish one would be improper.

As recognized in Justice Hickman's concurring opinion in the case of Kiefer v. State, 297 Ark. 464, 762 S.W. 2d 800 (1989),


[i]t is a universally accepted principle of law that courts cannot make substantive rules, that is make law like a legislature does. It is based on the fundamental principles of Constitutional law which regulate the roles of the branches of government--separation of powers and checks and balances. When governors or legislatures exceed their constitutional powers, the courts check them. When courts do so, there is not so much to check them, save the people rising up to stop them. In a system that depends on respect for the law for its existence rather than force, it is most difficult for the people to challenge unlawful acts of the judiciary. So a court exceeding its power is the most grievous violation of the constitutional law there is.

Id. at 469, 762 S.W. 2d at 802-803.

In summary, the Commission has determined that there is no time limit within which a "citizen complaint" must be filed.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217 (g)(2).

ARKANSAS ETHICS COMMISSION

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