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PROSECUTING ATTORNEY
STATE OF ARKANSAS | SIXTH JUDICIAL DISTRICT

JUNE 7, 2024

Roger Norman
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Re: ALA Report SP050123

Dear Mr. Norman:

On April 15, 2024, the Sixth Judicial Prosecuting Attorney received ALA Report SP050123, *A Special Report-Arkansas Governor's Office- Review of Selected Transactions and Procurements*, pursuant to Ark. Code Ann. § 10-4-419 and § 21-2-708. After a thorough review of the report and supporting documents, we find that criminal charges are not warranted for the following reasons:

1. The Department of Transformation and Shared Services (DTSS) response to the Freedom of Information Act Request dated September 11, 2023.

To sustain a criminal violation of the Freedom of Information Act, the state must prove beyond a reasonable doubt that the custodian negligently violated a provision of the act. Ark. Code Ann. § 25-19-104. The negligence standard for criminal culpability is greater than the standard civil liability, which only requires proof that the person failed to act with reasonable care. *Gill v. State*, 2015 Ark. 421 (2015). Criminal negligence is defined as a failure to perceive a substantial and unjustifiable risk that a result will occur. Ark. Code Ann. § 5-2-202(4)(A). The risk must be of such a nature that the failure to perceive it is a *gross deviation* from the standard of care. Ark. Code Ann. § 5-2-202(4)(B) (emphasis added). The audit determined that an unknown employee of DTSS provided 140 pages of records to the

FOIA requestor on September 15, 2023. During the audit, the committee requested the same set of documents from DTSS and received 153 pages. Although the number of pages differ, there is no evidence to show that the employee's failure to provide the additional thirteen pages was a gross deviation from the standard of care. Further, and most importantly, there is no evidence to show the identity of the employee that compiled the documents or if that person even qualifies as a custodian of the records, as is required by Ark. Code Ann. § 25-19-103(1)(A). Therefore, there is insufficient evidence to prove beyond a reasonable doubt that the custodian's exclusion of invoices rises to the level of criminal negligence.

2. Applicability of the General Accounting and Budgetary Procedures Law (GABPL) to constitutional officers.

Arkansas law is not clear as to whether the provisions of the GABPL at issue apply to constitutional officers. Given the conflict between the interpretation of the GABPL by the ALA, the Arkansas Governor's Office (AGO), and Op. Ark. Att'y Gen. No. 56 (2024), it is apparent that there is ambiguity in the law. *See generally Maddox v. City of Fort Smith*, 369 Ark. 143, 147, 251 S.W.3d 281, 284 (2007) (holding a statute is ambiguous where it is open to two or more constructions, or where reasonable minds might disagree or be uncertain as to its meaning).

The penalties provision of the GABPL, found at Ark. Code Ann. § 19-4-103, are applicable to a person who "knowingly violate[s]" its provisions. A person acts knowingly with respect to their conduct or the attendant circumstances when he or she is aware that his or her conduct is of that nature or that the attendant circumstances exist. Ark. Code Ann. § 5-2-202(2)(A). Given the multiple interpretations of the GABPL and the ambiguity over whether it applies to the AGO, there is insufficient evidence to prove beyond a reasonable doubt that the statute was *knowingly* violated.

3. The notation to the invoices does not violate Ark. Code Ann. § 5-54-121(a).

Reviewing the handwritten note on the invoice, referenced by the ALA at Appendix O, and considering the requirements of Ark. Code Ann. § 5-54-121(a), we find that no criminal conduct has

occurred. The action of the Executive Assistant – notating the invoice with “To be reimbursed - LH[,]” – did not constitute the offense of tampering with a public record. The Executive Assistant did not knowingly “make[] a false entry in or falsely alter[] any public record” or erase, obliterate, remove, destroy, or conceal a public record, as required by Ark. Code Ann. § 5-54-121(a)(1)-(2). Further, there is insufficient proof to show that the notation was added with the “purpose of impairing the verity, legibility, or availability of a public record.” The facts presented here are readily distinguishable from those in *Williams v. State*, 346 Ark. 304, 57 S.W.3d 706 (2001), as the added notation was not false; the Republican Party of Arkansas reimbursed the State for the purchase of the podium and case at issue.

For the above stated reasons, we find that there is insufficient proof of criminal conduct contained in ALA Report SP050123, *A Special Report-Arkansas Governor’s Office- Review of Selected Transactions and Procurements* or any of the supporting documents. Arkansas Rules of Professional Conduct state that a prosecutor in a criminal case shall “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” Ark. R. Prof Con. 3.8(a). Therefore, no further action will be taken.

Sincerely,



Will Jones
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