Opinion No. 2012-092

July 3, 2012

The Honorable Randy Stewart
State Representative
Post Office Box 23
Kirby, Arkansas 71950-0023

Dear Representative Kirby:

You have requested my opinion with regard to the following factual scenario:

> A person ran for and was elected on May 22, 2012 to be Pike County's new District Court judge, defeating the incumbent. She will assume office on January 1, 2013. The incumbent judge subsequently has decided to prematurely step down prior to her term expiring.

Against this background, you pose the following questions:

1. Can the person recently elected to the judgeship be appointed to fill out the remaining term without violating the constitutional prohibition against succeeding oneself in elected office from an appointment?

2. Further, should the newly elected judge be appointed to fill out the remainder of the incumbent's term and then assume office on January 1, 2013, would the constitution be violated should she run for reelection to the same seat, as her appointment would have post-dated her actual election?

RESPONSE

In my opinion, the answer to your first question is "yes." The answer to your second is "no," in my opinion.

The constitutional prohibition you refer to is found in Amendment 29 to the Arkansas Constitution, which governs the filling of vacancies in various offices, including that of district court judge.[1] Section 1 of Amendment 29 provides for the filling of vacancies by appointment by the Governor.[2] Section 2 of Amendment 29 provides in pertinent part that "[n]o person appointed under Section 1 shall be eligible for appointment or election to succeed himself."

Your first question is presumably prompted by this express prohibition in Amendment 29 against appointees succeeding themselves in office. I assume the concern is that Amendment 29, § 2, might prevent the newly-elected district judge from taking office in January if she is appointed to fill the vacancy that arose after the May election.[3]

In my opinion, this concern is unfounded. In providing that "[n]o person appointed under Section 1 shall be eligible for appointment or election to succeed himself," Amendment 29 plainly anticipates that the person's appointment to fill a vacancy will *precede* his or her election (or, the case of an appointive office, appointment to a full term).[4] This plain and unambiguous language must be given its obvious and common meaning.[5] I believe it necessarily follows from this

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[1] *See* A.C.A. § 16-17-132(c) (Repl. 2010) ("A vacancy in a district court judgeship shall be filled in the same manner and subject to the same restrictions as for vacancies under Arkansas Constitution, Amendment 29."); Ark. Const. amend. 80, § 17(B) ("Vacancies in these [circuit and district judge] offices shall be filled as provided by this Constitution."). This office has previously concluded that Amendment 29 is the applicable constitutional provision referenced by Section 17(B) of Amendment 80. *See* Op. Att'y Gen. 2001-259. Thus, under Amendment 80, district judges are subject to the provisions of Amendment 29.

[2] Section 1 of Amendment 29 states, with exceptions not relevant here, that vacancies in all "elective state, district, circuit, county, and township offices" shall be filled by appointment by the Governor.

[3] I assume from your statement that the person in question was elected on May 22, 2012, that she has been certified as the winner of the May general election for the nonpartisan office of district court judge. District judges are elected by majority vote on a nonpartisan basis pursuant to Ark. Const. amend. 80, § 17(A). *See also* A.C.A. § 7-10-102 (c) (1) (Repl. 2011). Legislation enacted to implement the nonpartisan elections of judicial offices provides that the general elections for these offices shall be held on the date of the preferential primary election. *Id*. at (b)(1) ("The general elections for nonpartisan judicial offices shall be held on the same dates and at the same times and places as provided by law for preferential primary elections.") The dates for preferential primary elections are governed by A.C.A. § 7-7-203 (Repl. 2011); and as you have indicated, this year's preferential primary election was held on May 22, 2012.

[4] The appointment under Section 1 to fill the vacancy is clearly distinct from the "appointment to succeed himself" that is referenced in the Section 2 prohibition. The latter term plainly has reference to an office that is appointive rather than elective.

[5] *See generally State v. Oldner*, 361 Ark. 316, 206 S.W.3d 818 (2005).

established rule of interpretation that the Amendment 29 prohibition is not implicated in the circumstances anticipated by your question, i.e., where the appointment to fill the vacancy will occur *after* the individual has been elected to the office.

One of my predecessors addressed a similar scenario. The question was posed:

> Can a person who was elected to an office at the general election held on November 8, 1994, and has not yet taken the office be appointed to that same office for one (1) month (until the new term begins in January 1995) because of the resignation of the person that currently holds the office?

My predecessor answered this question in the affirmative, stating:

> [I]t is my opinion that since the person has already been elected to the office, he would not fall within the scope of the [Amendment 29] prohibition. Accordingly, it is my opinion that the person referred to in your question may be appointed to fill the vacancy.[6]

My research has yielded no other authority on the point, but I agree with my predecessor that Amendment 29 is not offended in these circumstances. Simply put, a person who has been appointed to fill a vacancy in an office she has already won by election will not have been appointed or elected to succeed herself when she later actually assumes the office. The language of Amendment 29 simply cannot reasonably be construed to cover this scenario. Amendment 29 instead prevents an appointee from *later* running for (or being appointed to) the office to which she was temporarily appointed.

This conclusion is strongly reinforced, moreover, by the intent behind the prohibition in Amendment 29, § 2. Several of my predecessors have observed that the prohibition against an appointee "succeeding himself" in office was intended to remove any advantage an incumbent appointee might have as against those who would seek the office in the succeeding election.[7] Obviously, this potential for advantage is not present if the election has already occurred.

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[6] Op. Att'y Gen. 94-368. *See also* Op. Att'y Gen. 98-050 (noting the previous opinion to the effect that "the strictures of Amendment 29, § 2 do not apply to an individual who has already been elected.")

[7] Op. Att'y Gen. 2001-185; 2001-165; 98-076.

In sum, it is my opinion that the winner of the May, 2012, election for district court judge can be appointed to fill a vacancy that arose in the judgeship after the May election, and then take office in January, 2013, without offending Amendment 29 to the Arkansas Constitution. The answer to your first question is therefore "yes, in my opinion.

The answer to your second question is "no" because your reelection is to an office that you have filled by election, not appointment, for an immediately preceding term. Of necessity, then, you are not succeeding yourself from an *appointment* as contemplated by the Amendment 29 prohibition.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh