



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-127

January 27, 2016

The Honorable Charlie Collins
State Representative
3225 East Piper Glen
Fayetteville, AR 72703-4394

Dear Representative Collins:

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

Would it be an illegal exaction and potentially unconstitutional for the city to consolidate the former private pension fund of the Fayetteville Fire Fighters with the [Arkansas Local Police and Fire Retirement System (LOPFI)] retirement plan, and by doing so, obligate Fayetteville voters to the debt going forward?

RESPONSE

In my opinion, the proposed consolidation with LOPFI would not involve an unconstitutional lending of credit or illegal exaction on that basis.

DISCUSSION

Your request does not specify any constitutional provision under which the proposed consolidation might be deemed invalid. I am informed, however, that the Fayetteville city attorney has advised that the consolidation may involve the lending of the city's credit, which is constitutionally prohibited.¹

While few reported cases have interpreted this constitutional provision, it essentially amounts to a prohibition on a city's assumption or guaranty of a third party's obligation.²

¹ "[No] ... city ... shall ever lend its credit for any purpose whatever...." Ark. Const. art. 16, § 1.

² See, e.g., *Barnhart v. City of Fayetteville*, 321 Ark. 197, 206, 900 S.W.2d 539 (1995) ("Fayetteville's agreement to unconditionally guarantee the obligations of [the city of] West Fork and Washington County" was a lending of Fayetteville's credit); *Hays v. McDaniel, Treasurer*, 130 Ark. 52, 55-56, 196 S.W. 934

The city attorney's position that the consolidation may contravene this provision is premised on the proposition that any existing liability or obligation with respect to the pension fund is that of the pension fund's board of trustees,³ and not of the city itself. If one accepts the proposition, it follows that the proposed consolidation may involve the city's assumption or guaranty of an obligation currently the responsibility of some other entity (*i.e.*, the pension fund's board of trustees), which may amount to an unconstitutional lending of credit.

I cannot, however, accept the proposition that the existing obligation to retired firefighters is not the city's. The constitution permits "*cities* [to] levy a tax ... from which there shall be created a Fund to pay Retirement Salaries and pensions to policemen and firemen...."⁴ While the fund thus created is administered and disbursed by a board of trustees rather than by city officials as such,⁵ city officials and employees serve on the board,⁶ which is required to report certain matters to city officials,⁷ and, absent other permitted arrangements, the fund is held by the city's treasurer, who is liable therefore under his oath and bond as city treasurer.⁸ A person aggrieved by a board's decision may appeal to the "circuit court of the county in which the *town or city liable for the claim* may be located."⁹

The foregoing provisions all suggest that, while the board is responsible for administering the fund, the obligation to retired firemen is ultimately the city's, not merely the board's. The fund arises principally from a city tax, and nothing in the law provides or even strongly implies that ownership of the fund, and ultimate responsibility for the liabilities to retirees that arise in connection with the fund,

(1917) (constitutional provision prohibits assumption of "any obligation for any purpose other than its own use" and "denies to [the governmental entities to which it applies] the right to permit another agency to use its credit...").

³ See generally Ark. Code Ann. § 24-11-801 (Repl. 2014).

⁴ Ark. Const. amend. 31 (emphasis added).

⁵ See Ark. Code Ann. § 24-11-801(b).

⁶ See Ark. Code Ann. § 24-11-801(a)(1), (2), (3).

⁷ See Ark. Code Ann. § 21-11-802(d)(1) (Repl. 2014).

⁸ See Ark. Code Ann. § 24-11-805(a)(1) (Repl. 2014).

⁹ Ark. Code Ann. § 24-11-815 (Repl. 2014) (emphasis added).

are vested solely in the board.¹⁰ In my view, it follows that there can be no unconstitutional lending of credit in connection with the proposed consolidation, because it will not involve the city's assumption or guaranty of another party's obligation.

This is not to say that the proposed consolidation will not change the nature or extent of the city's liabilities to retirees. It may have that effect.¹¹ But the proposed consolidation will not, in my opinion, constitute a lending of credit for purposes of the constitutional prohibition.¹²

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹⁰ With respect to the extent of a local fund's liabilities to retirees, the law provides that, "[s]hould the fund ... be insufficient to make full payment ... to all persons entitled thereto, then the fund shall be prorated among [them]..." Ark. Code Ann. § 24-11-807(b) (Repl. 2014).

¹¹ The law provides that a city may, by agreement with LOPFI, provide for LOPFI coverage of employees theretofore covered by a municipal plan similar in purpose to LOPFI. Ark. Code Ann. § 24-10-302(d) (Repl. 2014). I expect the proposed consolidation would proceed under this authorization. I cannot predict what the agreement between the city and LOPFI might provide with respect to the city's obligations following the consolidation.

¹² Your request also asks whether the proposed consolidation might involve an illegal exaction. The constitution provides that a citizen may bring suit "to protect the inhabitants [of a county, city, or town] against the enforcement of any illegal exactions whatever." Ark. Const. art. 16, § 13.

An illegal exaction is defined as any exaction that either is not authorized by law or is contrary to law.... Two types of illegal-exaction cases can arise under article 16, section 13: "public funds" cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent, and "illegal-tax" cases, where the plaintiff asserts that the tax itself is illegal.

Carnegie Pub. Library of Eureka Springs v. Carroll Cnty., 2012 Ark. 128, *4, 2012 WL 1036847.

As suggested by the quoted language, this constitutional provision does not, in and of itself, prohibit any particular application or payment of public funds or any particular type of tax. Rather, it provides a remedy when public funds have been, or are threatened to be, raised or applied in violation of some other legal standard. *See, e.g., Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.2d 378 (2001) (expenditures were consistent with article 12, section 5; "[t]herefore there is no illegal exaction under Art. 16, § 13"); and Op. Att'y Gen. 2005-205 ("[i]f certain political subdivisions are ... making ... contributions [to private, nonprofit corporations], I believe they are doing so in derogation of Ark. Const. art. 12, § 5 and the contributions might be challenged as illegal exactions" and "any payments [made in] violat[ion of a specified] statute [would] invite an illegal-exaction challenge"). It is my view, therefore, that article 16, section 13 will be implicated, and may provide a remedy, only if the proposed consolidation involves raising or spending public funds in ways that violate article 16, section 1, or some other legal standard apart from article 16, section 13.