

OFFICE OF THE ATTORNEY GENERAL



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Honorable W. Mack Price
Probate Judge
Barbour County
P. O. Box 558
Eufaula, AL 36027

Constables - Elections -
Officers and Offices - Civil
and Political Rights

The office of constable should not have been on the ballot in 1990; thus, the election is void. A quo warranto proceeding may be brought to prevent a person from holding office unlawfully.

Dear Judge Price:

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

QUESTIONS

Is Mr. Baker holding the office of constable illegally, or is his election valid?

If holding office illegally, what authority, if any, does he have and what procedures, if any, need to be followed to have him removed from office?

FACTS AND ANALYSIS

Your request states:

In 1990 Dean Allen Baker qualified to be a candidate for constable in Barbour County in the election to be held last year. His name appeared on the ballot, and he was elected without opposition. I have now discovered that the office of constable was not to be on the ballot for the 1990 election, and I have discovered that Mr. Baker had been found guilty of a felony.

Code of Alabama 1975, § 17-2-4, provides:

"Members of county commissions, one county treasurer in all counties having a county treasurer and one constable for each election precinct shall be elected on the first Tuesday after the first Monday in November, 1980, and every fourth year thereafter."

This office has previously held that constables shall be elected on the first Tuesday after the first Monday in November 1980 and every four years thereafter. Therefore, the office of constable should not have been on the ballot in the 1990 elections. Opinions to Honorable Tom Burleson, Probate Judge, under date of May 17, 1990; to Honorable Glen Browder, Secretary of State, under date of May 26, 1987; and to Honorable William B. Duncan, Probate Judge, Lauderdale County, under date of April 12, 1982. In the opinion to Honorable Glen Browder, cited above, we held that since the office of constable should not have been on the ballot in 1986 the constable's election is void and no commission should issue. Similarly, the election of the constable in Barbour County in 1990 is void. Mr. Baker should be advised of this fact and, if he refuses to vacate the office, a quo warranto proceeding may be brought to prevent him from unlawfully holding office. A quo warranto proceeding may be filed pursuant to Code of Alabama 1975, § 6-6-591 which states:

"(a) An action may be commenced in the name of the state against the party offending in the following cases:

"(1) When any person usurps, intrudes or unlawfully holds or exercises any public office, civil or

military, any franchise, any profession requiring a license, certificate or other legal authorization within this state or any office in a corporation created by the authority of this state;

"(2) When any public officer, civil or military, has done or suffered any act by which, under the law, he forfeits his office; or

"(3) When any association, or number of persons, acts within this state as a corporation without being duly incorporated.

"(b) The judge of the circuit court may direct the action to be commenced when he believes that any of the acts specified in subsection (a) of this section can be proved and it is necessary for the public good, or it may be commenced without the direction of such judge on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the action is brought.

"(c) An action under this section must be commenced in the circuit court of the county in which the acts are done or suffered or, if to try the right to a corporate office, in the circuit court of the county in which the corporation has its principal office or, if it has no principal office, in any county in which it does business." (Emphasis added.)

With respect to Mr. Baker's alleged felony conviction, we note, without determining whether Mr. Baker is ineligible for this reason, that a person may be held ineligible to and disqualified from holding office pursuant to Code of Alabama 1975, § 36-2-1(a)(3) which states:

"(a) The following persons shall be ineligible to and disqualified from holding office under the authority of this state:

. . .

"(3) Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery or any other crime punishable by imprisonment in the state or federal penitentiary and those who are idiots or insane; . . ."

Mr. Baker has no authority to act as constable since his election is void; however, in a prior opinion to Honorable William O. Walton, Jr., Attorney for Chambers County Commission, under date of November 17, 1988, this office stated that under the theory of quantum meruit the county commission should pay constables' fees for papers served in connection with district and circuit court proceedings during the time a person mistakenly believed himself to be a legally elected constable. (Copy attached for your review.)

CONCLUSION

The office of constable should not have been on the ballot in 1990; thus, the election is void. A quo warranto proceeding may be brought to prevent a person from holding office unlawfully.

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

Sincerely,

JIMMY EVANS
Attorney General
By:


JAMES R. SOLOMON, JR.
Chief, Opinions Division

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Attachment

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