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ATTORNEY GENERAL

Opinion No. 2024-056

April 10, 2024

The Honorable Sarah Huckabee Sanders
Governor of Arkansas
500 Woodlane Street
Little Rock, Arkansas 72201

Dear Governor Sanders:

I am writing in response to your request for my opinion about whether Arkansas's constitutional offices[1] are generally subject to the General Accounting and Budgetary Procedures Law (GABPL)[2] and A.C.A. § 25-8-106. You ask the following three questions:

1. Are constitutional offices "agencies" within the GABPL's general definition of "agencies," which is codified at A.C.A § 19-4-102(a)(1)(A)?

2. If not, which sections of the GABPL apply to constitutional offices?

3. Are constitutional offices subject to the requirements in A.C.A. § 25-8-106?

RESPONSE

Constitutional offices are not "agencies" generally subject to the GABPL for four reasons. First, the General Assembly usually is explicit if it intends to subject constitutional offices to regulation. Except for a few of its provisions, the GABPL does not explicitly apply to constitutional offices. Second, the provisions of the GABPL that explicitly apply to constitutional offices would not need to do so if constitutional offices were already generally subject to the GABPL. Third, the General Assembly has passed multiple pieces of legislation explicitly recognizing that constitutional offices are not generally subject to the GABPL. Fourth, if constitutional offices were generally subject to the GABPL, some of its provisions would likely be unconstitutional.

[1] For conciseness, I will use "constitutional offices" throughout this opinion when referring to constitutional offices and officers.

[2] A.C.A. §§ 19-4-101 to -2202.

Similarly, A.C.A. § 25-8-106 does not apply to constitutional offices. First, it does not explicitly identify constitutional offices as being subject to its regulations. Second, § 25-8-106 would be constitutionally suspect if it applied to constitutional offices.

DISCUSSION

Question 1: Are constitutional offices "agencies" within the GABPL's general definition of "agencies," which is codified at A.C.A. § 19-4-102(a)(1)(A)?

Constitutional offices are not included in the GABPL's general definition of "agencies" for four reasons.

First, the GABPL's general definition of "agencies" identifies a detailed list of covered entities ("all of [Arkansas's] agencies, boards, commissions, departments, and institutions"), but it does not include the terms "offices" or "officers."[3] This general definition applies to the GABPL "unless otherwise necessary."[4] It is thus the statutory definition that controls the scope of the word "agencies"; the purposes of the statute cannot be used to substitute others' judgment for the legislature's in how best to accomplish that purpose.[5]

As this office has long opined, when legislation enumerates a list of regulated entities, the regulation extends to constitutional offices only if they are specifically named or the list includes the term "offices" or "officers."[6] "Indeed, when the legislature has intended the term 'agency' to include the term 'office' with respect to a particular chapter or subchapter of the Code, it has specifically said so…."[7] The GABPL's general definition of "agencies" does not explicitly include the "constitutional offices."

Second, several subchapters and provisions of the GABPL explicitly apply to one or more constitutional offices, in addition to "agencies"; this would make little sense if

[3] A.C.A. § 19-4-102(a)(1)(A).

[4] *Id.*

[5] *See Mississippi Cnty. v. City of Blytheville*, 2018 Ark. 50, at 12–13, 538 S.W.3d 822, 830–31 (explaining that "ordinary meaning" controls when a statute is unambiguous and only if a statute is ambiguous will courts look go beyond a plain reading).

[6] Ark. Att'y Gen. Op. 93-146 (opining that when a statute applies to "any agency, institution, department, board or commission" but does explicitly apply to any "office," constitutional offices are not covered by the listed terms); *see also* Ark. Att'y Gen. Ops. 2019-046, 2002-176 (opining that when a statute uses "agency" without defining it or including it in a list of other covered entities, constitutional offices are covered only if the statutory context requires them to be covered).

[7] Ark. Att'y Gen. Op. 93-146.

constitutional offices were included in the general definition of "agencies."[8] For example, Subchapter 8 defines "[s]tate agency," in part, as "all…agencies…[and] offices."[9] Similarly, Subchapter 22 defines "[s]tate agency," in part, as "[e]very…office of state government whether executive, legislative, or judicial."[10] If the GABPL's general definition of "agencies" included constitutional offices, the addition of "offices" to the definitions in Subchapters 8 and 22 would be unnecessary.[11] That is particularly true for Subchapter 8, which includes "agencies" *and* "offices" as different regulated entities. If the word "agencies" included offices, Subchapter 8's addition of "offices" would be surplusage.[12]

Multiple other provisions of the GABPL also differentiate between a "state agency" and "a constitutional officer."[13] Again, if the word "agencies" subsumed constitutional offices, no distinction would be needed.

One might argue that a few provisions of the GABPL indicate that constitutional offices are included in the general "agencies" definition. One provision prohibits "constitutional officer[s]" from taking certain actions related to "his or her agency."[14] Similarly, in another subchapter, two provisions expressly exclude "constitutional officers" from a general use of "state agency."[15] While this office has opined that express exemptions from the general definition can support "[t]he plain meaning[] of the GABPL's" general definition of

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[8] *E.g., Rogers v. Ark. Dep't of Corr.*, 2022 Ark. 19, at 6, 638 S.W.3d 265, 269 ("It is a fundamental canon of construction that we may consider the text as a whole to derive its meaning….").

[9] A.C.A. § 19-4-801(2)(A). This statute proceeds to explicitly exempt some of the constitutional offices. A.C.A. § 19-4-801(2)(B) (excluding the Governor, among others, from the subchapter's definition of "state agency").

[10] A.C.A. § 19-4-2201(a)(3).

[11] *E.g., Steve's Auto Ctr. of Conway, Inc. v. Ark. State Police*, 2020 Ark. 58, at 6, 592 S.W.3d 695, 699 ("[W]e construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible.").

[12] *E.g., Stay Strong, Status Quo v. Bradford*, 2020 Ark. 331, at 9, 609 S.W.3d 367 ("According to the surplusage cannon of statutory construction, every phrase within a statute must be given meaning: 'The courts must lean in favor of a construction which will render every word operative, rather than one which may make some idle or nugatory.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)).

[13] A.C.A. § 19-4-903(b)(3)(A)(ii); *see also* A.C.A. § 19-4-202(a)(2) (differentiating between a "constitutional officer" and an "administrative head of [a] state agency").

[14] A.C.A. § 19-4-206(a)(1).

[15] A.C.A. §§ 19-4-607(a), -609(a). *Cf.* Ark. Att'y Gen. Op. 2011-040 (opining that institutions of higher education are "agencies" under the GABPL because the general definition explicitly includes "institutions" and because institutions of higher education were expressly exempt from the general definition 11 times throughout the GABPL).

"agencies,"[16] it cannot overcome the plain meaning. The GABPL's general "agencies" definition does not explicitly apply to constitutional offices, even though it includes an extensive list of regulated entities. The "ordinary and usually accepted meaning in common usage" of such an approach means that constitutional offices are not covered[17]; that is the norm for both the GABPL, as explained above,[18] and the entire Arkansas Code, as this office has long opined.[19] The GABPL should thus be read to apply to the constitutional offices only when "necessary," in the words of the GABPL.[20]

One might also point to A.C.A. § 19-4-904, which expressly exempts constitutional officers, to argue that "agencies" generally includes constitutional officers.[21] But those regulations don't apply to "agencies." Instead, the Chief Fiscal Officer of the State—the Secretary of the Department of Finance and Administration[22]—has authority to make certain travel-allowance procedures "for all *officers* and employees of the state government."[23] Thus, the constitutional officers needed to be exempted because they would otherwise be explicitly included.

Third, the General Assembly has recognized that constitutional offices are not generally subject to the GABPL. In 2019, the General Assembly made various changes to the GABPL, including adding certain budget requirements for constitutional offices.[24] In doing so, the legislature made clear that constitutional offices are not generally subject to the GABPL, saying "[i]t is not the intent of the General Assembly to":

- "Make the constitutional officers…state agencies for the purposes of state accounting and budgetary procedures";

- "Require the constitutional officers…to submit annual operations plans that are the same as the annual operations plans required for state agencies";

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[16] Ark. Att'y Gen. Op. 2011-040.

[17] Ark. Att'y Gen. Op. 93-146.

[18] *See also* A.C.A. § 19-4-405(a) (calling the Auditor of State an "office").

[19] Ark. Att'y Gen. Op. 93-146.

[20] A.C.A. § 19-4-102(a)(1)(A).

[21] A.C.A. § 19-4-904(a)(1)(A).

[22] A.C.A. § 19-1-201 ("The Secretary of the Department of Finance and Administration shall be the Chief Fiscal Officer of the State.").

[23] A.C.A. § 19-4-901 (emphasis added).

[24] Act 678 of 2019, § 4.

- "Apply the procurement laws…to the constitutional officers…to the extent that the procurement laws do not already apply"; or

- "Require legislative approval of any expenditure of an office…if such approval would conflict with the Arkansas Constitution."[25]

This position is nothing new. In 1967, the General Assembly passed a statute that is still on the books today, confirming that "the elected constitutional officers of the state…are exempt from…all or a part of the procedures set forth in…the General Accounting and Budgetary Procedures Law."[26] This provision's recognition that some constitutional offices are exempt from "all" of the GABPL confirms, like the 2019 counterpart, that the default rule for reading the GABPL is to exclude constitutional offices. If the exemptions were referring only to express exemptions, the 1967 statute would make no sense because no state entities are given an explicit, blanket exclusion from the GABPL.

Fourth, if the GABPL generally applied to the Governor, it would be constitutionally suspect, potentially violating the separation of powers.[27] The Arkansas Constitution divides "[t]he powers of the government…into three distinct departments": the legislative, the executive, and the judicial.[28] "No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances…expressly directed or permitted" by the constitution.[29] "The supreme executive power" is "vested" in the Governor.[30]

Some provisions of the GABPL (if they applied generally to constitutional offices) would make the Governor subordinate to a legislatively created executive official. For example, under the GABPL, agencies must report to the Secretary of the Department of Finance and Administration[31] certain proposed budget-classification transfers.[32] The Secretary then

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[25] *Id.* § 1(b).

[26] A.C.A. § 25-8-102(b).

[27] *Cf. Alpe v. Fed. Nat'l Mortg. Ass'n*, 2023 Ark. 58, at 2, 662 S.W.3d 650, 652 ("Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality. If possible, we will construe a statute so that it is constitutional." (citations omitted)).

[28] Ark. Const. art. 4, § 1.

[29] Ark. Const. art. 4, § 2.

[30] Ark. Const. art. 6, § 2.

[31] A.C.A. § 19-1-201 ("The Secretary of the Department of Finance and Administration shall be the Chief Fiscal Officer of the State.").

[32] A.C.A. § 19-4-522(c)(2); *see also* A.C.A. § 19-4-1103(a) (requiring "each executive head of a state agency" to follow certain "procedures established by the Chief Fiscal Officer of the State"); A.C.A. § 19-4-

makes the ultimate decision to allow the transfer "if in his or her opinion it is in the best interest of the state."[33] If the Governor had to take direction from the Secretary, the Governor would no longer be exercising the "supreme executive power" over the regulated classification transfers—the Secretary would be. As this office has opined in a similar situation, the legislative branch cannot rearrange the constitutionally mandated hierarchy of the executive branch by subordinating the Governor to a legislatively created executive official.[34] Such legislation would likely violate the separation of powers by taking the constitutionally vested "supreme executive power"—even if only a part of it—from the Governor and giving it to another executive official.

In sum, the GABPL's general definition of "agencies" does not include constitutional offices. Instead, the word "agencies" should only be read to apply to constitutional offices, as the GABPL puts it, if "necessary."[35] This is confirmed by the statutory text, the General Assembly's repeated confirmations, and the potential unconstitutionality that would result if the GABPL did generally apply to constitutional offices.

Question 2: If constitutional offices are not generally subject to the GABPL, which sections of the GABPL apply to them?

Although constitutional offices are not subject to every aspect of the GABPL, there are several provisions that do apply. For example, Subchapter 21 specifically applies to certain expenses of the seven elected constitutional officers.[36] Subchapter 22 also deviates from the general definition to include "[e]very…office of state government whether executive, legislative, or judicial" related to the review of certain grants.[37] And since 2019, the cash funds of certain constitutional offices have been "budgeted and proposed expenditures approved by enactments of the General Assembly."[38]

In short, the GABPL will apply to constitutional offices if the relevant provisions provide that they apply either: (1) to one or more specific constitutional offices or (2) generally to "offices" or "officers."

1503 (giving the Chief Fiscal Officer of the State unilateral authority to transfer and sell state agencies' property and equipment).

[33] A.C.A. § 19-4-522(c)(2).

[34] Ark. Att'y Gen. Op. 91-020.

[35] A.C.A. § 19-4-102(a)(1)(A).

[36] A.C.A. § 19-4-2101.

[37] A.C.A. § 19-4-2201(a)(3).

[38] A.C.A. § 19-4-817.

Question 3: Are constitutional offices subject to the requirements in A.C.A. § 25-8-106?

Constitutional offices are not subject to the marketing-and-redistribution process ("M&R") under A.C.A. § 25-8-106. Under § 25-8-106, only "state agencies, boards, commissions, departments, and colleges and universities are required…to utilize" M&R.[39] Like the GABPL's general definition of "agencies," this enumerated list does not identify "offices" or "officers" as being required to use M&R. As explained above, when a statute identifies an enumerated list of regulated entities and does not include the terms "office" or "officer," constitutional offices are not regulated.[40]

Also like the analysis above, if the Governor were required to use M&R, the statute would likely violate the separation of powers.[41] Under § 25-8-106, the Office of State Procurement and its director control M&R. Thus, if the Governor were required to use M&R, he or she would be made subordinate to another executive-branch official. The Arkansas Constitution, however, places "[t]he supreme executive power" in the Governor,[42] not the State Procurement Director—an appointee of an appointee.[43] This would likely violate the separation of powers.[44]

Although two sentences in a 23-page Attorney General opinion from 1992 indicate that constitutional offices must utilize M&R, that statement was not supported by any reasoning.[45] Instead of analyzing the law, the opinion merely cites two statutes—A.C.A. §§ 19-4-1503 and 25-8-106—neither of which are applicable. As explained above, § 25-8-106 does not apply to constitutional offices as a matter of text, and if it did, there would be serious constitutional issues with it. Section 19-4-1503 of the GABPL does not require constitutional offices to use M&R either. In fact, it doesn't require *any* state agency to use

[39] A.C.A. § 25-8-106(b)(2)(A).

[40] Ark. Att'y Gen. Op. 93-146 (opining that when a statute applies to "any agency, institution, department, board or commission" but does explicitly apply to any "office," constitutional offices are not covered by the listed terms); *see also* Ark. Att'y Gen. Ops. 2019-046, 2002-176 (opining that when a statute uses "agency" without defining it or including it in a list of other covered entities, constitutional offices are covered only if the statutory context requires them to be covered).

[41] *Cf. Alpe*, 2023 Ark. 58, at 2, 662 S.W.3d at 652 ("Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality. If possible, we will construe a statute so that it is constitutional." (citations omitted)).

[42] Ark. Const. art. 6, § 2.

[43] A.C.A. § 19-11-216(a)(2) ("The State Procurement Director shall be appointed by the Secretary of the Department of Transformation and Shared Services."); A.C.A. § 25-43-1503(b) ("The secretary [of the Department of Transformation and Shared Services] shall be appointed by the Governor, subject to confirmation by the Senate, and shall serve at the pleasure of the Governor.").

[44] Ark. Att'y Gen. Op. 91-020.

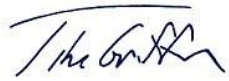
[45] Ark. Att'y Gen. Op. 91-416.

M&R. Instead, it is directed only at the Secretary of the Department of Finance and Administration, as the State's Chief Fiscal Officer: "The Chief Fiscal Officer of the State…may…[s]ell surplus property and equipment of any agency at a reasonable fair value thereof as authorized by § 25-8-106."[46] Thus, § 19-4-1503 does not regulate state agencies or constitutional offices.

In sum, constitutional offices are not required to use M&R under § 25-8-106 or § 19-4-1503. The text is clear and is confirmed by the potential that the law would be unconstitutional if applied to constitutional offices.

Deputy Attorney General Noah P. Watson prepared this opinion, which I hereby approve.

Sincerely,



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[46] A.C.A. § 19-4-1503(2).