2011-040

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.STATE.AL.US

February 25, 2011

Honorable Rebecca Narmore, Attorney
Cherokee Waterworks and Gas Board
301 North Dickson Street
Tuscumbia, Alabama 35674

Water and Gas Board – Boards of Directors – Removal from Office – Drug and Alcohol Testing – Colbert County

A member of a water and gas board organized under section 11-50-310, *et seq.*, of the Code of Alabama can be removed for certain causes. The member has the same voting privileges as the other members of the board until the member is removed.

Impeachment proceedings may be initiated by a grand jury and prosecuted by the district attorney or initiated by five resident taxpayers.

Dear Ms. Narmore:

This opinion of the Attorney General is issued in response to your request on behalf of the Cherokee Waterworks and Gas Board.

QUESTIONS

(1) Can a member of the Cherokee Waterworks and Gas Board ("Board") remain on the Board while refusing to submit to a drug and alcohol test and to random testing required by federal law?

(2) If the member can be removed, what procedures does the Board follow to do so?

(3) If the member can remain, how should the Board proceed with a member who refuses to comply with federal law and the Board's requirements?

(4) If the member can remain, can the member vote on issues and participate in Board matters?

FACTS AND ANALYSIS

Your request states that the Cherokee Waterworks and Gas Board is incorporated as a public corporation pursuant to section 11-50-310, *et seq.*, of the Code of Alabama. ALA. CODE §§ 11-50-310 to 11-50-324 (2008 & Supp. 2010).

Your questions stem from the application of the federal Natural Gas Pipeline Safety Act. 49 U.S.C. § 60101 to § 60137 (1994). *See* 49 C.F.R. pt. 190 to pt. 199 (2010). The Alabama Public Service Commission ("Commission") is given enforcement and regulatory authority over federal safety standards for the transportation of gas pursuant to section 37-4-80, *et seq.*, of the Code of Alabama. ALA. CODE §§ 37-4-80 to 37-4-88 (1992). The Commission has promulgated rules pursuant to this authority, one of which specifically addresses drug testing. Rule 5, Appendix A, *Alabama Public Service Commission Rules and Regulations for Gas Pipeline Safety* (2004). Rule 5 states that "[o]perators of pipeline facilities subject to the jurisdiction of this Commission shall adopt an employee drug testing program that complies with the requirements of Title 49 C.F.R., Part 199, and any future amendments thereto." *Id.*

A member of a water and gas board organized under section 11-50-310, *et seq.*, "can be removed only by a court of competent jurisdiction." Opinion to Honorable Paul Barr, Chairman, Bear Creek Water Works, dated April 7, 1989, A.G. No. 89-00239, at 2. A member may be removed by impeachment or for being ineligible to hold office.

Section 36-2-1 of the Code of Alabama prescribes the state officers who are ineligible or disqualified from holding office. ALA. CODE § 36-2-1 (2001). This Office has stated that a member of a water and gas board

organized under section 11-50-310, *et seq.*, is a state officer for purposes of section 36-2-1. Opinion to Honorable Bob J. Sharpe, Mayor, Town of Blountsville, dated April 4, 2005, A.G. No. 2005-097. Section 36-11-1(a) of the Code prescribes the state officers who are subject to impeachment. ALA. CODE § 36-11-1(a) (2001). Section 36-11-1(b) states the following:

> (b) The officers specified in subsection (a) of this section may be impeached and removed from office for the following causes:
>
> (1) Willful neglect of duty;
>
> (2) Corruption in office;
>
> (3) Incompetency;
>
> (4) Intemperance in the use of intoxicating liquors or narcotics to such an extent in view of the dignity of the office and importance of its duties as unfits the officer for the discharge of such duties; or
>
> (5) Any offense involving moral turpitude while in office or committed under color thereof or connected therewith.

ALA. CODE § 36-11-1(b) (2001).

This Office has stated that it "does not issue opinions on whether a certain activity constitutes a violation of a criminal law. Only a properly empanelled jury and judge can make such a determination." Opinion to Honorable Arthur Green, Jr., District Attorney, Tenth Judicial Circuit – Bessemer Division, dated August 9, 2005, A.G. No. 2005-173, at 2; *see also*, opinion to Honorable Douglas Valeska, Houston County District Attorney, dated June 28, 1990, A.G. No. 90-00316. This Office has similarly stated that it cannot determine whether certain facts constitute grounds for impeachment. Opinion to Honorable Guy M. Sanders, Elmore County Constable, dated July 10, 2002, A.G. No. 2002-283.

This Office has explained that "[i]mpeachment may be initiated in two ways. The first is as set forth in § 36-11-3, and is initiated by a grand jury and prosecuted by the district attorney as specified in § 36-11-4. The second is by five resident taxpayers, who must post bond as

required by § 36-11-6." Opinion to Honorable H. C. Wiley, Jr., Attorney, Walker County Commission, dated September 10, 1997, A.G. No. 97-00276, at 5.

CONCLUSION

A member of a water and gas board organized under section 11-50-310, *et seq.*, of the Code of Alabama can be removed for certain causes. The member has the same voting privileges as the other members of the board until the member is removed.

Impeachment proceedings may be initiated by a grand jury and prosecuted by the district attorney or initiated by five resident taxpayers.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:

BRENDA F. SMITH
Chief, Opinions Division

LS/GWB

1072131/145404