

**MEETING WITH ATTORNEY GENERAL'S OFFICE**  
**Prepared by Division Head of Human Resources Crystal Woods**

On October 24, 2011 at 3:00 p.m., the following individuals met at the Attorney General's office in downtown Little Rock: AHTD Assistant to the Director Ralph Hall, AHTD Human Resources Division Head Crystal Woods, AHTD Deputy Chief Counsel Maria Schenetzke, AG Office Attorney Dennis Hansen (501-682-2081), and AG Office Attorney Lori Freno (501-682-1314). The purpose of the meeting was to discuss the AHTD's authority to hire outside legal counsel and other related matters. The following is a summary of the information and guidance provided by Hansen and Freno, which has been paraphrased by Woods.

Authority to hire outside counsel

There are two statutes on the books: one says the Attorney General is the attorney for the entire State of Arkansas unless there's a conflict, and another says the Attorney General can retain "special counsel." Both of these statutes are very old and do not reflect the current environment. They reflect a time when the AG's office actually did handle all cases for state government. Over the last 40 years, lawyers hired by state agencies have proliferated. Many state agencies hire outside counsel, usually through the professional services contract system which is outlined in state procurement laws. These laws do not relate or refer to either statute, so there is some ambiguity. We suggest that you contact DFA's Procurement Lawyer Ray Pearce, or someone at State Procurement.

Many state agencies will contact the AG Office and say, "We went through a procedure, and chose a law firm based on their expertise or our relationship with them, and we've entered into a contract. Will you review it and say it's okay?" Then they will send it to DF&A and the legislative committee for approval. Usually they do it because there is special language in their appropriations act which says none of the funds appropriated shall be used for legal services without the prior approval of the AG's office. However, there is no consistency with this either. Some appropriations bills have that language and some don't. (AHTD's does not.) If that language is not included, there is no real restriction. Nonetheless, some agencies still ask for AG approval. On the other hand, some agencies which do have that language in their bill will enter into contracts without AG approval. The AG office has no authority to enforce it. The legislature could enforce it if they chose to do so, but they haven't.

Use of AG's Office for Legal Services

We've been with the AG's office 14 years and AHTD Chief Counsel Robert Wilson almost never contacted us for anything. We never knew he was hiring outside lawyers. Of course, he didn't have to contact us to do so. However, the AG's office has a civil department with a full staff of employment lawyers. Each is assigned a list of state agencies and each has a lot of employment law experience. You are welcome to call on us anytime for free legal advice on employment matters.

### D&O Insurance

D&O (liability) insurance is a needless expense, in our opinion. We believe it's better if you rely on qualified immunity. If you purchase insurance, you are waiving your immunity up to the amount of the insurance policy.

### Immunity and Personal Liability

The Highway Commission and AHTD have sovereign immunity under Article 5 Section 20 of the Arkansas Constitution. However, the agency is not immune from liability under Title VII of the Civil Rights Act, so that's how the agency gets sued in discrimination cases. Under Title VII, individual supervisors are immune, and punitive damages are not allowed either. That's why plaintiff's attorneys often sue under both Title VII and 42 USC Section 1983. Section 1983 is used to sue individuals and also to seek punitive damages. Under 1983, individuals have qualified immunity, which means they are immune to the extent they didn't knowingly violate an established law. If there was no violation of law, or if a reasonable person would not have believed they were violating the law, then claims against individuals under 1983 are dismissed. Plaintiffs have 90 days from the notice of dismissal and right-to-sue letter from the EEOC to file suit under Title VII, and they have three years from the date of the conduct to file suit under Section 1983.

### Punitive Damages

The State of Arkansas is not allowed to pay punitive damages and never does so. Punitive damages against individuals are hardly ever awarded, and almost never in discrimination cases. The only time state employees have been liable for punitive damages to our knowledge was in cases of excessive force against law enforcement officers or prison guards – cases of rape or physical abuse. The risk of individual liability is very low.

### State Purchasing

After the meeting with the AG Office, contact was made with the State Purchasing Director who advised that AHTD is excluded from state purchasing laws. A written statement has been requested.