

Opinion No. 2013-001

March 6, 2013

The Honorable Jimmy Jeffress, State Senator
The Honorable Sue Madison, State Senator
State Capitol Room 320
Little Rock, Arkansas 72201

Dear Senators Jeffress and Madison:

I am writing in response to your request for my opinion on the following questions:

1. Do the provisions of Ark. Const. Amend. 33 concern “state,” rather than local or private, boards?
2. Did predecessors of two-year institutions have boards with powers that might vest?
3. Do the two-year institutions’ boards have Amendment 33 protection if they were not governed by state boards in existence in 1943?
4. Had substantive powers vested in the ASU-Beebe board by January 15, 1943?
5. If a two-year institution joins a university system such as the University of Arkansas System or the Arkansas State University System, does their protection under Amendment 33 depend on powers having vested in their original board or does their protection under Amendment 33 depend on powers having vested in their system’s board?

6. If the predecessor to Westark was governed by a board, had substantive powers vested in that board by 1943 that would extend to Westark?
7. If the predecessor to Little Rock University (LRU) was governed by a board, had substantive powers vested in that board by 1943 that would extend to LRU?
8. Do the University of Arkansas at Little Rock and the University of Arkansas at Fort Smith have Amendment 33 protection?

By way of background information, you report that your research reveals the following:

ASU-Beebe was first organized as the Junior Agriculture School of Central Arkansas in 1927. The school was run by the Beebe Public School System and became a junior college in 1931.

Two institutions currently with the University of Arkansas System were originally organized as junior colleges.

The University of Arkansas at Fort Smith began as a junior college in 1928 and was part of the public school system. In 1950, it separated from the public school system and became a private institution. In 1965, the Sebastian County Community Junior College District was created, eventually becoming Westark Community College. We are unable to determine if the Junior College was governed by a board. Westark merged with the UA System in 2002.

The University of Arkansas at Little Rock began in 1927 as the Little Rock Junior College under the City Board of Education. In 1957, it became Little Rock University (LRU), independent of the Board of Education. We are unable to determine if LRU was governed by a board. LRU merged with the University of Arkansas System in 1969.

RESPONSE

In my opinion, the answer to your first question is “yes.” With respect to your second question, in my opinion, only a qualifying state institution can have powers capable of “vesting” in the sense of that term contemplated in Amendment 33. Not being a finder of fact, I cannot opine which “predecessors of two-year institutions” met this criterion. With respect to your third question, regardless of whether the two-year institution was governed by a state board in 1943, if it is currently a state institution, its board has “Amendment 33 protection” in the sense that the board’s vested powers may not be transferred in the absence of the institution’s abolition or its consolidation with another state institution. I cannot answer your fourth question because doing so would entail conducting a factual inquiry of the sort I am neither authorized nor equipped to undertake.

With respect to your fifth question, in my opinion, if an *Amendment 33 state institution* is consolidated with another state institution, its board’s powers *may* be transferred to the governing board(s) of the post-consolidation institution. If such a transfer occurs, those powers will presumably be allocated and exercised by the recipient board(s)¹ in whatever manner accords with the conditions of the transfer. Whatever vested powers have been transferred incident to a consolidation would in turn not be transferrable from the governing board(s) of the post-consolidation institution unless the conditions of Amendment 33 were met. It is not the case, then, despite your suggestion to the contrary, that the consolidated two-year institution would necessarily be subject only to one or the other of its own or the system’s “protection under Amendment 33.” The Amendment does not address the allocation of vested powers among what may be multiple governing boards of an Amendment 33 institution. The *sole point* of Amendment 33 is to *forbid* the transfer of vested powers from a qualifying state institution absent either that institution’s abolition or its consolidation with another state institution. The Amendment is thus proscriptive rather than prescriptive; it is intended only to foreclose the transfer of vested power from an existing, qualifying state institution. And, again, Amendment 33 does not bear on any transfer of power from the board of a non-state institution.

¹ The parenthetical “(s)” is meant to acknowledge that the successor institution – particularly if it comprises separate campuses – may be governed by more than one board.

With respect to your sixth and seventh questions, nothing in Amendment 33 requires, as these questions suggest, that powers be vested in a qualifying board as of the Amendment's effective date of 1943 in order to be subject to the Amendment's terms. A qualifying board's powers may vest at any time. Although only a finder of fact could determine what powers were vested in a board for purposes of applying Amendment 33, I gather from your factual summary that neither Westark, Little Rock University nor either of its predecessors was a state institution, meaning that neither institution's board could even have developed its own "vested powers" under Amendment 33, much less have inherited such powers from a predecessor non-state institution's board.

With respect to your eighth question, both institutions you mention are state entities subject to the provisions of Amendment 33. Amendment 33 "protect[s]" these institutions to the extent that the powers "vested" in either of their governing boards may not be transferred unless the institution in question is either abolished or consolidated with another state institution.

DISCUSSION

By way of preface to my responses to your specific questions, I will briefly discuss the scope of Amendment 33. The Amendment affords the following protection to covered institutions:

The board or commission of any institution, governed by this amendment, shall not be abolished *nor shall the powers vested in any such board or commission be transferred, unless the institution is abolished or consolidated with some other State institution.*²

The highlighted portion of this excerpt is strikingly silent on one issue that bears directly on various of your questions: it defines neither what powers might "vest" in a covered state board – and hence be subject to transfer only in conjunction with an abolishment or consolidation of the referenced sort – nor how such powers might come to be "vested."

² Ark. Const. amend. 33, § 2 (emphasis added).

This office has on various occasions addressed what might constitute a “vested” power potentially subject to the restriction set forth in Amendment 33.³ Although I will not here repeat these previous analyses, the upshot of these opinions, whose conclusions are admittedly tentative in that they lack direct judicial confirmation, is that a “vested power” is one that a qualifying state board has traditionally exercised in matters of substantive institutional policy. As these opinions have further pointed out, the intent underlying Amendment 33, which was adopted in the wake of various political manipulations of governing state boards, was to preclude unwarranted outside interference with the established, substantive operations of covered state institutions.

As noted above, the portion of Amendment 33 previously quoted is both limited in its range of coverage to certain *state* boards and purely prohibitive in its effect: it bars the transfer by any entity – most notably the legislature – of any power “vested” in any covered state board unless the institution it serves is either abolished or consolidated with another state institution. The Amendment is concerned with “vested” powers only to the extent that they *currently* exist in a *state*, as distinct from a private or local governmental, institution. It follows that a power cannot “vest” in the board of a non-state institution for Amendment 33 purposes. Amendment 33 simply does not apply to such institutions or to the powers their boards may historically have exercised.

In accordance with these conclusions, it is both immaterial and meaningless in terms of an Amendment 33 analysis to consider whether powers may have “vested” in, and subsequently been transferred from, a non-state institution. The only relevant issues in entertaining an Amendment 33 challenge to a transfer of powers from a state governing board are (1) whether a power residing in the institution’s board has been “transferred”; (2) whether the board governed a covered state institution; (3) whether the board’s power was “vested” at the time of the transfer; and (4) whether the transfer occurred in conjunction with the institution’s abolition or consolidation with another state institution. Addressing each of these issues will in each instance entail conducting a factual inquiry of the sort this office is neither authorized nor equipped to undertake in the course of issuing a formal opinion. The ensuing responses will consequently set forth only the legal principles to be applied by a finder of fact in any given case.

³ See, e.g., Ops. Att’y Gen. 2007-007; 2002-119 and 2000-007. I am attaching for your convenience a copy of Opinion 2000-007, which discusses in detail the historical background of legislative interference with the University of Arkansas’s board that prompted adoption of Amendment 33.

I will further note that neither Amendment 33 itself, case law interpreting the Amendment nor any Attorney General’s opinion has yet addressed whether a vested power capable of transfer under Amendment 33 *must* be transferred if a qualifying institution is consolidated with another state institution. On its face, the Amendment does *not* require that a transfer of powers occur simply because such a transfer would be permitted. Presumably, then, the legislature might simply elect to refrain from assigning powers at issue to any board – i.e., to dispense with them altogether.

Finally, even if a vested power is properly transferred pursuant to Amendment 33, a failure by the successor governing board(s) to exercise the power might conceivably result in its no longer being vested. Although neither the courts nor this office have addressed this issue, I assume a substantive power vested through exercise over time might conversely be capable of *divestment* through disuse, quite possibly opening up a formerly protected area of policymaking authority to executive or legislative incursion. In short, if faced with the question, a court might plausibly interpret Amendment 33 as designed to protect powers accrued and vested through historical and *ongoing* exercise thereof.

Question 1: Do the provisions of Ark. Const. Amend. 33 concern “state,” rather than local or private, boards?

In my opinion, the answer to this question is “yes.” On its face, Amendment 33 deals only with “boards or commissions charged with the management or control of all charitable, penal or correctional institutions and institutions of higher learning *of the State of Arkansas*. . . .”⁴

Question 2: Did predecessors of two-year institutions have boards with powers that might vest?

In my opinion, the answer to this question is “no” if the predecessor institution was a non-state institution and “yes” if it was a qualifying state institution.

As noted above, Amendment 33 is concerned only with the transfer of “powers vested” in certain *state* boards. Of necessity, the only vested powers that factor into an Amendment 33 analysis are those that reside in a *state* institution. Determining what those vested powers might be will not involve considering what

⁴ Ark. Const. amend. 33, § 1 (emphasis added).

powers a non-state predecessor institution may have exercised and how those powers may have been characterized. In my opinion, the board of a state institution cannot inherit “vested” powers, in an Amendment 33 sense of that term, from the board of a non-state predecessor institution. By contrast, I believe the board of a state institution might inherit vested powers from the board of an abolished or consolidated state institution of the sort enumerated in the Amendment.

Question 3: Do the two-year institutions’ boards have Amendment 33 protection if they were not governed by state boards in existence in 1943?

I assume that your reference to “the two-year institutions” is to current state institutions of higher education. Subject to this assumption, in my opinion, the answer to your question is “yes,” so long as the boards qualify for such “protection” in the sense of being “charged with the management or control” of the institutions.⁵

Your question appears to be whether Amendment 33 applies to a current state institution that was not a state institution on the Amendment’s 1943 effective date.⁶ In my opinion, a current state board’s coverage under Amendment 33 does not turn on its having existed as a state entity on the Amendment’s effective date.⁷ Amendment 33 expressly declares that it will apply to boards described therein “now in existence or hereafter created.”⁸

Although your question is not entirely clear, you may further be asking whether the boards of private institutions might themselves have “vested” powers subject to the transfer protections set forth in Amendment 33. As I noted in my response to your first question, Amendment 33 applies only when one state institution is “abolished or consolidated with some *other* state institution.”⁹ The highlighted

⁵ The quoted language, which is included in Ark. Const. amend. 33, § 1, defines the scope of boards subject to the Amendment’s provisions. Determining whether a given board qualifies as a governing board would involve making a factual determination in each instance.

⁶ Amendment 33 took effect on January 15, 1943. Ark. Const. amend. 33, § 6.

⁷ *Accord* Opinion 2007-007.

⁸ Amendment 33, § 1.

⁹ Amendment 33, § 2 (emphasis added).

term just quoted confirms that the Amendment's application turns on the abolished or consolidated institution's itself having been a state institution. The Amendment is intended primarily to prevent executive and legislative encroachment upon a *state* board's authority by transferring its core powers to another entity. Any such transfer, the Amendment declares, may occur only in the limited contexts of a qualifying state institution's abolition or consolidation with another state institution. This proscription has no bearing on any powers held or exercised by the board of a private entity.

Question 4: Had substantive powers vested in the ASU-Beebe board by January 15, 1943?

Answering this question would entail conducting a factual inquiry of the sort I am neither authorized nor equipped to undertake in connection with a formal opinion request. I am unaware, for instance, whether in 1943 ASU-Beebe was even a state institution whose board's substantive powers would be capable of "vesting" in the manner contemplated in Amendment 33. Moreover, even if it were and its board's powers had "vested," these conditions alone would appear to establish little of current significance, since a state board's substantive powers may vest at any time and must be assessed as of the date an Amendment 33 issue arises.

Question 5: If a two-year institution joins a university system such as the University of Arkansas System or the Arkansas State University System, does their protection under Amendment 33 depend on powers having vested in their original board or does their protection under Amendment 33 depend on powers having vested in their system's board?

I will paraphrase as follows what I take to be your question: If an institution is merged with or consolidated into a state university system will the institution's Amendment 33 "protection," if any, consist in (1) the "vested" powers its board possessed on the date of the consolidation or merger or (2) the University System Board's vested powers?

As reflected in the foregoing discussion, for Amendment 33 purposes, if the pre-joinder two-year institution was not a state entity, what you term "their [sic] protection under Amendment 33" could not possibly "depend on powers having vested in their [sic] original board." As noted above, Amendment 33 merely recites the limited conditions warranting the transfer of vested powers from one of

the recited state boards to another state board. Amendment 33 does not apply if the proposed transferring board does not serve a qualifying state institution.

By contrast, if a state institution covered by Amendment 33 is abolished or consolidated with another state institution, the successor institution's governing board(s) may apparently inherit whatever powers had vested in the board of the abolished or consolidated institution. Amendment 33 does not prescribe any particular allocation of governing authority between or among pre-consolidation boards that may survive the reorganization. Rather, it merely prohibits transferring vested power from one board to another *in the absence of* a qualifying institution's abolition or consolidation. In the absence of some contrary directive regarding the transferred powers, whatever board(s) might remain in the wake of the consolidation would presumably be empowered to exercise whatever transferred vested powers the original boards brought to their union. Should more than one board remain when the dust of reorganization has settled, the boards might presumably be empowered to apportion vested powers between or among themselves.

In the case of your hypothetical, then, I do not believe it is meaningful to ask whether a consolidated two-year institution's "protection under Amendment 33" would "depend on powers . . . vested" in either one or the other of two boards – namely, its own or the system's. Whatever rights are considered "vested" in the board(s) of the successor institution pursuant to the principles discussed above will be subject to "protection under Amendment 33," meaning that they cannot be transferred in the future unless one or more of the contingencies set forth in the Amendment occur. These rights may, but will not necessarily, include the rights formerly vested in the governing board(s) of the predecessor institution. Having ventured these opinions, I must add that judicial confirmation of this reading of the Amendment would be highly welcome.

Question 6: If the predecessor to Westark was governed by a board, had substantive powers vested in that board by 1943 that would extend to Westark?

For reasons discussed in my previous responses, this question is mistaken in apparently assuming that the extension to Westark of powers vested in a previous board would depend on whether those powers had vested before the 1943 effective date of Amendment 33. As discussed above, powers can vest in a qualifying state board at any time.

Perhaps more fundamentally, based upon your recitation of background facts, it appears questionable that either Westark or its predecessor was a state institution of the sort subject to Amendment 33 analysis. The notion of “substantive powers vested” in a board has significance with respect to Amendment 33 only if the predecessor institution was a qualifying state institution. Based upon your factual summary, neither the predecessor institution nor Westark itself was a state institution.

Question 7: If the predecessor to Little Rock University (LRU) was governed by a board, had substantive powers vested in that board by 1943 that would extend to LRU?

All of the remarks made and conclusions drawn in my response to your previous question regarding Westark apply equally with respect to Little Rock University in this question.

Question 8: Do the University of Arkansas at Little Rock and the University of Arkansas at Fort Smith have Amendment 33 protection?

If you are simply asking whether these state institutions are subject to the provisions of Amendment 33, the answer is “yes.” If you are further asking whether the governing boards of these institutions have vested powers that may not be transferred pursuant to the prohibition set forth in Amendment 33, I must respectfully decline to answer. Determining what powers have “vested” in an Amendment 33 board under the definition discussed above will necessarily entail conducting a factual inquiry of the sort this office is neither authorized nor equipped to undertake.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

Enclosure