



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-142

January 21, 2016

The Honorable Camille Bennett  
State Representative  
P. O. Box 414  
Lonoke, AR 72086-0414

Dear Representative Bennett:

This is in response to your request for my opinion on the following question:

May a member of the General Assembly accept a position on the Board of Commissioners of a drainage improvement district?

You have asked this question in light of Article 5, Section 10 of the Arkansas Constitution, which provides:

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.

You state that the specific district at issue is the Old River Drainage District, which was established under Act 353 of 1921.

**RESPONSE**

In my opinion, the answer to your question is “no.” I believe service as an appointee to the board of commissioners of the drainage improvement district would constitute holding a “civil office under this State” and would hence be foreclosed to a sitting legislator by Ark. Const. art. 5, § 10.

## DISCUSSION

### “Civil office”

Your question and the constitutional provision it implicates<sup>1</sup> require that I address initially whether a position on the drainage improvement district board of commissioners is a “civil office.” The Arkansas Supreme Court has stated the following in defining the term “civil office”:

Early on, we cited with approval a definition of “civil office” offered by the Iowa Supreme Court: “A civil office is a grant and possession of the sovereign power.” *Wood v. Miller*, 154 Ark. at 322-323, 242 S.W. at 575, citing *State v. Spauling*, 102 Iowa 639, 72 N.W. 288 (1897). Sovereign power is the authority of the State to act. BLACK’S LAW DICTIONARY 1396 (6th ed.1990). Later, we wrote that 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. at 46, 450 S.W.2d at 287.<sup>2</sup>

In *Wood v. Miller*, quoted in the above excerpt, the Court also quoted with approval one treatise’s statement that “[a]ny officer who holds his appointment under the government \* \* \* is a civil officer.”<sup>3</sup>

The Court has declined to set forth any hard and fast rules with regard to the nature of a “civil office,” but it has observed 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....”<sup>4</sup> The Court has also 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.<sup>5</sup> Other typical factors signifying a public office include the taking of an oath

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<sup>1</sup> Ark. Const., art. 5, § 10.

<sup>2</sup> *State Board of Workforce Education v. King*, 336 Ark. 409, 416, 985 S.W.2d 731, 734 (1999).

<sup>3</sup> 154 Ark. at 323, 242 S.W. at 575 (quoting Mecham, *Public Offices and Officers*, § 24 (1890)).

<sup>4</sup> *Lucas v. Futrall*, 84 Ark. 540, 547, 106 S.W. 667, 669 (1907).

<sup>5</sup> E.g., *Martindale v. Honey*, 259 Ark. 416, 533 S.W.2d 198 (1976); *Haynes v. Riales*, 226 Ark. 370, 290 S.W.2d 7 (1956).

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.<sup>6</sup>

In the time period since *Wood* and *Lucas v. Futrall* (note 3, *supra*), 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.<sup>7</sup>

In the present case, the position of drainage improvement district commissioner (“Commissioner”) was indeed “created by law” under Act 353 of 1921, and the incidents of civil office recited above are included. Act 353 is codified in part at Ark. Code Ann. § 14-121-303, which provides for the appointment of commissioners as follows:

(a) When the county court has established any such drainage district, it shall appoint three (3) owners of real property within the county to act as commissioners.

(b) Each of these commissioners shall take the oath of office required by Arkansas Constitution, Article 19, § 20, and shall also swear that he will not directly or indirectly be interested in any contract made by the board and that he will well and truly assess all benefits resulting from the improvement and all damages caused thereby.<sup>8</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> See *Martindale v. Honey*, 261 Ark. 708, 551 S.W.2d 202 (1977) (deputy prosecuting attorney is civil officer within art. 5, § 10 prohibition); *Williams v. Douglas*, 251 Ark. 555, 473 S.W.2d 896 (1971) (school director is civil officer within art. 5, § 10 prohibition); *Harvey v. Ridgeway*, 248 Ark. 35, 450 S.W.2d 281 (1970) (delegate to constitutional convention is not civil officer within art. 5, § 10 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 art. 5, § 10 prohibition); *Jones v. Duckett*, 234 Ark. 990, 356 S.W.2d 5 (1962) (county election commissioner is civil officer within art. 5, § 10 prohibition); *Smith v. Faubus*, 230 Ark. 831, 327 S.W.2d 562 (1959) (member of state sovereignty commission is civil officer within art. 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 art. 5, § 10 prohibition); *Collins v. McClendon*, 177 Ark. 44, 5 S.W.2d 734 (1928) (mayor is civil officer within art. 5, § 10 prohibition).

<sup>8</sup> Ark. Code Ann. § 14-121-301 (Repl. 1998).

The position of Commissioner is thus created by law, and the law—not a contract—expressly establishes the Commissioners’ duties (“assess all benefits ... and all damages....”). The duties are continuing, not occasional or intermittent. Other incidents of civil office include the receipt of compensation and expenses<sup>9</sup> and the taking of “the oath of office.”<sup>10</sup> Perhaps most significantly, as reflected by the following passage in a case involving a municipal improvement district, the position of Commissioner plainly involves the exercise of sovereign power:

In determining the status of improvement districts, particularly in Arkansas, a historical review is helpful and is discussed by Horace Sloan in *A Treatise on the Law of Improvement Districts in Arkansas* (1928). *The power of taxation, whether by general taxation or by local assessment, is legislative and cannot be exercised in absence of statutory authority. Additionally, no improvement district may be created or local assessment imposed unless statutorily authorized....[I]mprovement districts are agents of the state and derive their limited powers and duties of a public nature by legislative delegation through the taxing power of the state....Further, there is a wealth of case law acknowledging the agency status of improvement districts as governmental in nature.*<sup>11</sup>

Commissioners of a drainage improvement district are thus vested with a portion of the State’s power of taxation.<sup>12</sup> In my opinion, the office of Commissioner of

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<sup>9</sup> *Id.* at § 14-121-301(f) (“The commissioners provided for in this subchapter shall receive as compensation the sum of twenty-five dollars (\$25.00) each day for attending meetings of the board, together with their necessary expenses.”).

<sup>10</sup> *Id.* at § 14-121-301(b).

<sup>11</sup> *Quapaw Cent. Bus. Imp. Dist. v. Bond-Kinman, Inc.*, 315 Ark. 703, 706, 870 S.W.2d 390, 392 (1994) (emphasis added).

<sup>12</sup> It should be noted, however, that improvement district assessments are distinct from “taxes.” As explained by the Court in *Rainwater v. Hayes*, 244 Ark. 1191, 1193-94, 428 S.W.2d 254, 256 (1968):

[S]pecial assessments are not really ‘taxes’ in the usual and ordinary meaning of the word. While both are referable to the sovereign power of taxation, the words ‘taxes’ on the one hand and ‘assessment’, ‘special assessments’ or ‘local assessments’ on the other, ordinarily have distinct legal meanings. The word ‘taxes’ refers to exactions laid by the government for purposes of general

the drainage improvement district involves a legislatively sanctioned exercise of state sovereignty and would hence be deemed a “civil office” for purposes of applying the proscription set forth in Ark. Const. art. 5, § 10.<sup>13</sup>

**“Under this State”**

In my opinion, a Commissioner 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.<sup>14</sup>

To the extent, then, that the holding of a “civil office” involves the exercise of sovereign authority conferred by the State, a “civil officer” would necessarily appear to be serving “under this State”—a conclusion that would apply to local as

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revenue. The word ‘assessments’ refers to exactions laid for making local improvements for the benefit of property owners.

<sup>13</sup> This is consistent with the Supreme Court of Mississippi’s decision, cited in *Wood*, that a legislator could not serve as a levee inspector:

The Supreme Court of Mississippi, in the case of *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169, held that, under a provision of the Constitution identical with our constitutional provision on that subject [referring to Ark. Const. art. 5, § 10], a member of the Legislature could not, during his term, hold the office of levee inspector, and in the opinion said:

“It follows, hence, that whether an office has been created by the Constitution itself, or by statute enacted pursuant to its provisions, the incumbent, as a component member of one of the bodies of the magistracy, is vested with a portion of the power of the government, whether the portion of the power of the government which he is thus entitled to exercise is legislative, judicial, or executive in its character.”

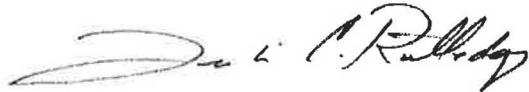
154 Ark. at 323, 242 S.W. at 575.

<sup>14</sup> *Id.*

well as to state civil officers. And indeed, the case law reflects that local offices do constitute civil offices under this State.<sup>15</sup>

It is therefore my opinion that Ark. Const. art. 5, § 10 bars a member of the General Assembly from simultaneously serving on the Board of Commissioners of a drainage improvement district.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

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<sup>15</sup> *Williams v. Douglas*, 251 Ark. 555, 473 S.W.2d 896 (1971) (school director is civil officer within art. 5, § 10 prohibition); *Collins v. McLendon*, 177 Ark. 44, 5 S.W.2d 734 (1928) (legislator elected mayor would be subject to challenge under art. 5, § 10); *Wood, supra*, 154 Ark. at 323, 242 S.W. at 575 (state representative barred by art. 5, § 10 from serving as a municipal judge, the Court expressly finding that “[m]unicipal offices are created by the statutes of the state and are therefore civil offices ‘under this state.’”). *Accord* Op. Att’y Gen. Nos. 2014-064 (opining that it would be a violation of art. 5, § 10 for a legislator to be appointed during his term to a county parks and recreation commission); 2006-078 (opining that art. 5, § 10 bars a legislator from simultaneously serving as an alderman); 2002-209 (opining that sitting legislator cannot serve simultaneously as a city attorney); 2002-328 (citing *Wood* and noting: “[m]y predecessors and I have previously concluded that various local offices do constitute civil offices under this State. *See* Ops. Att’y Gen. Nos. 2002-073...; 2002-039; 97-025; 96-147; 91-314.”).