



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-064

July 25, 2014

The Honorable Andy Mayberry
State Representative
3022 East Woodson Lateral Road
Hensley, Arkansas 72065-9169

Dear Representative Mayberry:

I am writing in response to your request for my opinion regarding whether a member of the General Assembly may also serve on the Saline County Parks and Recreation Commission. You report the following background facts:

Saline County created the Parks and Recreation Commission by Ordinance No. 77-25 in 1977^[1] The commission has been dormant as there has been no need for the commission until recently. Saline County intends to activate the commission, and to appoint the members of the commission.^[2]

¹ Given the date of this ordinance, I assume the commission was initially formed in the wake of the legislature's enactment of Act 742 of 1977, known as the County Government Code, currently codified at A.C.A. § 14-14-101 *et seq.* (Repl. 1998 & Supp. 2013), which implemented the reorganization of county government mandated by Ark. Const. amend. 55.

² With regard to statutes authorizing or acknowledging a county's authority to create parks, *see* A.C.A. §§ 14-14-712 (Repl. 1998) (listing "[c]ounty park commissions" within the category of "organizations subject to reorganization by county ordinance"); 14-14-802(b)(2)(C)(vi) (Repl. 1998) (authorizing a county, through its quorum court, to provide "[p]ark and recreation services"), *accord* Op. Att'y Gen. 89-321 (opining that this provision might authorize a county's construction of a lake); 14-137-106 (Repl. 1998) (authorizing a county to establish a public facilities board to develop, *inter alia*, "[p]ublic parks . . . or other public open spaces"); 14-170-205 (Repl. 1998) (authorizing counties to develop "parks" in connection with any "tourism project"); 14-16-201(a)(1) (Repl. 1998) (authorizing "[a]ny county or county board" to "[o]perate a program of public recreation"); 14-188-103(7) and -104 (Repl. 1998) (authorizing a county to establish parks and recreation facilities through its rural development authority); 14-14-801(a)(10) and (13) (Repl. 1998) (affording the quorum court local legislative authority to "[p]rovide for any service or performance of any function relating to county affairs," and to "[e]xercise other powers, not inconsistent with law, necessary for effective administration of authorized services and functions"); *see generally*

Against this backdrop, you have posed the following specific questions:

1. Is it a violation of Arkansas Constitution, article 4, section 2, for a member of the General Assembly to serve simultaneously as an appointed member of the Saline County Parks and Recreation Commission (the "SCPRC")?
2. Is it a violation of Arkansas Constitution, article 5, section 10, for a member of the General Assembly to serve simultaneously as an appointed member of the SCPRC?
3. Is it a violation of any other state law for a member of the General Assembly to simultaneously serve as an appointed member of the SCPRC?

RESPONSE

In my opinion, the answer to your first and third questions is "no." With respect to your second question, in my opinion, service as an appointee to the SCPRC would constitute the holding of a "civil office" and would hence be foreclosed to a sitting state legislator by Ark. Const. art. 5, § 10.

Question 1: Is it a violation of Arkansas Constitution, article 4, section 2, for a member of the General Assembly to serve simultaneously as an appointed member of the Saline County Parks and Recreation Commission (the "SCPRC")?

In my opinion, the answer to this question is "no."

Three categories of unlawful conflicts of interest potentially bar the holding of dual offices: a constitutional conflict,³ a statutory conflict, and a conflict created by offices having incompatible duties.³ Your current question focuses exclusively

Walker v. Washington Co., 263 Ark. 317, 564 S.W.2d 513, (1978) (declaring that Ark. Const. amend 55, § 4, which provides that "the Quorum Court shall have the power to . . . adopt ordinances necessary for the government of the county," enables the quorum court to take actions by ordinance not expressly authorized by statute).

³ *Byrd v. State*, 240 Ark. 743, 302 S.W.2d 121 (1966).

on a particular constitutional objection based upon what is commonly known as the “separation-of-powers” doctrine.

Article 4, § 2 of the Arkansas Constitution sets forth this doctrine as follows:

No person or collection of persons, being of one of these departments,^[4] shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

In *Murphy v. Townsend*,⁵ the Arkansas Supreme Court made clear that the separation-of-powers doctrine does not apply to offices held at different levels of government.⁶ At issue in *Murphy*, *inter alia*, was whether an individual was barred from serving simultaneously as county recorder, county judge and probate judge by Ark. Const. art. 19, § 6, which provides that “[n]o person shall hold or perform the duties of more than one office in the same department at the same time, except as expressly directed or permitted by this constitution.”⁷ After noting that a county and probate judge is a “county officer,” the court noted that his office is nevertheless “clearly within the judicial department of the *state* government.”⁸

⁴ The referenced “departments” are listed in Ark. Const. art. 4, § 1, which provides:

The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

⁵ 72 Ark. 180, 79 S.W. 782 (1904).

⁶ In *Murphy*, the court declared that an officer appointed and subject to removal by local officials – conditions also met under the ordinance here at issue – is “not a state officer in the sense of the constitutional provisions prohibiting one person to hold two offices at one and the same time.” *Id.* at 184. In *Peterson v. Culpepper*, 72 Ark. 230, 234, 79 S.W. 783 (1904), the court invoked *Murphy* as standing for the proposition that both Ark. Const. arts. 4, § 2 and 19, § 6 (which bars dual service in the same branch of government) apply *only* to state officers. *But see Marshall v. Holland*, 168 Ark. 449, 270 S.W. 609 (1925) (without mentioning Article 4, § 2, subsequently holding that Article 19, § 6 may apply to purely local offices) and Op. Att’y Gen. 2010-045 (relying upon *Marshall* to opine that Article 19, § 6 bars a county coroner from simultaneously serving as a county sheriff’s department investigator). This uncertainty regarding whether the Article 4, § 2 bar applies to dual service at the exclusively local level is not germane to my present discussion, however, since, as discussed in my text, this case involves dual service by a *state* legislator on a *local* commission.

⁷ 72 Ark. at 182.

⁸ *Id.* at 183 (emphasis added).

The court further declared that, while a town recorder is likewise a judicial officer inasmuch as he occasionally presides over the mayor's court, he is a *local* official and as such is not a "state officer."⁹ Based upon this distinction, the court concluded that Article 19, § 6 did not apply to foreclose the dual service.¹⁰ The court further indicated that a similar analysis would apply to "the officers and offices of the state" referenced in Article 4, § 2.¹¹

Under the terms of the ordinance attached to your request, an SCPRC member is likewise appointed and removable by local officials, thus rendering the office "local" under the *Murphy* analysis. A member of the General Assembly, by contrast, clearly serves as a "state" officer. It follows that Article 4, § 2 cannot serve as a basis to challenge the dual service.¹²

Question 2: Is it a violation of Arkansas Constitution, article 5, section 10, for a member of the General Assembly to serve simultaneously as an appointed member of the SCPRC?

In my opinion, the answer to this question is "yes" with respect to a legislator whose appointment would occur during his legislative term, which is apparently what is contemplated under the scenario set forth in your request.

Article 5, § 10 of the Arkansas Constitution provides as follows:

No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State.

⁹ *Id.* at 183-84.

¹⁰ *Id.* at 184; *accord* Ops. Att'y Gen. 98-086 (summarizing *Culpepper, supra*, as "holding that art. 19 § 6, which prohibits the holding of more than one office in 'the same department of the government,' does not prohibit the holding of a state office and a municipal office simultaneously") and 2006-127 ("Although state officers cannot hold other offices in the same department of government, they are not prohibited by the constitution from holding municipal offices, such as the office of mayor.").

¹¹ *Id.* at 182-83; *accord* Op. Att'y Gen. 96-106, n.1 ("The constitutional doctrine of separation of powers (Ark. Const. art. 4, §§ 1 and 2) would not apply, in my opinion, to prevent a deputy prosecuting attorney's service on a county quorum court. Although the quorum court clearly exercises legislative powers, it does so as part of the constitutionally prescribed legislative branch of county, rather than state government.").

¹² *Cf.* Op. Att'y Gen. 2000-291 (opining that a justice of the peace, being charged with the "judicial power of the State" under Ark. Const. art. 7, § 1, might qualify as a state officer, whereas a deputy city attorney is a local officer, thus rendering the Article 4, § 2 bar inapplicable).

On its face, this provision bars a sitting legislator from being appointed to a “civil office under this State.”¹³ Given your report that the county only “intends to activate the commission,” I will assume that your inquiry focuses only on the eligibility of a sitting legislator to serve on the SCPRC.

Article 5, § 10 requires that I address initially whether an SCPRC commissioner is a “civil officer under this State.” The Arkansas Supreme Court has defined a “civil office” as “a grant and possession of the sovereign power,” further noting that “[a]ny officer who hold his appointment under the government is a civil officer.”¹⁴ The court has further declared:

Sovereign power is the authority of the State to act. *Black's Law Dictionary* 1396 (6th ed. 1990). . . . [A] civil office is “an office created by civil law within one of the only three branches of government provided for under the present Constitution of this state.” *Harvey v. Ridgeway*, 248 Ark. [35] at 46, 450 S.W.2d [281 (1970)] at 287.¹⁵

Although the Arkansas Supreme Court has declined to set forth any hard and fast rules with regard to the nature of a “civil office,” the court has quoted with approval the following definition of the term “public office”:

¹³ It would not apply, however, to bar the holder of a “civil office” from running for and serving in the legislature, although it would bar him from being reappointed during his legislative term. *See* Op. Att’y Gen. 97-025 (“[W]hile it is permissible for a legislator to serve out the term of another office to which he was elected prior to being elected to the state legislature, it is not permissible for him to be re-elected to that other office during his term in the state legislature.”) (citation omitted).

¹⁴ *Wood v. Miller*, 154 Ark. 318, 322, 242 S.W. 573 (1922), citing *State v. Spaulding*, 102 Iowa 639, 72 N.W. 288 (1897), *Mechem on Public Officers*, 24.); *accord* Op. Att’y Gen. 2002-073. Specifically with respect to the applicability of the phrase “appointment under the government” to local officers, *see also* Ops. Att’y Gen. 2002-328 (citing *Wood* in support of the following: “[M]y predecessors and I have previously concluded that various local offices do constitute civil officers under this State. *See* Ops. Att’y Gen. Nos. 2002-073, citing *Collins v. McLendon*, 177 Ark. 44, 5 S.W.2d 734 (1928) (legislator elected mayor would be subject to challenge under Ark. Const. art. 5, § 10); 2002-039; 97-025; 96-147; 91-314.”).

¹⁵ *State Board of Workforce Education v. King*, 336 Ark. 409, 416, 985 S.W.2d 731 (1999).

“An office is a public station or employment, conferred by the appointment of government, and embrace[s] the idea of tenure, duration, emolument, and duties.”¹⁶

The court elaborated that in any public office the “duty [is] a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed. . . .”¹⁷

I have previously summarized as follows the general features of a “civil office”:

In determining whether a particular position constitutes an “office,” the Arkansas Supreme Court has consistently adhered to the view that an office is created by law, with the tenure, compensation, and duties of the position also usually fixed by law. . . . Additionally, a public officer ordinarily exercises some part of the state’s sovereign power. . . . Other typical factors signifying a public office include the taking of an oath of office, the receipt of a formal commission, and the giving of a bond, although the court has consistently maintained that no single factor is ever conclusive. . . .¹⁸

In the present case, the position of SCPRC commissioner was indeed “created by law” through quorum-court ordinance, and the incidents of civil office recited above, including the posting of bond and the administration of “the oath required by law in the State of Arkansas of public officials,” are included in the enacting ordinance attached to your request.¹⁹ In my opinion, then, the office of commissioner involves a constitutionally and legislatively sanctioned exercise of state sovereignty and would hence be deemed a “civil office,” essentially

¹⁶ *Lucas v. Futrall*, 84 Ark. 540, 547 (1907), quoting *United States v. Hartwell*, 73 U.S. 385 (1867); accord Op. Att’y Gen. 96-147.

¹⁷ 84 Ark. at 547.

¹⁸ Op. Att’y Gen. 2007-045 (citations omitted).

¹⁹ For further discussion of these features of “civil office,” see Ops. Att’y Gen. 88-187 (reciting the above incidents of a “public office”) and 96-147 (specifically noting with respect to remuneration, which is foreclosed under the Saline County ordinance, “[t]he fact that a commissioner does or does not receive remuneration or benefits for his service as a commissioner has no impact upon the prohibition imposed by Article 5, § 10”).

executive in its nature, for purposes of applying the proscription set forth in Article 5, § 10.²⁰

In my opinion, an SCPRC member would further be deemed to hold a position “under this State.” The court in *Wood*, offered the following definition of this phrase:

The words “under this State,” as used in the Constitution, mean under the laws of this State or by virtue of or in conformity with the authority conferred by the State as sovereign. It embraces all offices created by the laws of the State as contradistinguished from other authority.²¹

To the extent, then, that the holding of a “civil office” involves the exercise of sovereign authority conferred by the state,²² a “civil officer” would necessarily appear to be serving “under this State” – a conclusion that would apply to “local,” in the *Murphy* court’s sense of that term, as well as to “state” civil officers.²³

²⁰ This conclusion is in all respects consistent with the catalog, set forth in Op. Att’y Gen. 96-147, of supreme court determinations regarding what constitutes a “civil office” under this standard for purposes of applying Article 5, § 10:

In the time period since the *Wood v. Miller* and *Lucas v. Futrall* decisions, the court has consistently applied the principles set forth in those cases so as either to prohibit or to allow dual service by General Assembly members. See, e.g., *Martindale v. Honey*, 261 Ark. 708, 551 S.W.2d 202 (1977) (deputy prosecuting attorney is civil officer within Article 5, § 10 prohibition); *Williams v. Douglas*, 251 Ark. 555, 473 S.W.2d 896 (1971) (school director is civil officer within Article 5, § 10 prohibition); *Harvey v. Ridgeway*, 248 Ark. 35, 450 S.W.2d 281 (1970) (delegate to constitutional convention is not civil officer within Article 10, § 5 prohibition because not serving within one of three branches of state government); *Starnes v. Sadler*, 237 Ark. 325, 372 S.W.2d 585 (1963) (member of state board of pardons and paroles is civil officer within Article 5, § 10 prohibition); *Jones v. Duckett*, 234 Ark. 990, 356 S.W.2d 5 (1962) (county election commissioner is civil officer within Article 5, § 10 prohibition); *Smith v. Faubus*, 230 Ark. 831, 327 S.W.2d 562 (1959) (member of state sovereignty commission is civil officer within Article 5, § 10 prohibition); *Haynes v. Riales*, 226 Ark. 370, 290 S.W.2d 7 (1956) (auditor for burial association board is not civil officer within Article 5, § 10 prohibition); *Collins v. McClendon*, 177 Ark. 44, 5 S.W.2d 734 (1928) (mayor is civil officer within Article 5, § 10 prohibition).

²¹ 154 Ark. at 323.

²² *Id.* at 322; accord Op. Att’y Gen. 2002-073.

²³ In this regard, see Ops. Att’y Gen. 2006-078 (opining that Article 5, § 10 bars a legislator from simultaneously serving as an alderman); 2002-209 (opining that sitting legislator cannot serve

Relying on *Murphy, supra*, the appellee in *Wood* sought to avoid this conclusion in arguing that Article 5, § 10 did not bar a state representative from simultaneously serving as a municipal judge. As previously noted, in *Murphy*, the court had rejected the argument that a county recorder was a state officer for purposes of applying Article 19, § 6, reasoning that the office must be local because “this officer is appointed by the municipal authorities, and is removable by the same tribunal.”²⁴ This formulation, *if applicable to an Article 5, § 10 challenge*, would *support* classifying a board position on the SCPRC as *not* being “under this State” – notwithstanding the fact that the SCPRC presumably exercises “authority conferred by the state as sovereign.” SCPRC commissioners, after all, are likewise appointed by and removable by local authorities under the ordinance attached to your request. If the appellee in *Wood* were correct in his analysis, then, Article 5, § 10 would not bar the dual employment at issue here.

In *Wood*, however, the court directly rejected the appellee’s attempt to apply the *Murphy* court’s reasoning to an Article 5, § 10 challenge:

Counsel for appellee rely on the decisions of this court in [*Murphy* and *Peterson, supra*]. . . . These cases involved the application of a clause of the Constitution (article 19, § 6) which provides that no person “shall hold or perform the duties of more than one office in the same department * * * at the same time.” . . . We are now dealing with a provision of the Constitution altogether different from the one quoted above. It applies only to senators and representatives in the General Assembly, and provides that they shall not, during the time for which they shall have been elected, “be appointed or elected to any civil office under this state.”

The purpose of this provision of the Constitution is plain. In many of the states the Constitution merely prohibits legislative representatives, during their terms, from holding an office created

simultaneously as a city attorney, since the latter is a municipal office “under this State”); 2002-073 (opining, in response to a request dealing generically with municipal officers, that “as a general proposition, . . . a ‘municipal officer’ would qualify as holding an “office . . . under this State”); 91-314 (“Municipal police officers, in my opinion, are a part of the executive department of government whose duty it is to enforce the law. As such, they exercise part of the sovereign power of the state.”). *See also* authorities cited in note 14, *supra*.

²⁴ 72 Ark. at 184.

during that term, or where the salary of the office is increased during the term. But the language of our Constitution is broader.²⁵

This passage verges on declaring outright that the Article 5, 10 prohibition will apply simply upon determining that the challenged position held by a legislator qualifies as a “civil office” under the analysis set forth above – a fact that may explain why the case law applying Article 5, § 10 almost always focuses *exclusively* upon whether a position qualifies as a “civil office.”²⁶

In *Williams v. Douglas, supra*, the court held that “the office of school director is a civil office” and that Article 5, § 10 consequently barred a state senator from simultaneously serving on a local school board.²⁷ In support of this conclusion, and by way of preface to an elaborate review of the history leading to the adoption of Article 5, § 10, the court remarked:

The people in creating the offices of Representative and Senator had the right to assure unto themselves that a person so elected would use the office for purposes of representing the people *rather than for self[-]promotion such as seeking an election or promotion to office.*²⁸

Significantly, this declaration draws no distinction between offices held at the “state” or “local” level in the sense of those terms as used in *Murphy*; rather, it simply declares that Article 5, § 10 was intended to bar any legislator from the temptation of holding any additional “office.” Hence, as one of my predecessors has observed of Article 5, § 10:

[T]his provision of our constitution prohibits not only the acceptance of a position which was created or enhanced during the Representative’s term, but prohibits the acceptance of *any civil office* during the legislator’s term.²⁹

²⁵ 154 Ark. at 322.

²⁶ See cases cited in note 20, *supra*.

²⁷ 251 Ark. at 557.

²⁸ *Id.* at 559 (emphasis added).

²⁹ Op. Att’y Gen. 99-396 (emphasis in original).

The *Douglas* court's historical review strongly supports this conclusion. Without reproducing this review in detail,³⁰ I will merely note that the court clearly believed that Article 5, § 10 marked a deliberate reaction to perceived abuses resulting from the provisions of previous constitutions – culminating in what is pejoratively known as the “Carpet-bag” Constitution of 1868 – that enabled legislators to obtain offices other than their positions in the General Assembly.³¹ The court concluded as follows:

The experiences of this State with the “carpet-baggers” and the Brooks-Baxter War^[32] are history but it was after those experiences that the people enacted the PROHIBITION set forth in Art. 5 § 10. This historical review rather amply demonstrates that, in the enactment of the PROHIBITION, the people were attempting to correct something more than that which is referred to as “incompatibility”³³

The referenced “more,” the court clearly implied, was *any* holding of “civil office” by a member of the legislature.

To be sure, the court's declarations regarding the prohibitory scope of Article 5, § 10 are not always so clear-cut. In *Harvey v. Ridgeway*, for instance, the court remarked:

Article 5, 10 of the present Constitution was designed and intended as a protection against the possible conflicts in interests a member of

³⁰ For further discussion of this historical background as set forth in *Douglas*, see Op. Att’y Gen. No. 99-396.

³¹ *Douglas*, 251 Ark. at 559-61. As discussed in *Douglas* and Op. Att’y Gen. 99-396, the Arkansas Constitutions of 1836, 1861 and 1864 all contained provisions barring a legislator from holding any additional civil office created, or the emoluments of which were increased, during his term. The “Carpet-bag” Constitution of 1868, as summarized by my predecessor, “prohibited certain officers from being elected to the General Assembly, but did nothing to prohibit General Assembly members, once elected, from being appointed to other offices or positions.

³² The Brooks-Baxter War was an 1874 armed conflict in Little Rock between factions of the Republican Party – labelled “scalawags” (largely native Arkansans) and “carpetbaggers” (perceived Yankee interlopers), respectively – relating to the 1872 gubernatorial election. The conflict occurred in the waning phase of Reconstruction and inspired the adoption of our current constitution.

³³ 251 Ark. at 561 (emphasis in original).

the legislature might have as an elected official with the power, influence and authority to create positions and offices, and the interest he might have as a private citizen who would desire to hold such civil office by appointment or election.³⁴

Considered in isolation, this passage might be read as suggesting that Article 5, § 10 was designed to bar only a sitting legislator's appointment or election to offices *created during his or her term*. I consider this reading improper, however, for the reasons recited in *Douglas*, which characterizes the prohibition against a legislator's simultaneously holding another "civil office" as absolute, rather than as dependent upon the timing of the office's creation. Indeed, as the *Douglas* court's historical review reflects, the versions of the Arkansas Constitution that preceded the "Carpet-bag" Constitution of 1868 all contained qualifying language restricting the prohibition to civil offices created or enhanced during a proposed dual-office holder's legislative term – restrictions that the people significantly chose to *delete* in the Constitution of 1874, which is currently in effect. Accordingly, I believe the prohibition must be read as applying in the manner suggested in *Douglas* – i.e., as foreclosing a legislator's holding *any* other civil office, thereby foreclosing any "self[-]promotion such as seeking an election or promotion to office." The passage just quoted from *Ridgeway* is not facially inconsistent with this conclusion, and I question that it should be read as qualifying the court's own reading of Article 5, § 10 in *Douglas*.

Question 3: Is it a violation of any other state law for a member of the General Assembly to simultaneously serve as an appointed member of the SCPRC?

Although this question is moot in light of my response to your previous question, I will note briefly that I am unaware of any provision of state constitutional, statutory or common law other than Article 5, § 10 of the Arkansas Constitution that would bar the proposed dual service. I have discussed the pertinent constitutional provisions above. No statute bars the dual service contemplated, and, in my estimation, the two offices at issue would not be independently barred

³⁴ 248 Ark. 35, 48, 450 S.W.2d 281 (1970). The court later quoted this passage with approval in *King*, 336 Ark. at 416, as has this office in Op. Att'y Gen. 2000-144. Compare *Fulkerson v. Refunding Board of Arkansas*, 201 Ark. 957, 969, 147 S.W.2d 980 (1941) (declaring it "contrary to both the spirit and the letter" of Article 10, § 5 "for the General Assembly to *create an office* or board or other state agency, *and then to fill the place thus created with one or more of its own members*") (emphasis added).

under the common-law doctrine of incompatibility,³⁵ whose application I need not explore here.

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

Sincerely,



DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

³⁵ The Supreme Court has defined this doctrine as follows:

“The inconsistency, which at common law makes offices incompatible, . . . lies . . . in the conflict of interest, as where one is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one office has the power to remove the incumbent of the other or to audit the accounts of the other.”

Tappan v. Helena Federal Savings & Loan Association, 193 Ark. 1023, 1025, 104 S.W.2d 458 (1937), quoting 46 C.J. 942. *Accord, Thompson v. Roberts*, 333 Ark. 544, 970 S.W.2d 239 (1998). *See also Byrd v. State*, 240 Ark. 743, 402 S.W.2d 121 (1966).