

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTEENTH DIVISION**

WILLARD PROCTOR, JR.

PLAINTIFF

VS.

NO. 60 CV-10-1439

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Pat O'Brien Pulaski Circuit Clerk
CRO1

**HONORABLE CHARLIE DANIELS,
IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE, ET AL.**

DEFENDANTS

**MEMORANDUM OPINION AND
ORDER OF DISMISSAL**

Before the Court are the motions to dismiss the plaintiff's amended complaint filed by defendants Hon. Charlie Daniels, in his official capacity as Arkansas Secretary of State, and the Arkansas Judicial Discipline and Disability Commission, which were respectively filed on March 31, 2010, and April 1, 2010. At the request of plaintiff Willard Proctor, Jr., this case was set for an oral hearing on all pending motions on Friday, April 2, 2010. On that date, the plaintiff appeared in person and through counsel, Ms. Chrishauna Easley Clark; defendants Hon. Charlie Daniels, in his official capacity as Arkansas Secretary of State, and the Arkansas Judicial Discipline and Disability Commission appeared through their counsel, Assistant Attorneys General Mark N. Ohrenberger and Regina Haralson; and defendant the Pulaski County Election Commission appeared through its counsel, Pulaski County Attorney Karla Burnett and Assistant Pulaski County Attorney Amanda M. Mitchell. The Court heard argument on the pending motions to dismiss from counsel for all parties, and, at the conclusion of the hearing, the Court took those motions under advisement.

Upon consideration of the amended complaint, the pending motions to dismiss, all other filings in the record, and the oral argument of counsel, the Court finds that the

plaintiff's amended complaint fails to state facts upon which relief can be granted against any of the defendants and shall therefore be dismissed in its entirety pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. In reaching this conclusion, the Court finds and hereby declares, that the statute challenged in the plaintiff's amended complaint, Ark. Code Ann. § 16-10-410(d) is constitutional. Accordingly, the Court issues a writ of mandamus to the Pulaski County Election Commission that it shall not count any votes cast in favor of the plaintiff, Willard Proctor, Jr., in the non-partisan judicial election, scheduled for May 18, 2010, for which the plaintiff has filed as a write-in candidate. The Court bases its ruling in this matter on the reasoning set forth below.

Plaintiff Willard Proctor, Jr. has previously been removed from the position of Circuit Judge for Arkansas's Sixth Judicial District, Fifth Division, by the Arkansas Supreme Court, upon a finding that the plaintiff violated numerous provisions of the Arkansas Code of Judicial Conduct. *See generally Arkansas Judicial Discipline and Disability Comm'n v. Proctor*, 2010 Ark. 38. Thereafter, the plaintiff filed with the Arkansas Secretary of State as a write-in candidate for the same judicial position from which he had previously been removed. (Am. Compl. ¶ 3.)

In filing his amended complaint, the plaintiff brought a pre-election qualifications challenge to determine whether, if elected, he could serve as a circuit judge notwithstanding his previous removal from the bench. In so doing, the plaintiff cast his complaint in the form of a petition for declaratory judgment, seeking a declaration that Ark. Code Ann. § 16-10-410(d) is unconstitutional, combined with a petition for a writ of mandamus, directing the Pulaski County Board of Election Commissioners to count all

write-in votes cast in the plaintiff's favor in the non-partisan judicial election, scheduled for May 18, 2010, for which the plaintiff has filed as a write-in candidate.

As an initial matter, any challenge to the constitutionality of a state statute begins with the long-standing principle that the statute is presumed to be constitutional. *Clinton v. Bonds*, 306 Ark. 554, 816 S.W.2d 169 (1991). Further, the burden of proving that a statute is unconstitutional rests upon the party challenging it. *Id.* If it is at all possible for a reviewing court to construe a legislative enactment so that it will meet the test of constitutionality, it must do so; every reasonable construction must be resorted to in order to save a challenged statute from unconstitutionality, and any doubts must be resolved in the act's favor. *Hand v. H & R Block, Inc.*, 258 Ark. 774, 528 S.W.2d 916 (1975); *Bush v. Martineau*, 174 Ark. 214, 295 S.W. 9 (1927); *State v Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

Another key principle of constitutional interpretation is how the constitution limits, or in this case does not limit, legislative action. The Arkansas Constitution does not serve as a vehicle for bestowing specific powers to act upon the State government. Rather, the Constitution serves to place limitations on the power given to the General Assembly. Consequently, if no limitation of power is either specifically or impliedly expressed in the Constitution, the legislature, as the representative of the people, may enact laws as it deems necessary. *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979). Additionally, it is the duty of the courts to harmonize all provisions of the Constitution and amendments thereto and to construe them with a view of a harmonious whole. *Huggins v. Wacaster*, 223 Ark. 390, 266 S.W.2d 58 (1954). It is a rule of universal application that the Constitution must be considered as a whole, and it must be

read in the light of other provisions relating to the same subject. *Chesshir v. Copeland*, 182 Ark. 425, 32 S.W.2d 301 (1930). Finally, constitutional amendments are liberally construed so as to accomplish their purposes. *Fort Smith School District v. Beebe*, 2009 WL 1564465 (Ark. 2009).

The statute challenged in the present case reads as follows: “Any judge removed from office pursuant to this subchapter cannot be appointed or elected thereafter to serve as judge.” Ark. Code Ann. § 16-10-410(d). Relying chiefly on the Arkansas Supreme Court’s holdings in *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377 (1940), and *Daniels v. Dennis*, 365 Ark. 338, 229 S.W.3d 880 (2006), the plaintiff argues that the challenged statute impermissibly imposes a qualification on individuals wishing to hold the office of circuit judge beyond the qualifications for circuit judges set forth in the Arkansas Constitution – namely, the plaintiff argues that the statute adds the qualification that the candidate has not previously been removed from judicial office by the Arkansas Supreme Court. (See Am. Compl. ¶¶ 11-13.) The Secretary of State and the Judicial Discipline and Disability Commission counter that the bar prohibiting removed judges from ever again holding judicial office addressed in Ark. Code Ann. § 16-10-410(d) does not create a “qualification” for individuals wishing to hold judicial office but rather serves a limitation on an individual’s eligibility to hold judicial office as the result of past judicial disciplinary action. These defendants further argue that even if the challenged provision was properly considered a “qualification” for holding office, the statute is nevertheless constitutional because any such qualification is created by the Constitution itself in the language of Amendment 66.

The plaintiff correctly states the law with respect to qualifications for holding offices created by the Arkansas Constitution – where the Arkansas Constitution sets specific qualifications for an office, the General Assembly cannot impose additional qualifications for that office. *Mississippi County v. Green*, 200 Ark. at 206-07, 138 S.W.2d at 379; *Daniels v. Dennis*, 365 Ark. 340-41, 229 S.W.3d at 882-83. However, neither the *Dennis* case nor the *Mississippi County* case controls the present controversy for each of two reasons: (1) the challenged statute does not impose any additional qualification for holding the office of circuit judge; and (2) even if the prohibition on holding judicial office subsequent to removal from the bench did constitute a “qualification” for office, such a qualification is derived not from the challenged statute but from Amendment 66 to the Arkansas Constitution.

First, while the statutory impositions at issue in *Dennis* and *Mississippi County* clearly constituted “qualifications,” the bar on holding judicial office following a former judicial officer’s removal from the bench is merely an individualized limitation in furtherance of a constitutionally-authorized sanction – removal from office. *See* Ark. Const. Amend. 66. Neither the *Dennis* nor the *Mississippi County* case involved matters of constitutionally-authorized judicial discipline, and those cases are thus distinguishable from the present case. The Court finds that Ark. Code Ann. § 16-10-410(d) does not create a “qualification” for holding the office of circuit judge, and the statute is constitutional.

Second, and perhaps more significantly, even if the prohibition on holding judicial office subsequent to removal from the bench described in Ark. Code Ann. § 16-10-410(d) did constitute a qualification for holding the office of circuit judge, the statute

would nevertheless pass constitutional muster because it does nothing more than clarify a qualification that already exists in the Arkansas Constitution. Arkansas Constitution Amendment 66, which created the Arkansas Judicial Discipline and Disability Commission, also authorized the Arkansas Supreme Court to suspend or remove a judge from office upon an appropriate finding of judicial misconduct. The amendment further authorized the General Assembly to designate the grounds upon which the Arkansas Supreme Court can suspend or remove an officer from the judiciary.

The distinction between the sanctions of “suspension” and “removal,” as those terms are used in the plain language of Amendment 66, is critical to the resolution of this case. The Arkansas Supreme Court’s treatment of these terms, without reference to Ark. Code Ann. § 16-10-410(d), in its November 2009 opinion in *Judicial Discipline and Disability Commission v. Simes*, 2009 Ark. 543, is particularly instructive on this subject. In *Simes*, the court reviewed the Arkansas Judicial Discipline and Disability Commission’s recommendation that the judge in question should be removed from office on the basis of the Commission’s finding that the judge had violated various provisions of the Arkansas Code of Judicial Conduct. *See Simes*, 2009 Ark. 543, at 1. Although the court accepted the Commission’s findings of judicial misconduct, *id.*, it concluded that “permanent removal from the bench” was not warranted, *id.* at 24. Instead, the court concluded the appropriate sanction for the judge’s conduct was suspension without pay for the remainder of the judge’s term. *Id.* at 24. As such, the court expressly recognized that the sanction of suspension without pay, even a suspension running for the entire remainder of the sanctioned judge’s term, as opposed to removal from the bench, would

permit the sanctioned judge to run again to hold judicial office after the suspension's expiration if that judge chose to do so. *Id.*

If the Supreme Court considered "removal" to be anything less than permanent and to place no bar on the sanctioned judge from holding judicial office again in the future, it could simply have removed the judge in question in *Simes* in order to produce the same result achieved by suspending the judge without pay for the remainder of his term. In making the distinction between "suspension" and "removal" and the distinction between the consequences of those sanctions so explicitly in *Simes*, the court recognized its authority to remove a judge from the bench permanently. For this Court to now interpret the term "removal" to mean anything less than permanent removal from office would undermine the Arkansas Supreme Court's clear intention in applying the sanction of removal to the plaintiff in *Arkansas Judicial Discipline and Disability Commission v. Proctor*, 2010 Ark. 38, less than three months after the court issued its decision in *Simes*. Compare *Simes*, 2009 Ark. 543, at 24, with *Proctor*, 2010 Ark. 38 at 58-60.

Because this Court finds that the term "removal," as used in the plain text of Arkansas Constitution Amendment 66, means permanent removal from the judiciary and precludes the possibility of an individual serving on the bench, whether by appointment or by election, subsequent to that individual's removal by the Arkansas Supreme Court, the prohibition on election or appointment to judicial office subsequent to removal described in Ark. Code Ann. § 16-10-410(d) does not create any qualification for the office of circuit judge that does not already exist in the Arkansas Constitution. Further, the Court finds that in passing Ark. Code Ann. § 16-10-410(d), the General Assembly did not overstep its authority to establish the grounds for suspension and removal granted to

it in Amendment 66, as the challenged statute does little more than clarify the definition of the term “removal” in a manner that is consistent with how that term is used in the plain text of Amendment 66.

Finally, the Court finds that to the extent Amendment 66 might be construed to create a qualification for the office of circuit judge, such a qualification can be read in harmony with the other qualifications for the office of circuit judge set forth in Arkansas Constitution Amendment 80, Section 16. The Court further finds that the passage of Amendment 80 did not repeal or otherwise limit the Arkansas Supreme Court’s authority to permanently remove a judge from office upon an appropriate finding of judicial misconduct. *See Ark. Const. Amend. 80, Sec. 22* (specifying those provisions of the Arkansas Constitution to be repealed or amended by Amendment 80, stating that no other provision of the Arkansas Constitution shall be repealed by Amendment 80 unless that provision is found to be in irreconcilable conflict with Amendment 80, and omitting any reference to Amendment 66).

For all of these reasons, the Court hereby declares that Ark. Code Ann. § 16-10-410(d) is constitutional.

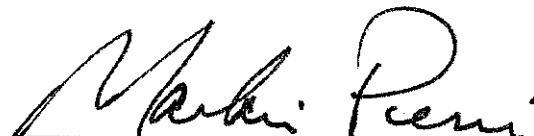
THEREFORE, the Court hereby GRANTS the motions to dismiss filed by defendants Hon. Charlie Daniels, in his official capacity as Arkansas Secretary of State, and the Arkansas Judicial Discipline and Disability Commission, and orders the following:

1. Ark. Code Ann. § 16-10-410(d) shall be declared constitutional;

2. Mandamus shall issue to the Pulaski County Election Commission not to count any votes cast in favor of Willard Proctor, Jr., in the non-partisan judicial election, scheduled for May 18, 2010, for which the plaintiff has filed as a write-in candidate; and

3. The amended complaint shall be dismissed in its entirety.

It is so ORDERED this 12th day of April, 2010.


Hon. Mackie Pierce, Circuit Judge

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