

**State of Arkansas**  
**Bureau of**  
**Legislative Research**

Marty Garrity, Director  
Kevin Anderson, Assistant Director  
for Fiscal Services  
Matthew Miller, Assistant Director  
for Legal Services  
Richard Wilson, Assistant Director  
for Research Services



---

**MEMORANDUM**

---

**TO:** Senator Dismang

**FROM:** Diane Torres-Porter, Legislative Attorney, Legal Research and Drafting

**DATE:** August 3, 2020

**SUBJECT:** Task Force Oversight of Arkansas Department of Transportation and State Highway Commission

---

**QUESTION PRESENTED**

1. To what extent may the General Assembly delegate its legislative powers to a task force created to oversee the Arkansas Department of Transportation's implementation of the recommendations resulting from the study conducted under Act 298 of 2019?
2. What legislative authority does the General Assembly have over employees of the Arkansas Department of Transportation, specifically concerning employee classification and compensation?

**BRIEF RESPONSE**

The General Assembly may have the authority to delegate legislative powers to a task force that are necessary for the orderly and efficient operation of the Arkansas Department of Transportation. Arkansas Constitutional Amendment 42 gives the General Assembly the authority to grant and repeal the powers and duties the State Highway Commission needs for the administration of the department. This includes the administration of department employees. However, employees of the department do not fall under the Uniform Classification and Compensation Act.

## DISCUSSION

A task force is generally a group of people who come together from diverse branches, positions, and points of view to facilitate the development of ideas, create new opportunities, answer questions, or solve a problem. In this case, a task force created by the General Assembly will focus on ensuring the Arkansas Department of Transportation and State Highway Commission implement the recommendations produced from the study conducted to evaluate the processes and functioning of the department under Act 298 of 2019.

### **I. Unlawful Delegation**

Under constitutional separation-of-powers provisions, laws are enacted by the legislature, administered by the executive and interpreted by the judiciary. Legislatures cannot be expected to ratify statutes that address every minute detail of policy. Therefore, it may be realistic to permit delegation of some legislative powers. However, questions typically arise over which powers can be delegated, to whom and to what extent.

The U.S. Supreme Court has allowed some delegation of legislative power. In *Wayman v. Southard*, Chief Justice John Marshall distinguished between “important subjects” and “mere details.”<sup>1</sup> He wrote that “a general provision may be made, and the power given to those who are to act under such general provision, to fill up the details.”<sup>2</sup>

Similarly, in *Mistretta v. United States*, the U.S. Supreme Court applied the “intelligible principle” test.<sup>3</sup> The Court deemed it “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>4</sup>

The ability to delegate legislative authority varies among the states. Researchers often divide the states into three general groups:

- The “strict standards and safeguards” category. States in this category permit “delegation of legislative power only if the statute delegating the power provides definite standards or procedures” to which the recipient must adhere.

---

<sup>1</sup> *Wayman v. Southard*, 23 U.S. 1 (1825)

<sup>2</sup> *Id.*

<sup>3</sup> *Mistretta v. United States*, 488 U.S. 361 (1989)

<sup>4</sup> *Id.*

- The “loose standards and safeguards” category. States in this category view delegation as acceptable “if the delegating statute includes a general legislative statement of policy or a general rule to guide the recipient in exercising the delegated power.”
- The “procedural safeguards” category. States in this group “find delegations of legislative power to be acceptable so long as recipients of the power have adequate procedural safeguards in place.

Arkansas appears to fall under the “loose standards and safeguards” category. Additionally, the Arkansas Supreme Court determined the “state legislature could not delegate its power to make laws but could make a law that delegated a power to determine some fact or state of things upon which the law depended”.<sup>5</sup> In *Hooker v. Parkin*, the question was raised whether the Highway Commission and State Board of Education were unlawfully delegated the authority to fix the salaries of employees.<sup>6</sup> The Court found the delegation of power to determine the salary or wage deserved by an individual employee is not unlawful.<sup>7</sup> The delegation of this power is necessary for the orderly and efficient operation of the Arkansas Department of Transportation.<sup>8</sup> Based on *Hooker*, it may be argued that the legislature has the power to legislatively authorize the task force to delegate powers and duties to the commission concerning the administration of the department for the orderly and efficient operation of the department.

## II. REVIEW AND APPROVAL

Amendment 92 to the Arkansas Constitution states:

(a) The General Assembly may provide by law:

(1) For the review by a legislative committee of administrative rules promulgated by a state agency before the administrative rules become effective; and

(2) That administrative rules promulgated by a state agency shall not become effective until reviewed and approved by the legislative committee charged by law with the review of administrative rules under subdivision (a)(1) of this section.

(b) The review and approval by a legislative committee under subsection (a) of this section may occur during the interim or during a regular, special, or fiscal session of the General Assembly.

Arkansas § 10-3-309 defines the term “state agency” in order to implement Amendment 92. The purpose of the law, enacted in 2015, is to establish a method for continuing legislative review and

---

<sup>5</sup> *Hooker v. Parkin*, 235 Ark. 218

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

approval of rules to correct abuses of rulemaking authority or clarify the legislative intent with respect to the rulemaking authority granted the administrative boards, commissions, departments, or agencies. Arkansas Code § 10-3-309 provides:

(2)(A) "State agency" means an office, board, commission, department, council, bureau, or other agency of state government having authority to promulgate or enforce rules.

(B) "State agency" does not include the following unless the Legislative Council adopts rules under subsection (h) of this section including one (1) or more of the following in the definition of "state agency":

(i) The Arkansas State Game and Fish Commission, if the rule is not promulgated under authority of a statute enacted by the General Assembly;

(ii) The State Highway Commission and the Arkansas State Highway and Transportation Department, if the rule is not promulgated under authority of a statute enacted by the General Assembly; and

(iii) An institution of higher education.

The definition of "state agency" intentionally excludes the State Highway Commission and the Arkansas Department of Transportation, but the General Assembly or the Legislative Council has the right to amend the definition to include them both.

It is unlikely that the task force may be given the authority of review and approval. However, the task force may make recommendations that the General Assembly may then review and approve, if legislation is passed giving the General Assembly that power.

### **III. Arkansas Department of Transportation Employees**

Arkansas Constitutional Amendment 42 authorizes the legislature to enact the laws necessary or proper to enable the State Highway Commission or any of its officers or employees to carry out fully and effectively the regulations and laws relating to the Arkansas Department of Transportation. In other words, the legislature has the power to impose and repeal laws necessary for the administration of the department, including laws "establishing agency powers and duties, salary limits, numbers of authorized personnel, overtime pay, uniform and tool allowance, and moving expenses".<sup>9</sup> It is clear from this language that the legislature has authority over department employees concerning classification and compensation.

The purpose of Ark. Code Ann. 21-5-201 et seq. is to establish uniform classifications for all affected state employees of agencies, boards, commissions, and institution of higher education and a

---

<sup>9</sup> Ark. Motor Carriers Ass'n v. Pritchett, 303 Ark. 620 (1990).

uniform compensation plan to be followed by the agencies, boards, commissions, and institutions of higher education, with respect to the authorized positions of their employees. The department is specifically excluded from the act under Ark. Code Ann. 21-5-204. However, that same statute goes on to authorize certain types of pay increases to department employees, making it clear that the General Assembly has authority over the employees of the department.