

ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 2024-EC-001 Issued July 19, 2024

The Arkansas Ethics Commission (the “Commission”) has received a written advisory opinion request from Joshua Alexander, the Director of the City of Sherwood Office of Economic and Community Development. Therein, Mr. Alexander provides the following information:

1. A resident-led local option initiative is currently taking place in Sherwood regarding the “wet/dry” status of one-half of the City of Sherwood.
2. The original boundaries of the City of Sherwood have been fully “wet” since the repeal of prohibition. However, over the years the City of Sherwood has annexed territory of a now defunct township that voted itself “dry” in 1956. This area has been and will remain dry until such time as 38% of the registered voters in the impacted area sign a petition for the issue to be placed on a general election ballot for a formal vote.
3. A group of Sherwood residents began this process at the beginning of 2024. To date, no elected official has participated in the signature collection process despite their desires to be involved as this is a crucial issue impacting the economic growth of the city. They are operating under the premise that, in accordance with state law, they cannot participate in the signature collection process. The theory is, that as an elected official, they are always representing the city with no set office hours and that their participation would by default create municipal endorsement of the issue.

Mr. Alexander posed the following questions:

1. *Is it legal for elected officials to participate in a local option signature collection process while not in performance of official duties?*
2. *Is it legal for elected officials to openly support a local option signature collection process while not performing official duties?*

3. *If 1 and 2 are legal, what documentation process needs to take place to show that the collection of signatures or endorsement is being done on personal time?*

It should be noted at the outset that the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission refrains from opining about the permissibility of a specific past event.

1. *Is it legal for elected officials to participate in a local option signature collection process while not in performance of official duties?*

The statutory provision applicable to the first question presented by Mr. Alexander is Ark. Code Ann. § 7-1-103(a)(2)(B), which provides as follows:

(B) It shall be unlawful for any public servant, as defined in § 21-8-402, to circulate an initiative or referendum petition or to solicit signatures on an initiative or referendum petition in any public office of the state, county, or municipal governments of Arkansas or during the usual office hours or while on duty for any state agency or any county or municipal government in Arkansas.

Ark. Code Ann. § 7-1-103(a)(2) applies to public servants. Ark. Code Ann. § 21-8-402(18) defines the term “public servant” to mean all public officials, public employees, and public appointees. Ark. Code Ann. § 21-8-402(17)(A) defines the term “public official” to mean a legislator or any other person holding an elective office of any governmental body, whether elected or appointed to the office, and shall include such persons during the time period between the date they were elected and the date they took office. Accordingly, municipal public officials are subject to the prohibitions set forth in Ark. Code Ann. § 7-1-103(a)(2).

Ark. Code Ann. § 7-1-103(a)(2)(B) can be viewed as having three (3) separate prohibitions against public servants circulating initiative or referendum petitions or soliciting signatures on an initiative or referendum petition. The first prohibition is a restriction on where a public servant may circulate petitions or solicit signatures. It is unlawful for public servants to circulate an initiative or referendum petition or to solicit signatures on an initiative or referendum petition in any public office of the state, county, or municipal governments of Arkansas regardless of whether or not the petitions are circulated during regular office hours or the public servant is on duty.

The other two (2) prohibitions set forth by Ark. Code Ann. § 7-1-103(a)(2)(B) are restrictions on when public servants may circulate initiative or referendum petitions or solicit signatures on an initiative or referendum petition. The first temporal prohibition is “during the usual office hours”. While aldermen may not have office hours, an alderman would violate the statute if he or she circulated initiative or referendum petitions or solicited signatures while a city council or committee meeting took place. A city attorney, city clerk, or mayor will probably have specified office hours.¹ If a public official circulated initiative or referendum petitions or solicited signatures during his or her usual office hours without taking vacation or other personal leave, the public official has violated the statute.

The Commission addressed a similar prohibition applicable to public servants with respect to a prohibition on spending time or labor during usual office hours toward the campaign of any other candidate for office² in Advisory Opinion No. 2002-EC-005. Therein, the Commission concluded that the prohibition does not apply to situations in which a public servant has taken vacation or other personal leave to devote time or labor to campaign activities.

The second temporal prohibition is when the public servant is “on duty for any state agency or any county or municipal government in Arkansas.” The term “on duty” is not defined in Ark. Code Ann. § 7-1-101 et seq. The *Oxford New Desk Dictionary and Thesaurus*) defines “on duty” to mean “engaged in one’s work.”³ Some duties for elected municipal officials are set forth in statute, but some may be much less formalized. For example, Ark. Code Ann. § 14-43-401(a)(2) provides that a mayor shall keep an office at some convenient place in the city, to be provided by the city council, and shall keep the corporate seal of the city in his or her charge. There is no statute requiring it, but a mayor often appears in his or her official capacity at events such as a ribbon cutting for a new business or a chamber of commerce event. In both examples, the mayor would be “on duty.”

There are certainly times outside usual office hours where an elected official is on duty. A city council meeting held after hours likely would be attended by the mayor, the members of the city council, the city clerk, and the city attorney. In many Arkansas cities,

¹ The City of Sherwood’s website lists the City Clerk’s office hours as 7:30 a.m.- 4:30 p.m. Monday-Friday. The website does not list hours for the Mayor or the City Attorney. Search results from google.com reflected that Sherwood City Hall is open 8:00 a.m.- 5:00 p.m. Monday-Friday.

² Ark. Code Ann. § 7-1-103(a)(2)(A) provides that it shall be unlawful for any public servant, as defined in §21-8-402, to devote any time or labor during usual office hours toward the campaign of any other candidate for office or for the nomination to any office.

³ The primary rule of statutory interpretation is to give effect to the intent of the legislature. *Mississippi Cnty. v. City of Blytheville*, 2018 Ark. 50, 538 S.W.3d 822. Courts first construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* When the language is plain and unambiguous, we determine the drafter’s intent from the ordinary meaning of the language used. *City of Helena-West Helena v. Williams*, 2024 Ark. 102, CV-23-575 (Ark. Jun 06, 2024).

mayors are frequently called on to appear in their official capacities at civic or charitable events. On the other hand, if an elected official leaves the office and goes home for dinner, he or she is not on duty. Ultimately, an elected municipal official is responsible for establishing that he or she is off duty prior to circulating or soliciting signatures on an initiative or referendum petition.

2. *Is it legal for elected officials to openly support a local option signature collection process while not performing official duties?*

There is no law under the Commission’s jurisdiction that prohibits a public official from openly supporting a local-option ballot question. Ark. Code Ann. § 7-1-111 appears to directly address this question. That statute was established by Act 312 of 2013 and falls outside the Commission’s jurisdiction. Pursuant thereto, an “elected official” or “a person appointed to an elective office” is permitted to expend or permit the expenditure of public funds to support or oppose a ballot measure.

However, Ark. Code Ann. § 7-1-111(b) provides that “[i]t is unlawful for a public servant or a governmental body to expend or permit the expenditure of public funds to support or oppose a ballot measure.” With regard to this prohibition, it is noted that the term “public funds” is defined to mean “funds, moneys, receivables, grants, investments, instruments, real or personal property, or other assets, liabilities, equities, revenues, receipts, or disbursements belonging to, held by, or passed through a governmental body[.]” In addition, the term “public servant” is defined to mean “an individual who is (i) Employed by a governmental body; (ii) Appointed to serve a governmental body; or (iii) Appointed to a governmental body.”

That definition goes on to state that “‘Public servant’ does not include: (i) An elected official; or (ii) A person appointed to an elective office.” Ark. Code Ann. § 7-1-111 further provides that the statute does not: limit the freedom of speech of a public servant or governmental body, including without limitation verbal expressions of views supporting or opposing a ballot measure; prohibit a governmental body from expressing an opinion on a ballot measure through the passage of a resolution or proclamation; prohibit the incidental use of state resources by a public servant, including without limitation travel costs, when speaking at an event in which a ballot measure is discussed if the subject matter of the speaking engagement is within the scope of the official duties and responsibilities of the public servant; or prohibit the dissemination of public information at a speaking engagement and the incidental use of state resources in the analysis and preparation of that public information if the subject matter of the public information is within the scope of the official duties and responsibilities of the public servant.

Ark. Code Ann. § 7-1-111 provides that a violation of the prohibition contained therein is a Class A misdemeanor, with the exception that a public servant who is found guilty or pleads guilty or nolo contendere to such a violation is ineligible to hold any office,

employment, or appointment in a governmental body and that if a public servant is found guilty or pleads guilty or nolo contendere to such a violation while employed by a governmental body, he or she shall be removed from employment immediately.

Because Ark. Code Ann. § 7-1-111 falls outside the Commission's jurisdiction, municipal public servants are encouraged to seek advice on compliance with the statute from the municipality's city attorney or the Arkansas Attorney General.

3. *If 1 and 2 are legal, what documentation process needs to take place to show that the collection of signatures or endorsement is being done on personal time?*

There is no formal documentation process set forth in Arkansas statutes or the Commission's rules with respect to an elected official circulating or soliciting signatures on an initiative or referendum petition. If a city has passed an ordinance setting forth a formal vacation or personal leave policy applicable to elected officials, then the elected official would take vacation or personal leave under that policy.

In the absence of such a policy, the elected official should take steps to make clear that he or she will not be in the office and is not on duty during the period he or she is circulating or soliciting signatures on an initiative or referendum petition. Those steps could include informing city personnel in writing or electronically that he or she will be off duty for a specified period. The elected official could memorialize the time off duty on an office calendar. If the elected official has an office voicemail or email address with an "out of office" function, it could be activated. If the elected official is soliciting signatures, he or she will likely be speaking with citizens. Discussing city concerns while collecting signatures may pull that elected official back "on duty". The elected official should make clear that he or she is not appearing in his or her official capacity.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

ARKANSAS ETHICS COMMISSION

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