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STATE OF ALABAMA

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Honorable Roger H. Bedford, Jr.  
Member, State Senate  
District No. 6  
P. O. Box 669  
Russellville, AL 35653

Elections - Military Affairs -  
Sheriffs - Offices and Officers  
- Counties

Sheriff may be activated for  
service in Alabama Army  
National Guard.

If conditions of Code of  
Alabama 1975, § 36-8-2 are met,  
sheriff who is activated for  
service in Alabama Army  
National Guard prior to  
entering upon discharge of his  
duties and prior to taking oath  
of office would be entitled to  
protections of Code of Alabama  
1975, § 36-8-1, et seq.

In the event sheriff is  
activated under conditions set  
forth in § 36-8-2, § 36-8-3(a)  
provides for appointment by  
governor of temporary acting  
official.

Amendment No. 255 to  
Constitution of Alabama of  
1901, also known as "Posey  
Amendment," would not affect  
application of § 36-8-1, et  
seq., to questions raised.

Dear Senator Bedford:

This opinion is issued in response to your request for an  
opinion from the Attorney General.

QUESTIONS

1. Is an elected sheriff deployable and/or activated in the Alabama Army National Guard for service?
2. When and where does the sheriff-elect take office if he/she is deployed and would he/she have to be in his/her home county to be sworn into office?
3. Does the sheriff-elect have to have a replacement if he/she is activated and, if so, who would it be and how is it determined?
4. In Winston County, does the "Posey Amendment" affect the process any differently?

FACTS AND ANALYSIS

Code of Alabama 1975, § 36-8-2 provides in pertinent part:

"The office of any official . . . of any county . . . of the state of Alabama who has heretofore entered or who shall hereafter enter the military service of the United States, whether voluntarily or as a result of being called, drafted or requested to do so or not, at a time when there is an existing state of war between the United States of America and any other country or when a state of national emergency has been declared to exist by the president of the United States shall not be deemed vacated by reason of such service, nor shall such service be deemed an acceptance of or the holding of an office of profit under the United States within the purview of section 280 of the Alabama Constitution of 1901."

Moreover, § 36-8-1 defines the term "military service of the United States" to include "any reserve or auxiliary component" of the U.S. Army, Navy, Air Force, Marine Corps or Coast Guard.

In light of the wording of § 36-8-2, supra, it is clear that a county official such as a sheriff may be deployed and/or activated for service in the Alabama Army National Guard.

Before answering your next questions, it is necessary to address the threshold issue of whether there is currently "an existing state of war between the United States . . . and any other country" or whether "a state of national emergency has been declared to exist by the president of the United States."

At the present time there has been no formal declaration of war and the president has not declared that a state of national emergency exists concerning the Persian Gulf crisis.

We note that in an opinion rendered under date of December 29, 1950, appearing in Quarterly Report of the Attorney General, Vol. 61, p. 81, this office stated that the emphasis of what is presently codified as Code of Alabama 1975, §§ 36-8-1, et seq., was "placed on securing to a county official his right to a public office when he entered the service of his country at any time in the discharge of a duty of citizenship."

We further stated, "[v]iewing retrospectively the situation existing at the time of the . . . statute in question, it is not difficult to conclude that such was the letter and spirit of the statute, and that no technical application of the term 'an existing state of war' should militate against the rights sought to be secured by that enactment."

In light of our holding in said prior opinion, it is the opinion of this office that a person who has been elected sheriff ~~and~~ who has been activated in the Alabama Army National Guard ~~during~~ the Persian Gulf crisis would be entitled to the ~~protections~~ afforded under Code of Alabama 1975, § 36-8-1, et seq.

With regard to your second question, we note that Code of Alabama 1975, § 36-2-10 provides as follows:

"All county officers and officers chosen for any portion or district of a county shall be authorized to exercise the duties and functions of the office to which they are elected after they shall have received certificates of their election as provided by law whether they have received their commissions or not, but such officers shall first give the bond, if any, required by law and take the oath of office prescribed by the Constitution."

Thus, in response to your inquiry as to when a sheriff takes office, based on § 36-2-10, it is our opinion that a sheriff takes office after he has received a certificate of election and after he has given any required bond and has taken the oath of office prescribed by the state Constitution.

With regard to the second part of your second question, we have found no constitutional or statutory provision which requires that a sheriff would have to take the oath of office in his home county. Article XVI, Section 279 of the Constitution of Alabama of 1901 provides the particular oath to be taken by a sheriff prior to entering upon the execution of the duties of office, and while that section states that said oath may be administered "by the presiding officer of either house of the legislature, or by any officer authorized by law to administer an oath," said section does not specify where the oath must be taken.

We further note that § 36-4-4 provides as follows:

"Judges of other inferior courts and all other officers whose general duties are confined to a single county must, unless otherwise provided, file such oath and certificate in the office of the judge of probate of their respective counties."  
(Emphasis added.)

In light of the foregoing constitutional and statutory provisions, it is the opinion of this office that the sheriff's oath may be administered by any officer authorized by law to administer an oath and, thereafter, the oath shall be filed in

the probate judge's office in the county where he was elected. It is further our opinion that the oath would not have to be administered in the sheriff's home county.

We would further point out that Code of Alabama 1975, § 36-8-6 provides that, "[t]his chapter shall apply to all officials heretofore or hereafter elected at any special or general election, whether or not they have entered upon the discharge of their duties." Hence, if the conditions of § 36-8-2 are met, an elected sheriff who is activated for service in the Alabama Army National Guard prior to entering upon the discharge of his duties and prior to taking the oath of office would be entitled to the protections afforded under Code of Alabama 1975, §§ 36-8-1, et seq.

In response to your third question, Code of Alabama 1975, § 36-8-3(a) provides as follows:

"(a) The officer or board who has the power to appoint to vacancies in such office or, if there is no such officer or board having the power to fill vacancies provided by law, then the governor, upon being advised in writing by an elected or appointed official of the state of Alabama that such official has or will enter the service of the United States and desires to avail himself of the privileges and immunity granted by this chapter or upon failure of such official to so advise the appointing authority within a period of 30 days after his entry into the service, shall have the power to appoint a temporary acting official who shall be clothed with all the powers, privileges and duties regularly exercised by the official in whose place he is acting. Such temporary acting official shall receive the same compensation, payable in the same manner and from the same source as the official in whose place he is serving."

Pursuant to § 36-8-3 the governor would have the power to appoint a temporary acting official to serve during the sheriff's military service.

With respect to your last question, the "Posey Amendment" to which you refer is Amendment No. 255 to the Constitution of Alabama of 1901 and reads as follows:

"The legislature shall not pass a special or local law affecting Winston county or any city, town, village, district, or other such political subdivision of the county, unless the operation of such law shall be approved by a vote of the duly qualified electors of such county, city, town, village, district, or other political subdivision of the county, at an election held for such purpose, in the manner prescribed by such law."

It is the opinion of this office that Code of Alabama 1975, §§ 36-8-1 through -6 would not be a "special or local law affecting Winston County or any city, town, village, district, or other such political subdivision of the county," and hence, the Posey Amendment would not come into play.

#### CONCLUSION

A sheriff may be activated for service in the Alabama Army National Guard.

If the conditions of Code of Alabama 1975, § 36-8-2 are met, a sheriff who is activated for service in the Alabama Army National Guard prior to entering upon the discharge of his duties and prior to the time of taking the oath of office would be entitled to the protections of Code of Alabama 1975, § 36-8-1, et seq.

In the event a sheriff is activated under the conditions set forth in § 36-8-2, § 36-8-3(a) provides for the appointment by the governor of a temporary acting official.

Amendment No. 255 to the Constitution of Alabama of 1901, also known as the "Posey Amendment," would not affect the application of § 36-8-1, et seq., to the questions raised.

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I hope this sufficiently answers your questions. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

DON SIEGELMAN  
Attorney General  
By:



JEAN WILLIAMS BROWN  
Assistant Attorney General

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