

Opinion No. 2013-142

February 26, 2014

The Honorable Eddie Cheatham
State Senator
2814 Ashley 239
Crossett, Arkansas 71635-8824

Dear Senator Cheatham:

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

1. Does a county personnel policy requiring employees to vacate their positions after filing for elective office infringe upon the county office and/or an elected official's authority in providing services to the public with properly trained, experienced employees?
2. Does this [policy] place an undue burden on the county office serviced by the person required to vacate their position?
3. Does the quorum court have the authority to make and enforce such a policy? If so, does it go beyond a general employee policy?

You report that your questions relate to the following personnel policy apparently in effect in Ashley County:

Seeking Public Office: Any non-elected employee of Ashley County receiving compensation by the use of Ashley County Public Funds must comply with the following guidelines:

When seeking a publicly elected office of Ashley county Government employees must be removed from active employment of Ashley County by resignation, termination, or approved leave without pay, for the time beginning at such time the employee pays a filing fee or files petitions with the election commission until it is determined by the Ashley County Election Commission that said employee has been eliminated from an election or said candidate (employee) has no further opposition to election to the office or position that was filed for. Any non-elected employee seeking public office will be considered as continuously active with Ashley County Government as it might relate to sick leave and/or vacation time.

RESPONSE

I need not address your first two questions, which are moot in light of my answer to your third question. In my opinion, the answer to the first part of your third question is “no.” Given this conclusion, I will focus only on supporting my conclusion that a county lacks authority to adopt or enforce a policy of the sort set forth immediately above.

Resolving your question turns on the application of the following statute:

No employee of the state, a county, a municipality, a school district, or any other political subdivision of this state shall be deprived of his or her right to run as a candidate for an elective office or to express his or her opinion as a citizen on political subjects, unless as necessary to meet the requirements of federal law as pertains to employees.¹

This statute creates a “right” in any public “employee” – a term that, in my estimation, denotes *current and ongoing* paid employment – to “run as a candidate for an elective office.” In my opinion, a local policy requiring a public employee to give up his paid employment as a condition of seeking local office, which is what the Ashley County personnel policy set forth above purports to do, is inconsistent with this statute.

¹ A.C.A. § 21-1-207 (Supp. 2013).

Some preliminary historical review may serve as backdrop to the analysis below. The statute just quoted was enacted in 1997.² One of my predecessors, in an opinion issued in 1993,³ addressed the enforceability at that time of an Ashley County personnel policy very similar to the one set forth in the factual recitation above.⁴ *At a time when no legislation existed barring a county restriction of this sort*, my predecessor, after acknowledging that the issue was ultimately one for judicial determination, opined that “a persuasive argument can be made . . . in favor of the enforceability of this particular policy.”⁵ Your question requires a determination whether this provisional endorsement of the personnel policy continues to apply in the face of since enacted legislation that expressly ensures the right of any public employee to run for public office.

This statutory guarantee is, in my opinion, flatly at odds with the Ashley County personnel policy requiring that any such candidate be first “removed from active employment by Ashley County.” I believe a reviewing court would conclude that the policy cannot stand in the face of the 1997 legislation.

At issue is whether the legislature has the authority to pass a law that forbids a county from restricting employment in a manner that, prior to enactment of the state law, may well have been permissible.⁶ In my opinion, it does. It is well

² Acts 1997, No. 124, § 1. This statute has never been amended and appears in the 2013 Supplement only to reflect a corrective change in the section heading.

³ Op. Att’y Gen. No. 93-423.

⁴ The policy under review provided as follows:

When seeking a publicly elected office of Ashley County Government, employee must be removed from active employment by Ashley County by, i.e.: resignation, termination, or approved leave of absence without pay; for the time frame beginning with a public announcement such as a notice by a news media or the registration for candidacy with the County Clerk, whichever comes first, until it is determined by the Ashley County Election Commission that said employee has been eliminated from election, or said candidate (employee) has no further opposition to election to the office or position that was filed for.

⁵ I need not here reproduce the bases for my predecessor’s opinion, since they do no bear on my analysis.

⁶ Again, in this regard, my predecessor’s 1993 opinion supports only the conclusion that *before the 1997 legislation took effect*, no law appeared to preclude enforcement of the Ashley County policy. Understandably, given the absence of legislation then addressing the issue, my predecessor opined only that

settled that the Arkansas Constitution is not a grant, but rather a limitation, of powers, meaning that the legislature may rightfully enact legislation subject only to restrictions and limitations imposed by the Arkansas and United States Constitutions.⁷ To be sure, by constitutional mandate, a county “acting through its Quorum Court may exercise local legislative authority not denied by the Constitution *or by law*.”⁸ This county authority, however, is by its very terms subject to state legislative restriction. In the present case, it is precisely “by law,” in the form of the statute set forth above, that the county is precluded from pursuing a personnel policy of the sort set forth above.⁹

Unsurprisingly, previous opinions issued by this office have likewise concluded that the statute quoted above precludes any personnel policy of the sort at issue in Ashley County. For instance, in 1999, one of my predecessors addressed the question: “What legal restrictions may a county employer place upon employees seeking office.”¹⁰ Although declining to itemize what might pass muster as permissible restrictions, my predecessor opined generally that “any restrictions placed upon employees seeking office may not be inconsistent with or contrary to

a county policy of the sort in effect in Ashley County might well withstand a *constitutional* objection. My predecessor was not asked whether the legislature could nevertheless do what it in fact did in 1997 – namely, forbid any such local policy in the exercise of its state legislative authority.

⁷ *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979).

⁸ Ark. Const. amend. 55, § 1 (emphasis added). *See also* A.C.A. § 14-14-801(a) (Repl. 1998) (acknowledging the county’s constitutional power to “exercise local legislative authority not expressly prohibited by the Arkansas Constitution or by law for the affairs of the county”).

⁹ With respect to the second part of your question, I will merely add in passing that, in my opinion, the preclusive effect of this statute upon the Ashley County personnel policy is not mitigated by the General Assembly’s broad legislative grant of authority to counties over “employee policy and practices of a general nature.” A.C.A. § 14-14-805(2) (Supp. 2013). By way of illustration of such general policies, the statute recites “establishment of general vacation and sick leave policies, general office hour policies, general policies with reference to nepotism, or general policies to be applicable in the hiring of county employees.” A policy effectively foreclosing county employment while running in a contested county election strikes me as different in kind from such general policies applicable to active and prospective employees. Moreover, in the event the two statutes are deemed to conflict, A.C.A. § 21-1-207 should be given effect over A.C.A. § 14-14-805(2) both (1) because it is more specific with respect to the issue of public employment by a candidate for office, *see Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994) (a general statute normally does not apply where there is a specific statute governing a particular subject matter); and (2) because it was enacted later in time, *see Daniels v. City of Fort Smith*, 268 Ark. 157, 594 S.W.2d 238 (1980) (ordinarily, the provisions of an act adopted later in time will be given effect over the conflicting provisions of an earlier act).

¹⁰ Op. Att’y Gen. No. 99-155.

state law.” He further unequivocally invoked the above statute as “clearly permit[ting] a county employee . . . ‘to run as a candidate for an elective office.’” Similarly, in 1998, another of my predecessors concluded that the statute was “clearly intended to permit a municipal employee ‘to run as a candidate for an elective office.’”¹¹ Implicit in both opinions is recognition that no public employer may preclude any of its active employees from running for elective office, including any county office, regardless of whether the position is contested. This is precisely what the Ashley County personnel policy purports to do. Accordingly, in my opinion, the policy is unenforceable.

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

¹¹ Op. Att’y Gen. No. 98-084.