

CV-20-164

IN THE ARKANSAS SUPREME COURT

MICHAEL McCARTY, et al

APPELLANT

v.

ARKANSAS STATE PLANT BOARD, et al

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS**

HONORABLE TIMOTHY D. FOX

APPELLANTS' REPLY BRIEF

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ARGUMENT

In opposition to Appellants' claims, the Appellees have failed to identify a single case where an Appellate Court anywhere in this Nation has upheld a Legislative delegation of public appointment power to a private industry group. Nevertheless, the Appellees ask that this Court rule that the Arkansas General Assembly can grant public power to private individuals and interests. The Appellants request that this Court reverse the Circuit Court below and uphold the constitutional principal that all political power is inherent in the people and maintain that public political power must remain in the public domain.

While the State Plant Board argues that the Legislature may delegate appointment powers and that this Court has previously affirmed the delegation of appointment powers *to other branches of state government*, Appellees miss the very significant point that all of the cases cited by Appellees, for the proposition that the legislature may delegate its constitutional powers, deal with delegation to **other branches of state government**, not to private entities. This is a case where the Legislature has taken a constitutional power to appoint members of a State Agency and gifted this power to private industry associations, with no State oversight of these associations' appointment process. The Arkansas Code provision which allows private entities to appoint the majority of voting members of the Arkansas State Plant Board is unconstitutional as it provides for a delegation of Legislative

power to private industry, in violation of the nondelegation doctrine which has long been recognized by Courts across this Nation.

I. THE STATUTORY APPOINTMENT PROCESS FOR MEMBERS OF THE ASPB VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Appellees argue that Arkansas Code § 2-16-206 does not violate separation of powers principles because the statute includes “appropriate standards” and “reasonable guidelines” which private industry associations must follow while they are exercising public appointment powers. Appellees’ Counsel cites two (2) primary cases in support of this argument, *Hobbs v. McGehee*¹ and *Abraham v. Beck*.² The *Hobbs* and *Abraham* cases do not stand for the proposition that the legislature can delegate its appointment power to private entities, if the legislature provides “appropriate standards” or “reasonable guidelines” for the appointment process. Instead, these cases stand for the proposition that “discretionary power [as to a law's execution] may be delegated by the legislature **to a state agency** as long as reasonable guidelines are provided.” *Abraham v. Beck*, 2015 Ark. 80, 14–15, 456 S.W.3d 744, 754 (2015) (emphasis added).

The *Hobbs* and *Abraham* cases do involve a separation of powers issues, but the issue in both *Hobbs* and *Abraham* was whether the legislature, by granting broad

¹ *Hobbs v. McGehee*, 2015 Ark. 116 (2015).

² *Abraham v. Beck*, 2015 Ark. 80 (2015).

statutory decision-making powers to certain state agencies, had granted “unbridled discretion” to the Executive branch of State Government. The *Hobbs* Court also held that the legislature “can delegate some discretionary authority to the other branches” such as “the Legislature may delegate to executive officers the power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute is, by its terms, made to depend.” *Hobbs v. McGehee*, 2015 Ark. 116, 8, 458 S.W.3d 707, 713 (2015). The problem for the State Plant Board, in the present case, is that neither *Hobbs* nor *Abraham* say that the legislature may delegate appointment power to private entities.

The take-away from both *Hobbs* and *Abraham* is that “discretionary power may be delegated by the legislature to a state agency as long as reasonable guidelines are provided.” *Hobbs v. McGehee*, 2015 Ark. 116, 9, 458 S.W.3d 707, 713 (2015) (Emphasis Added). In conclusion, these cases are not relevant to the question of whether the Legislature can delegate its appointment power to private entities, as these cases never address such facts. In addition, the cases cited by the Appellees do not identify, define, or describe any standards or factors for this Court to consider, in deciding whether a delegation of legislative power to private interests is permissible under the Arkansas Constitution.

II. THE ARKANSAS SUPREME COURT HAS NEVER TAKEN THE POSITION THAT THE LEGISLATURE MAY DELEGATE ITS APPOINTMENT POWER TO PRIVATE INTERESTS.

Appellees argue to this Court that it “has already rejected the proposition that rule-making powers may not be delegated to representatives of private industry groups.” (See Appellees Brief at Arg. 8, lines 4-5). This is an erroneous statement of Law, and the Appellees cite no case law in support of this statement. The Appellees suggest that the Supreme Court’s decision in *Leathers v. Gulf Rice Arkansas* provides support for the constitutionality of the statute in question, but a review of the Case proves otherwise. *Leathers v. Gulf Rice Arkansas*, 338 Ark. 425 (1999). The Court, in *Leathers*, actually held that Act 344 and the former Arkansas Code Annotated § 2-20-511 was an unconstitutional delegation of legislative authority and the State’s taxing power, as it delegated the public taxing power to private individuals (rice producers) and allowed private individuals the power to determine whether rice buyers should be assessed a 1.35 cents per bushel “tax” on rice purchased. The Supreme Court’s decision in *Leathers* provides support for the Appellants’ case as the Supreme Court determined that Act 344, which granted private individuals a public power, was unconstitutional. A ruling by this Court that the Legislature’s delegation of public power to private individuals, who make up the private industry associations that presently appoint the majority of voting members of the State Plant Board, is consistent with this Court’s decision in *Leathers*.

The Supreme Court explained in *Leathers* that Act 344 of the Legislature authorized private individuals (rice producers) to authorize a monetary assessment on rice buyers and producers. *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 428, 994 S.W.2d 481, 482 (1999). As in the present case, the Attorney General’s office represented the Rice Research and Promotion Board, a State Agency created by statute at Ark. Code Ann. § 2-20-505, and the Board argued that, because the Legislature had provided significant guidelines on the use of its authority, the legislature has not unlawfully delegated its authority. *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 429, 994 S.W.2d 481, 483 (1999). However, the Supreme Court explicitly stated, “We do not agree.” *Id.* The Court found that “Act 344 is an unconstitutional delegation of legislative authority.” *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 433, 994 S.W.2d 481, 486 (1999).

Furthermore, the Appellees assertion that the *Leathers* Court took no issue with the composition of the Rice Research and Promotion Board- comprised of representatives of private interests- is misleading to the Court. The composition of the Rice Research and Promotion Board was not an issue before the Court, the Legislature did not enact a statute allowing private interests to appoint the members of the Rice Research and Promotion Board, and the members of the Rice Research and Promotion Board were not appointed by private business associations.

The power to appoint officers of State Agencies may not be limited to any one branch of State Government. But, as the Supreme Court of Arkansas has long held “it is a prerogative of the people” and should not be delegated to private interests. In *Cox v. State*, our Supreme Court explained “in the United States the general power to appoint officers is not inherent in the executive or in any other branch of the government. **It is a prerogative of the people, to be exercised by them or that department of the state to which it has been confided by the Constitution.**”

Cox v. State, 72 Ark. 94, 78 S.W. 756, 756 (1904). The *Cox* Court, in 1904, recognized that public appointment power is vested in the people and their government as provided for in the Constitution. There is no support for the idea that our Government may give this power to private individuals or entities. The Arkansas Attorney General’s Office has even explicitly stated “private organizations may not be given the authority to appoint board members.” See Ark. Att’y Gen. Op. No. 2005-213, *available at* 2005 WL 2822920. In the case at hand, the Legislature has, by statute, delegated the people’s appointment power away from the public and the departments of the State. Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation of appointment power to private business associations.

III. THE ARKANSAS CONSTITUTION DOES, IN FACT, LIMIT THE LEGISLATURE'S POWER, SPECIFICALLY REQUIRING THE PUBLIC POWER SHALL REMAIN IN THE PUBLIC DOMAIN.

The State Plant Board is incorrect in its argument that the Arkansas Constitution does not limit legislative delegation of its power. Specifically, the Arkansas Constitution provides, “**all political power is inherent in the people** and government and is instituted for their protection, security and benefit; **and they have the right to alter, reform or abolish the same**, in such manner as they may think proper.” See Article 2, § 1 of the Arkansas Constitution (emphasis added). Consequently, the Legislature cannot give public power to private business associations or entities that are not subject to the supervision of the public or their elected officials.

Article 5 and Article 2 of the State Constitution require that all public power remain in the *public* domain. The Arkansas Legislature derives its authority from Article 5 of the Constitution, which is limited by the section of Article 2 referenced above, and the legislature has no constitutional authority to delegate its *public* power to private interests. Fundamental principles of our State Constitution require that the people control their government, and the appointment process outlined in Arkansas Code § 2-16-206 has robbed the regulated citizenry of this State of public power.

IV. ARKANSAS CODE § 2-16-206 CONTAINS NO “APPROPRIATE STANDARDS” WHICH COULD CURE THE UNCONSTITUTIONAL DELEGATION OF AUTHORITY PROSCRIBED THEREUNDER.

Even if this Court were to decide that the Arkansas Legislature may delegate its constitutionally granted public powers to private interests so long as the Legislature provided “appropriate standards and guidelines,” Arkansas Code § 2-16-206 would fail this test. What “reasonable guidelines” or “standards” does Arkansas Code § 2-16-206 place on the private entities that are currently appointing the voting members of the State Plant Board? Unlike the *Hobbs* and *Abraham* cases cited above, the statute contains no list of “standards” for a plant board member, nor is there a list of “factors” that must be considered when a private entity determines who it will appoint to the State Plant Board.

In fact, the Arkansas Oil Marketers Association, the Arkansas Agricultural Aviation Association, and the Arkansas Forestry Association are each currently appointing a member to the State Plant Board with absolutely no statutory conditions on who these organizations appoint. Arkansas Code Annotated § 2-16-206(a). The only statutory requirement placed on appointments by multiple other private associations are that appointees be “actively engaged” in the business represented by each private industry association (seed dealer, nurseryman, pest control operator, etc). *Id.* This “actively engaged” in the business requirement is unclear and undefined. Arkansas Code Annotated § 2-16-206(a). The Arkansas Legislature has

not placed “reasonable guidelines” on appointees or any discernible “standards” for appointees to the Plant Board. As a result, Arkansas has a plant board selected by a few vested industry groups, which does not adequately represent Arkansas farmers such as the Appellants herein.

V. THE *DE FACTO* OFFICER DOCTRINE IS NOT APPLICABLE TO THIS CASE AS IT IS NOT A “COLLATERAL PROCEEDING” RELATING TO THE AUTHORITY OF THE MEMBERS OF THE STATE PLANT BOARD.

Contrary to the argument of the Appellees, the *De Facto* Officer doctrine is not applicable to this proceeding as it is a direct action against the state Plant Board to determine the constitutionality of a statutory appointment process. As the Appellees point out in their brief, the *De Facto* Officer Doctrine stands for the proposition that “the acts of an officer *de facto* cannot be questioned collaterally.” *Appleby v. Belden Corp.*, 22 Ark. App. 243, 247-248 (1987). The present proceeding is not a “collateral” attack on the constitutionality of the appointment of members of the state Plant Board. Instead, this is a direct proceeding where the Appellants requested a declaratory judgment challenging the constitutionality of a State Statute and directly alleged that the State Plant Board’s approval of rules regarding dicamba based herbicides were made upon unlawful procedure in violation of the State Constitution.

The *De Facto* Officer doctrine has come into play in cases where an individual or entity is charged with violating an administrative rule or state law. Our Courts have held that such defendants may not challenge the authority of prosecutors in the criminal proceedings against them, as these challenges are “collateral” meaning “secondary, subsidiary, subordinate, i.e., related to the main matter under consideration but not strictly a part thereof.” *State v. Roberts*, 255 Ark. 183, 186-187 (1973). Our Courts have held that a private individual may have standing to assert that an officer’s acts are not lawful but that “the defendant was required to challenge his authority in a direct proceeding, rather than in the criminal proceeding against him.” *Aydelotte v. State*, 85 Ark. App. 67, 75 (2004).

The present case is not a collateral proceeding and the *de facto* officer doctrine does not bar their action, nor does it bar suits seeking to enjoin state agency actions that are illegal, unconstitutional, or ultra vires. Arkansas citizens have a right to bring suits seeking to enjoin illegal and unconstitutional action by the state. *Hostler v. Dennison*, 2020 Ark. App. 255, 4 (2020). In addition, the United States Supreme Court has directed that the *de facto* officer doctrine should not be applied to cases where the appointment of a public officer violates constitutional requirements, as is the current case before this Court. *Ryder v. United States*, 515 U.S. 177, 182-83 (1995). The *De Facto* officer doctrine is not applicable to the present action.

CONCLUSION

The Supreme Court of Arkansas appears to be faced, for the first time, with the question of whether the Legislature may delegate its public appointment power to private business entities. No other jurisdiction in this nation has approved such an absolute delegation of public power. The Appellants now ask that this Court preserve the public appointment power for the public and the branches of Government established by the Constitution of this State. The Appellants ask that this Court reverse the Circuit Court's determination denying their Motion for Judgment on the Pleadings and enter an Order finding that Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation of legislative appointment power in violation of the nondelegation doctrine and the Arkansas Constitution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, J. Grant Ballard, do hereby certify that I have sent via the state Courts' E-Filing System this 13th day of July, 2020, a true and complete copy of the forgoing to the following:

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/s/Grant Ballard _____
J. Grant Ballard

Case Name: *Michael McCarty, et al. vs. Arkansas State Plant Board*

Docket Number: CV-20-164

Title of Brief: Appellants' Brief

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted and served on opposing counsel an unredacted PDF document that complies with the Rules of the Supreme Court and Court of Appeals. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the Court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free from computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document: None.

/s/ Grant Ballard
(Signature of filing party)

J. Grant Ballard
(Printed name)

Ark Ag Law, PLLC
(Firm)

July 13, 2020
(Date)