

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS

PAUL FOSTER, KEN FAIRLESS, and RONNIE HALL,
in their official capacities as the COMMISSIONERS of the
FAULKNER COUNTY ELECTION COMMISSION, and
MARGARET DARTER, in her official capacity as
FAULKNER COUNTY CLERK

PETITIONERS

VS.

CASE NO. 23 CV-18-_____

SHELLY CARPENTER, JOHNNY BRADY, and ANDY SHOCK

RESPONDENTS

PETITION FOR DECLARATORY JUDGMENT AND WRIT OF MANDAMUS

Come now Faulkner County Election Commissioners Paul Foster, Ken Fairless and Ronnie Hall, in their official capacities as the Commissioners of the Faulkner County Election Commission (hereinafter referred to as "FCEC"), by and through their attorney, David Hogue, and for their Petition for Declaratory Judgment and Writ of Mandamus state the following:

Parties

1. Petitioners Paul Foster, Ken Fairless and Ronnie Hall are the duly elected members of the Faulkner County Election Commission.
2. Petitioner Margaret Darter is the duly elected County Clerk of Faulkner County.
3. Respondent Shelly Carpenter is a "concerned citizen and registered voter of Faulkner County."
4. Respondent Johnny Brady is the incumbent Justice of the Peace of Faulkner County District Ten, and filed for re-election on February 22, 2018. See Exhibit A.
5. Respondent Andy Shock filed to be a candidate for Justice of the Peace of Faulkner County District Ten on February 27, 2018. See Exhibit B.
6. The Respondents are all registered voters and therefore concerned with proper, legal elections, and two have filed as candidates in the subject race, and should therefore be entitled to defend their respective positions.

Jurisdiction and Venue

7. This Court has subject matter jurisdiction of the matters stated herein.
8. Venue lies in Faulkner County because the subject election is an election for a District of Faulkner County and the Commissioners and Clerk are officers of Faulkner County.

Procedural Status

9. Shelly Carpenter filed a Complaint with the FCEC on February 28, 2018, alleging that Andy Shock has “filed for Justice of the Peace District 10 which is illegal to serve on the Parole Board and the Coram [sic] court at the same time.” See Exhibit C

10. The Complaint was sent to the County Clerk and the County Attorney for evaluation under A.C.A. §§7-1-109 and 16-21-114(d).

11. Upon request of the County Attorney, the FCEC held a public meeting to hear the report regarding the Complaint. Upon hearing the report, the FCEC determined that the public interest would be best served by submitting the question of the qualification of a candidate to the circuit court for prompt determination, to avoid any delays or unnecessary questions regarding the validity of the election.

12. The FCEC and Mrs. Darter have standing to bring this action under *Helton v. Jacobs*, 346 Ark. 344 (2001), in that both have the “duty to assure proper and lawful elections,” and would be the parties to which a Writ of Mandamus would be directed.

13. The Petition for Declaratory Judgment and Writ of Mandamus is proper as the Arkansas Supreme Court has ruled that this is the proper procedure in such a case in *Fite v. Gulkey*, 2011 Ark. 188 (2011) and *Tumey v. Daniels*, 359 Ark. 256 (2004).

14. Petitioners respectfully request an expedited hearing on this matter as Arkansas Rule of Civil Procedure 78(d) requires a hearing “no sooner than 2 and no longer than 7 days thereafter to hear and determine the cause” upon the filing of a petition for mandamus in an election matter.

Case or Controversy

15. On Monday, August 10, 2015, Governor Asa Hutchinson announced the appointment of then Sheriff Andy Shock to the Arkansas State Parole Board, and he holds such position to date.

16. It is undisputed that the parole board position is a “civil office” within the meaning of Arkansas State Constitution Article 7 § 53, as passed in 2016 as Amendment 95. *Starnes v. Sadler*, 237 Ark. 325 (1963) named the position as a civil office and the position still qualifies, as the member exercises the sovereign power of the state under more modern tests.

17. Article 7 §53 reads as follows:

“A person elected or appointed to any of the following county offices shall not, during the term for which he or she has been elected, be appointed or elected to any civil office in this state:

1. County Judge;
2. Justice of the Peace;
3. Sheriff;
4. Circuit Clerk;
5. County Clerk;
6. Assessor;
7. Coroner;
8. Treasurer;
9. County surveyor; or
10. Collector of taxes.”

18. Given Mr. Shock’s current civil office, the Petitioners request a Declaratory Judgment to determine his eligibility to be a Justice of the Peace in Faulkner County.

19. If Mr. Shock is determined ineligible, the Petitioners would request a Writ of Mandamus to the petitioners ordering Mr. Shock’s name stricken from the list of ballot eligible candidates and to the FCEC ordering them not to include Respondent Shock on the ballots or if his name is already on the ballot by the time of ruling, that no tabulation of votes for Respondent Shock occur.

WHEREFORE, Faulkner County Election Commissioners Paul Foster, Ken Fairless and Ronnie Hall, hereby request that this Court issue a ruling in this matter expeditiously and for all other legal and proper relief to which they may be entitled.

Respectfully submitted this the 5th day of March, 2018.

By: _____


David Hogue, AR Bar No. 98024
801 Locust St.
Conway, AR 72034
(501) 450-4900
(501) 450-4939 Fax
david.hogue@faulknercounty.org

*Attorney for
Faulkner County Election Commission*

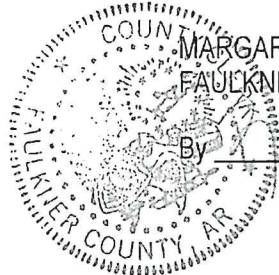
Clerk's Certificate

STATE OF ARKANSAS
COUNTY OF FAULKNER

I, MARGARET DARTER, County Clerk of Faulkner County, Arkansas, do hereby certify that the foregoing Political Practice Pledge and Candidate Filing Form and Affidavit of Eligibility are a true and correct copies of the original documents filed in my office in on February 22, 2018 by Johnny W. Brady.

Witness my hand and seal as such Clerk on this 5th day of March, 2018.

MARGARET DARTER
FAULKNER COUNTY CLERK
By Johnny W. Brady, D.C.

The seal of Faulkner County, Arkansas, is a circular emblem. It features a central design surrounded by the words "COUNTY OF FAULKNER" at the top and "ARKANSAS" at the bottom. The seal is partially obscured by the text of the certificate.

Ex A

281973

Mark Martin, Secretary of State

Elections Division, Room 026

State Capitol

Little Rock, Arkansas 72201

FILED Political Practices PledgeI, Johnny W. Brady a candidate for the Office of Justice of Peace
(Name of office)District Number #10 (If any), Subdistrict Number _____ (If any), Position Number _____ (If any)

hereby state that I am familiar with the requirements of Arkansas Code Annotated §§ 7-1-103, 7-1-104, 7-3-108, 7-6-101, 7-6-102, 7-6-103, and 7-6-104 and that I will in good faith comply with the provisions of the same.

Check all that are applicable:☒ **CANDIDATE FOR PARTY NOMINATION**Name of Party Republican☐ **NONPARTISAN CANDIDATE**☐ **WRITE-IN CANDIDATE**☐ **INDEPENDENT CANDIDATE**☐ **SCHOOL BOARD CANDIDATE****ALL CANDIDATES MUST COMPLETE THE FOLLOWING SECTION:**

I hereby certify that I have never been convicted of a felony in the State of Arkansas, or in any other jurisdiction outside of Arkansas.**

Johnny W. Brady
Candidate's Signature2-22-18
Date SignedJustice Johnny Brady
Print your name as it is to appear on ballot
(See Below, Ark Code Ann. § 7-7-305(c))301 Rocky Point Road
AddressVilonia, AR
City, State & Zip CodeFILED
2018 FEB 22 PM 12:03
MARGARET DARTER
FAULKNER COUNTY CLERK
BY JBR****A prospective candidate for state, district, county, municipal or township office who has had a felony conviction expunged in accordance with Ark. Code Ann. §§ 16-93-301 to 303 or similar expunction statute in another state may certify that he or she has never been convicted of a felony, provided the candidate presents a certificate of expunction from the court that convicted the prospective candidate. See Ark. Code Ann. § 7-6-102(d)****7-7-305. Printing of ballots - Form.**

(c) (1) (A) A person who files for an elective office in this state may use not more than three (3) given names, one (1) of which may be a nickname or any other word used to identify the person to the voters, and may add as a prefix to his or her name the title or an abbreviation of an elective public office the person currently holds.

(B) A person may use as the prefix the title of a nonpartisan judicial office in an election for a nonpartisan judicial office only if:

(i) The person is currently serving in a nonpartisan judicial office to which the person has been elected in the last election for the office; or

(ii) The person:

(a) Is a candidate for the office of circuit judge or district judge;

(b) Is currently serving in the office of circuit judge or district judge as an appointee; and

(c) Has been serving in that position for at least twelve (12) months.

(C) A nickname shall not include a professional or honorary title.

(2) The names and titles as proposed to be used by each candidate on the political practice pledge or, if the political practice pledge is not filed by the filing deadline, then the names and titles that appear on the party certificate shall be reviewed no later than one (1) business day after the filing deadline by the Secretary of State for state and district offices and by the county board of election commissioners for county, township, school, and municipal offices.

(3)(A) The name of every candidate shall be printed on the ballot in the form as certified by either the Secretary of State or the county board.

(B) However, the county board of election commissioners may substitute an abbreviated title if the ballot lacks space for the title requested by a candidate.

(C) The county board of election commissioners shall immediately notify a candidate whose requested title is abbreviated by the county board of election commissioners.

(4) A candidate shall not be permitted to change the form in which his or her name will be printed on the ballot after the deadline for filing the political practices pledge.

Rev. 12/2013

281973

**CANDIDATE FILING FORM
AFFIDAVIT OF ELIGIBILITY**
(To be completed and signed by candidate)

FILED

I, Johnny Brady
(Printed name of Candidate)

2018 FEB 22 PM 12:03
County, Arkansas

do hereby state on oath that I am a resident and qualified voter of Faulkner County, Arkansas
and I am eligible to seek the Republican nomination for the office of

Justice of the Peace District 10 Position No. 1
the Primary Election to be held on May 22, 2018

MARGARET DARTER
FAULKNER COUNTY CLERK
BY J Bonds DC

I hereby consent and acknowledge that the Secretary of the COUNTY COMMITTEE may make such independent investigation, as he/she deems necessary to determine my eligibility as a candidate; which investigation includes but is not limited to the power to compel me to answer interrogatories. I understand that the investigation concerning my eligibility shall be concluded within two (2) weeks after the filing deadline.

I further state that I will complete the filing requirements by filing written evidence of the payment of the party filing fees (**Receipt/Acknowledgement**) and a **Political Practices Pledge** in the office of the County Clerk by 12:00 noon on March 1, 2018.

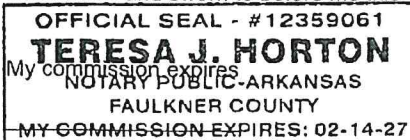
Signed this 22 day of February, 2018.

Telephone: 501-336-4451 Home
Work

Johnny Brady
(Signature)
301 Rocky Point Road
(Mailing Address)
Vilonia, AR 72173
(City, State, Zip)

STATE OF ARKANSAS)
COUNTY OF Faulkner)

Subscribed and sworn to before me this 22nd day of February, 2018.



Teresa Horton
Notary Public

RECEIVED \$ 300 FILING FEE
Cash ☒ Check

Secretary

*****Clip Here*****

COUNTY COMMITTEE
RECEIPT/ACKNOWLEDGEMENT FOR FILING

The Republican Party of Faulkner county, by the undersigned Secretary, hereby acknowledges receipt of \$ 300 filing fee from Johnny Brady for the office of JP 10 which fulfills the requirements of the Party. I further certify that the named person complies with the eligibility requirements of the office listed herein.

Dated 2/22/18

Melouaine Bullock
Republican Party Secretary

Note: Candidate should complete and file the top portion with the County Republican Committee Secretary. Secretary completes Receipt and Candidate shall file the same in the office of the County Clerk (Ark Code 7-7-301)

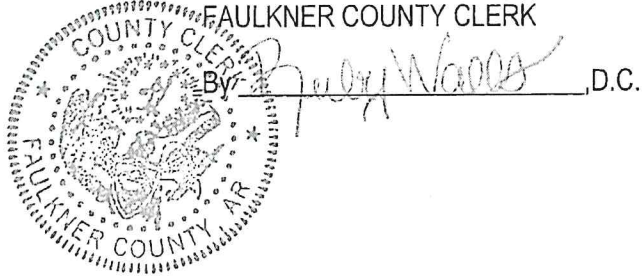
Clerk's Certificate

STATE OF ARKANSAS
COUNTY OF FAULKNER

I, MARGARET DARTER, County Clerk of Faulkner County, Arkansas, do hereby certify that the foregoing Political Practice Pledge and Candidate Filing Form and Affidavit of Eligibility are true and correct copies of the original documents filed February 27, 2018 by Andy Shock.

Witness my hand and seal as such Clerk on this 5th day of March, 2018.

MARGARET DARTER
FAULKNER COUNTY CLERK



Ex. B

Mark Martin, Secretary of State

Elections Division, Room 026
State Capitol
Little Rock, Arkansas 72201

Political Practices Pledge

I, WILLIAM A. "ANDY" SHOCK a candidate for the Office of JUSTICE OF THE PEACE
(Name of office)

District Number 10 (If any), Division Number _____ (If any), Subdistrict Number _____ (If any), Position Number _____ (If any)

hereby state that I am familiar with the requirements of Arkansas Code Annotated §§ 7-1-103, 7-1-104, 7-3-108, 7-6-101, 7-6-102, 7-6-103, and 7-6-104 and that I will in good faith comply with the provisions of the same.

Check all that are applicable:

X CANDIDATE FOR PARTY NOMINATION

Name of Party REPUBLICAN PARTY

____ NONPARTISAN CANDIDATE

____ WRITE-IN CANDIDATE

____ INDEPENDENT CANDIDATE

____ SCHOOL BOARD CANDIDATE

ALL CANDIDATES MUST COMPLETE THE FOLLOWING SECTION:

I hereby certify that I have never been convicted of a felony in the State of Arkansas, or in any other jurisdiction outside of Arkansas.**

Will A. Shock

Candidate's Signature

02-26-18
Date Signed

FILED
2018 FEB 27 AM 8:25
MARGARET DARTER
FAULKNER COUNTY CLERK
BY: RD DC

ANDY SHOCK

Print your name as it is to appear on ballot
(See Below, Ark Code Ann. § 7-7-305(c))

56 BUD CHUCK LANE

Address

CONWAY, AR. 72032

City, State & Zip Code

****A prospective candidate for state, district, county, municipal or township office who has had a felony conviction expunged in accordance with Ark. Code Ann. §§ 16-93-301 to 303 or similar expunction statute in another state may certify that he or she has never been convicted of a felony, provided the candidate presents a certificate of expunction from the court that convicted the prospective candidate. See Ark. Code Ann. § 7-6-102(d)**

7-7-305. Printing of ballots - Form.

(c) (1) (A) A person who files for an elective office in this state may use not more than three (3) given names, one (1) of which may be a nickname or any other word used to identify the person to the voters, and may add as a prefix to his or her name the title or an abbreviation of an elective public office the person currently holds.

(B) A person may use as the prefix the title of a nonpartisan judicial office in an election for a nonpartisan judicial office only if:

- (i) The person is currently serving in a nonpartisan judicial office to which the person has been elected in the last election for the office; or
- (ii) The person:
 - (a) Is a candidate for the office of circuit judge or district judge;
 - (b) Is currently serving in the office of circuit judge or district judge as an appointee; and
 - (c) Has been serving in that position for at least twelve (12) months.

(C) A nickname shall not include a professional or honorary title.

(2) The names and titles as proposed to be used by each candidate on the political practice pledge or, if the political practice pledge is not filed by the filing deadline, then the names and titles that appear on the party certificate shall be reviewed no later than one (1) business day after the filing deadline by the Secretary of State for state and district offices and by the county board of election commissioners for county, township, school, and municipal offices.

(3)(A) The name of every candidate shall be printed on the ballot in the form as certified by either the Secretary of State or the county board.

(B) However, the county board of election commissioners may substitute an abbreviated title if the ballot lacks space for the title requested by a candidate.

(C) The county board of election commissioners shall immediately notify a candidate whose requested title is abbreviated by the county board of election commissioners.

(4) A candidate shall not be permitted to change the form in which his or her name will be printed on the ballot after the deadline for filing the political practices pledge.

CANDIDATE FILING FORM
AFFIDAVIT OF ELIGIBILITY
(To be completed and signed by candidate)

FILED

I, Andy Shock
(Printed name of Candidate)

do hereby state on oath that I am a resident and qualified voter of Faulkner County, Arkansas
and I am eligible to seek the Republican nomination for the office of

Justice of the Peace District 10 Position No. 10
the Primary Election to be held on May 22, 2018
BY D. Waller DC

I hereby consent and acknowledge that the Secretary of the COUNTY COMMITTEE may make such independent investigation, as he/she deems necessary to determine my eligibility as a candidate; which investigation includes but is not limited to the power to compel me to answer interrogatories. I understand that the investigation concerning my eligibility shall be concluded within two (2) weeks after the filing deadline.

I further state that I will complete the filing requirements by filing written evidence of the payment of the party filing fees (Receipt/Acknowledgement) and a Political Practices Pledge in the office of the County Clerk by 12:00 noon on March 1, 2018.

Signed this 26th day of February, 2018.

Telephone: 501-796-3501 Home
Work
Mobile

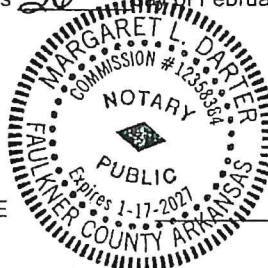
[Signature]
(Signature)
56 Bus Civic Ln.
(Mailing Address)
Conway AR 72032
(City, State/Zip)

STATE OF ARKANSAS
COUNTY OF Faulkner

Subscribed and sworn to before me this 26th day of February, 2018.

My commission expires

1-17-2027



Margaret L. Darter
Notary Public

RECEIVED \$ _____ FILING FEE _____ Secretary
_____ Cash _____ Check

*****Clip Here*****

COUNTY COMMITTEE
RECEIPT/ACKNOWLEDGEMENT FOR FILING

The Republican Party of Faulkner County, by the undersigned Secretary, hereby acknowledges receipt of \$ 300 filing fee from Andy Shock for the office of J.P. #10 which fulfills the requirements of the Party. I further certify that the named person complies with the eligibility requirements of the office listed herein.

Dated 02/24/18

[Signature]
Republican Party Secretary

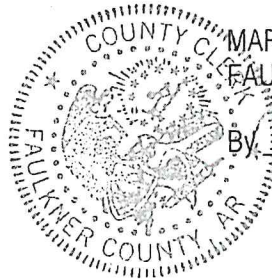
Note: Candidate should complete and file the top portion with the County Republican Committee Secretary. Secretary completes Receipt and Candidate shall file the same in the office of the County Clerk (Ark Code 7-7-301)

Clerk's Certificate

STATE OF ARKANSAS
COUNTY OF FAULKNER

I, MARGARET DARTER, County Clerk of Faulkner County, Arkansas, do hereby certify that the foregoing Complaint and attachments received by the Election Commission and the County Clerk on February 28, 2018 by Shelly Carpenter.

Witness my hand and seal as such Clerk on this 5th day of March, 2018.

 MARGARET DARTER
FAULKNER COUNTY CLERK
By: Shelly Carpenter D.C.

Ex. C

RECEIVED

FEB 28 2018

FAULKNER CO. CLERK

Electoral Commission

2-28-18

As a Concerned citizen and a registered voter of Faulkner County. I'm writting this in regards of Andy Shock that has Filed for Justice of the Peace District 10 which is illegal to ~~Serve~~ on the Parole Board and the Coram Court at the same time. I am attaching this to the case being Filed.

Shelly Carpenter



SANFORD LAW FIRM
AN ARKANSAS PROFESSIONAL LIMITED LIABILITY COMPANY

RUSSELLVILLE OFFICE:

103 West Parkway Avenue, Suite C
Post Office Box 39
Russellville, Arkansas 72811

Telephone: (479) 880-0088
Facsimile: (888) 787-2040
Email: lydia@sanfordlawfirm.com

LITTLE ROCK OFFICE:

One Financial Center
650 South Shackleford, Suite 411
Little Rock, Arkansas 72211

Telephone: (501) 221-0088
Facsimile: (888) 787-2040
Email: chris@sanfordlawfirm.com

RECEIVED

FEB 28 2018

FAULKNER CO. CLERK

JOSH SANFORD ^{1, 2, 4, 5}
ANNA SANFORD STIRITZ
VANESSA KINNEY²
LYDIA HAMLET³
CHRISTOPHER BURKS
STEVE RAULS
ALLISON KOILE
JOSHUA WEST
STACY GIBSON
REBECCA MATLOCK
APRIL RHÉAUME
DANIEL FORD
SEAN SHORT

OF COUNSEL:

KIRSTEN C. SANFORD

Also licensed in: 1-Colorado 2-Michigan
3-Mississippi 4-North Dakota 5-Texas

February 09, 2018

VIA U.S. MAIL

Hon. Johnny Brady
301 Rocky Point Rd.
Vilonia, AR 72173

Re: sitting Parole Board member cannot run for JP

Dear JP Brady,

I'm writing because a sitting Parole Board member cannot run for Justice of the Peace. Please share this opinion with all who are interested.

According to *Starnes v. Sadler*, 237 Ark. 325, 372 S.W.2d 585 (1963) a member of state board of pardons and paroles is a "civil officer" under art. 5, § 10 of the Arkansas Constitution and thus cannot run for another county other office.

Amendment 95 thus prohibits a candidate seeking to hold both a Justice of the Peace and State Parole Board member position. The Clerk should be advised not to accept the party certificate from such a candidate if that candidate were to file to run against you. I have enclosed an Attorney General opinion and the law.

Thank you for your time and attention to this matter.

Sincerely,
SANFORD LAW FIRM, PLLC

/s/ Christopher Burks

Christopher Burks
Attorney at Law

A-1



RECEIVED

FEB 28 2018

FAULKNER CO. CLERK

STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2017-028

August 10, 2017

The Honorable Bryan King
State Senator
871 CR 814
Green Forest, AR 72638

Dear Senator King:

This is in response to your request for an opinion on whether 23 boards or commissions within this state—some governmental in nature, others seemingly non-governmental or at least quasi-governmental—would be considered civil offices, and whether Article 7, section 53 of the Arkansas Constitution precludes county elected officials from being appointed to serve on such boards and commissions.

SUMMARY RESPONSE

I must respectfully decline to opine on the questions of (1) whether each of the numerous boards, commissions, or other entities you have listed in your request for my opinion constitutes a “civil office” for the purposes of the recently adopted Article 7, section 53, and (2) whether that same constitutional provision thus prohibits county elected officials from serving on them. As the discussion below illustrates, the application of the governing legal test requires discovery and analysis of numerous and varied facts concerning each entity. The fact finding required to address many of the entities you have listed is beyond the scope of an Attorney General’s opinion.

I will nonetheless lay out below the prevailing law on what constitutes a “civil office” in the context of a similar and long-standing constitutional prohibition placed on sitting legislators. This corpus of law, in my opinion, should be equally applicable to the provisions of Article 7, section 53. This should be of significant help to you as you apply the law to the individual facts in each case.

A-2
RECEIVED

FEB 28 2018

FAULKNER CO. CLERK

BACKGROUND

In November 2016, Arkansas voters adopted Amendment 95, which amended several articles of the state constitution. Of relevance to this opinion, Amendment 95 amended Article 7 to add a new section—section 53—concerning county elected officials, which reads:

A person elected or appointed to any of the following county offices shall not, during the term for which he or she has been elected, be appointed or elected to any civil office in this state:

- (1) County judge;
- (2) Justice of the peace;
- (3) Sheriff;
- (4) Circuit clerk;
- (5) County clerk;
- (6) Assessor;
- (7) Coroner;
- (8) Treasurer;
- (9) County surveyor; or
- (10) Collector of taxes.¹

This amendment is very similar in language to a long-existing constitutional provision regarding sitting members of the General Assembly:

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.²

In light of this new constitutional provision, you have sought my opinion regarding whether county elected officials' service on 23 boards or commissions of various types would be considered civil offices under Article 7, section 53, and thus prohibited.

DISCUSSION

In order to determine whether a particular position like the ones you mention falls within Article 7, section 53's proscription for elected county officials, one must

¹ Ark. Const., amend. 95, § 6 (codified at Ark. Const., art. 7, § 53) (Adv. Code Srvc., April 2017).

² Ark. Const., art 5, § 10 (Repl. 2004).

14-2
RECEIVED
FEB 28 2018
FAULKNER CO. CLERK

first determine whether the position is considered a "civil office." The Arkansas Supreme Court has stated the following in defining the term "civil office" in the context of Article 5, section 10's similar prohibition against such simultaneous service by sitting legislators:

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 287.³

In *Wood v. Miller*,⁴ 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."⁵

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...."⁶ 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.⁷ 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

³ *State Board of Workforce Education v. King*, 336 Ark. 409, 416, 985 S.W.2d 731, 734 (1999).

⁴ 154 Ark. 318, 242 S.W. 573 (1922).

⁵ *Id.* at 323, 242 S.W. at 575 (quoting Mechem, *Public Offices and Officers*, § 24 (1890)).

⁶ *Lucas v. Futrall*, 84 Ark. 540, 547, 106 S.W. 667, 669 (1907).

⁷ *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).

the Court has consistently maintained that no single factor is ever conclusive.⁸

In the time period since *Wood* and *Lucas v. Futrall*, the Court has consistently applied the principles set forth in those cases so as either to prohibit or to allow dual service insofar as it applies to members of the General Assembly pursuant to Article 5, section 10.⁹

I have had occasion to apply the above precepts and precedents to opine that the position of a commissioner for a drainage improvement district is a civil office.¹⁰ In that opinion, I noted that a commissioner's position is created by law, and the law—not a contract of employment—expressly establishes the commissioners' duties ("assess all benefits ... and all damages...."). Furthermore, I noted that the duties are continuing, not occasional or intermittent; and that other indicia of a civil office, including the receipt of compensation and expenses and the taking of an oath of office, were present. Finally, and perhaps most significantly for the purposes of that opinion, it was clear that the position of an improvement district commissioner involved the exercise of sovereign power as agents of the State both by statutory authority and "by legislative delegation through the taxing power of the [S]tate...."¹¹

⁸ *Id.*

⁹ See *Martindale v. Honey*, 259 Ark. 416, 533 S.W.2d 198 (1976) (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). Cf. Op. Att'y Gen. 94-220 (citing *Martindale* to support opinion that service on a county hospital board of governors, pursuant to Ark. Code Ann. § 14-263-101 *et seq.*, is a civil office).

¹⁰ See Op. Att'y Gen. 2015-142.

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

The Honorable Bryan King
 State Senator
 Opinion No. 2017-028
 Page 5

RECEIVED
 FEB 28 2018
 FAULKNER CO. CLERK

Thus, we can see what the Court generally looks for in determining whether a given position is a “civil office,” at least for the purposes of Article 5, section 10. I have no reason to doubt that the Court would apply the same definition and consider the same factors in determining a “civil office” in the context of Article 7, section 53.¹² Accordingly, in my opinion, the above principles should be applied to a given office or position, taking into consideration the facts of each specific case.¹³

In your request for my opinion, you note that some state statutes require at least one of the elected county officials named in Article 7, section 53 to serve on a specific board or commission.¹⁴ This raises another aspect that must be considered when looking at a specific appointment, that is, whether the statute is truly

¹² Similar language in the constitution is generally given a like construction. See *Vance v. Austell*, 45 Ark. 400 (1885) (“[T]he first mentioned construction has been placed upon similar language in constitutional provisions.”) (internal citations omitted). See also *Glover v. Hot Springs Kennel Club, Inc.*, 230 Ark. 544, 323 S.W.2d 902 (1959) (citing with approval *Vance v. Austell*). Accord Op. Att’y Gen. 2004-195.

¹³ The language in Article 5, section 10 and Article 7, section 53 differs in one respect. Article 5, section 10 states that no member of the General Assembly “shall ... be appointed or elected to any civil office *under* this State[.]” whereas Article 7, section 53 bars elected county officials from being “appointed or elected to any civil office *in* this state.” (Emphases added). While the words “under” and “in” are prepositions that have a facial distinction in common language (“under” generally meaning beneath, while “in” connotes, among other things, a physical location), I believe this is likely a distinction without a difference in the context of these two constitutional provisions. The key similarity between the two provisions is the prohibition against the elected officials’ holding a “civil office.” If, as stated above, the Court is likely to apply its long-standing definition of a “civil office” (a grant and possession of the State’s sovereign power, one created by the civil law of the State) to Article 7, section 53 as it has to Article 5, section 10, then it seems likely that a civil office to which a county elected official might be appointed or elected “in this state” would also be one “under this State.” As the Court stated in *Wood v. Miller*, note 4 *supra*, a civil officer is one who holds his appointment under the laws of the State. It thus seems likely that the officer’s exercise of the State’s sovereign power would exist no matter where in the State the law creates the civil office, or where in the State those sovereign powers are exercised.

¹⁴ See Ark. Code Ann. § 14-27-101 *et seq.* (Repl. 2013) (County Intergovernmental Councils), § 15-4-3701 *et seq.* (Repl. 2016) (Arkansas Workforce Development Board), § 26-27-301 *et seq.* (Repl. 2012 & Supp. 2015) (county equalizations boards), § 8-6-701 *et seq.* (Repl. 2011 & Supp. 2015) (regional solid waste management districts), and § 14-166-201 *et seq.* (Repl. 1998 & Supp. 2015) (multi-county planning and development districts).

77-6
RECEIVED
FEB 28 2018
FAULKNER CO. CLERK

creating a “civil office” or is merely imposing additional duties on the elected official in question.¹⁵

One of the appointments you asked about—a county clerk’s service as secretary of his or her county’s property tax assessment equalization board¹⁶—is exemplary of this distinction. According to state law, “[t]he county clerk or his or her designee shall serve as secretary of the county equalization board of his or her county and shall keep a complete and accurate journal of its proceedings and perform such other duties as may be by law required by the county equalization board.”¹⁷ Other responsibilities of the clerk to a county equalization board include the taking and filing of oaths by the board members¹⁸ and keeping the Assessment Coordination Department apprised of the names and addresses of the board members.¹⁹

From this description of what the county clerk is charged with by statute, we can see that serving as the secretary of the county equalization board has few, if any, of the indicia described above to be a “civil office” for the clerk. Instead, it appears more likely that legislature has simply added duties for the county clerk along with those already prescribed by law.

With respect to the list of 18 other boards or commissions you have asked about, I must respectfully decline to address each one of those individually. However, the foregoing discussion should greatly assist in the analysis of many of the boards and commissions you have inquired about and that are created pursuant to and

¹⁵ See *Sparling v. Refunding Board*, 189 Ark. 189, 71 S.W.2d 182 (1934). In *Sparling*, the Court rejected a constitutional challenge to a statute that created a tax “Refunding Board” composed of the Governor, Lieutenant Governor, Treasurer of State, Secretary of State, State Auditor, Attorney General, and the State Bank Commissioner. The Court held that membership on the Refunding Board was not an “additional office,” but merely amounted to the imposition of “additional duties ... by the [legislature] on the holders of the respective offices.” *Id.* at 191, 71 S.W.2d at 183 (emphasis added).

¹⁶ See Ark. Code Ann. § 26-27-301 *et seq.* (Repl. 2012 & Supp. 2015).

¹⁷ Ark. Code Ann. § 26-27-307(a) (Repl. 2012).

¹⁸ *Id.* at § 26-27-306 (Repl. 2012).

¹⁹ *Id.* at § 26-27-307(b).

The Honorable Bryan King
State Senator
Opinion No. 2017-028
Page 7

17-7
RECEIVED
FEB 28 2018
FAULKNER CO. CLERK

under the direction of state law.²⁰ Some of the boards or commissions you mention, though, appear to be for private or strictly local entities. I am unable to opine on these appointments, as the level of fact-finding necessary to determine their duties and authority is beyond the scope of an Attorney General's opinion. A county's attorney or other local counsel should be consulted in such cases.

Sincerely,


LESLIE RUTLEDGE
Attorney General

²⁰ See, e.g., Ark. Code Ann. § 14-137-101 *et seq.* (Repl. 1998 & Supp. 2015) (public facilities boards), § 14-125-101 *et seq.* (Repl. 1998 & Supp. 2015) (soil conservation districts), § 14-357-101 *et seq.* (1987) (county airport commissions), § 14-262-101 *et seq.* (Repl. 1998 & Supp. 2015) (county health boards), and § 14-123-201 *et seq.* (Repl. 1998 & Supp. 2015) (levee improvement districts).