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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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November 5, 2004

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Oaths and Affirmations – Candidates –
County Commissioners – Elections – Term
of Office - Help America Vote Act of 2002

The term of office of newly elected Mobile County Commissioners commences at 12:01 A.M. on the first Tuesday following their election as provided in section 11-3-1(b) of the Code of Alabama. The newly elected commissioners may take the oath of office and file the oath, along with any required bond, and assume the office before the county election canvassing board certifies the election results. If there is significant doubt as to the validity of a commissioner's election, however, it might be advisable for that commissioner to abstain from acting on official business before the Commission until the canvassing board certifies the results of the election.

Gentlemen:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. For county and certain district offices, is it legally permissible for a candidate, who appears to have received the most votes for a particular office, to take the oath of office and file same along with any required bond and assume such office prior to the county election canvassing board certifying the election results?

2. Are the existing Mobile County Commissioners or are the newly elected Mobile County Commissioners legally entitled to hold office from 12:01 a.m. on the 7th day next following the November 2, 2004, general election until the canvass of the vote is complete and the declaration of results of the election issues on the 2nd Friday following the election?

FACTS AND ANALYSIS

During its 2003 Regular Session, the Alabama Legislature passed Act 2003-313, implementing the requirements of the federal Help America Vote Act of 2002 ("HAVA"), 42 U.S.C.A. §§ 15301-15545 (West 2004). See 2003 Ala. Acts No. 2003-313. One of the provisions of Alabama law amended by this act was section 17-14-1 of the Code of Alabama.

Section 17-14-1, as amended, provides as follows:

On the second Friday next after the election, at the hour of 12:00 noon, the returning officer of the county, in person or by deputy, and the judge of probate and the clerk of the circuit court shall assemble at the courthouse; . . . and, in the presence of such other persons as choose to attend, the board shall make a correct statement from the returns of the votes from the several precincts of the county of the whole number of votes given therein for each officer, and the person to whom such votes were given.

ALA. CODE § 17-14-1 (Supp. 2004). Section 17-14-2 of the Code of Alabama further provides as follows:

Immediately after ascertaining the results of an election for county officers, including members of the House of Representatives of the Legislature, the board of supervisors must make in writing a public declaration of the result, stating the name of each officer elected and the office to which he was elected. The declaration must be signed by at least two of the supervisors and must be published by filing the original in the office of the judge of probate and by posting a copy thereof at the courthouse door. Said original certificate shall be recorded by the probate judge in a book to be provided for the purpose; and said record, or a duly certified copy thereof, shall constitute prima facie evidence of the result of said election and the declaration thereof as provided by law.

ALA. CODE § 17-14-2 (1995).

Section 11-3-1 of the Code of Alabama provides as follows:

(a) Unless otherwise provided by local law and as otherwise provided in subsection (b), there shall be in every county a county commission, composed of the judge of probate, who shall serve as chairman, and four commissioners, who shall be elected at the time prescribed by law and hold office for four years until their successors are elected and qualified.

(b) *Beginning with the next term of office for each county commissioner, the term shall expire on the first Monday following the day of the general election at which the successor to that office is elected. Thereafter each county commissioner shall hold office from 12:01 A.M. of the first Tuesday following his or her election and until his or her successor is elected and qualified.* This subsection shall apply to all counties and may not be altered by local law.

(c) Any other provision of law to the contrary notwithstanding, *each county commission shall meet on the first Tuesday following the election of any one*

of its number whose term commences on that day pursuant to the provisions of subsection (b). The meeting shall be in lieu of any meeting of the county commission required by law to be held within the same calendar week and shall be in all respects and for all purposes a regular meeting of the county commission. The county commission shall not meet following the election of any one of its number until the meeting provided by this subsection, unless there is a declared emergency.

An emergency may be declared for the purposes of this subsection upon a unanimous vote of the entire membership of the county commission.

ALA. CODE § 11-3-1 (Supp. 2004) (emphasis added).

Act 2003-313 amended section 17-14-1 to delay canvassing for county elections from “Friday next after the election” [ALA. CODE § 17-14-1 (1995) (amended 2003)] to “the second Friday next after the election” so that provisional ballots could be counted. You assert that this conflicts with section 11-3-1(b) because the amendment requires canvassing to occur after the county commissioners have taken office on the first Tuesday after the election. The provisions of section 11-3-1 were not amended by Act 2003-313.

The fundamental rule of construction is to ascertain and give effect to the intent of the Legislature in enacting the statute. *Ex parte Ala. Dept. of Mental Health and Mental Retardation*, 840 So. 2d 863 (Ala. 2002); *Gholston v. State*, 620 So. 2d 719 (Ala. 1993). Where a statutory pronouncement is distinct and unequivocal, there remains no room for judicial construction, and the clearly expressed intent of the Legislature must be given effect. *Ex parte Holladay*, 466 So. 2d 956 (Ala. 1985); *Dumas Bros. Mfg. Co. v. Southern Guar. Ins. Co.*, 431 So. 2d 534 (Ala. 1983). “If a statute is susceptible of two constructions, one of which is workable and fair, and the other unworkable and unjust, the court will assume that the legislature intended that which is workable and fair.” *Ex parte Hayes*, 405 So. 2d 366, 370 (Ala. 1981).

Section 11-3-1(b) plainly states that the term of each existing county commissioner “*shall expire* on the first Monday following the day of the general election at which the successor to that office is elected.” ALA. CODE § 11-3-1(b) (Supp. 2004) (emphasis added). Each newly elected “county commissioner *shall hold office* from 12:01 A.M. of the first Tuesday following his or her

election and until his or her successor is elected and qualified.” *Id.* (emphasis added). As the Supreme Court of Alabama has observed, “[t]he word ‘shall’ is considered presumptively mandatory unless something in the character of the provision being construed requires that it be considered differently.” *Hornsby v. Sessions*, 703 So. 2d 932, 939 (Ala. 1997) (citing 3 Norman J. Singer, *Sutherland Statutory Construction*, § 57.02, p. 4 (1992)); see also Opinion to the Honorable Bob Riley, Governor, Alabama Governor’s Office, dated December 18, 2003, A.G. No. 2004-042, at 3 (citing *Hornsby*). The use of “shall” in consecutive sentences in section 11-3-1(b) only underscores the mandatory nature of its terms, and nothing “in the character of the provision” suggests otherwise.

The Supreme Court held long ago that “when the legislature employs the word election, they mean the act of casting and receiving the ballots, the day and time of voting.” *State ex rel. Harris v. Tucker*, 54 Ala. 205, 210 (1875); see also *Ex parte So. Bldg. Code Cong.*, 282 Ala. 523, 526, 213 So. 2d 365, 367 (1968) (“The primary meaning of the word ‘election’ is choice. It relates to the time when the ballots are cast.”); *Vickery v. King*, 281 Ala. 303, 308, 202 So. 2d 148, 153 (1967). In *Tucker*, the Court rejected the argument that election must mean the date on which a sheriff received his certificate of election from the Secretary of State rather than the date of voting. See 54 Ala. at 208.

The fact that the terms of county commissioners would begin before official canvassing of the votes might seem unusual, but it is no more unusual than legislators’ terms “commenc[ing] on the day after the general election at which they are elected,” as provided in section 46 of article IV of the Constitution of Alabama. See *Opinion of the Justices No. 305*, 442 So. 2d 42, 45 (Ala. 1983) (“[T]he terms of the members of the Legislature elected on November 8, 1983, commenced on November 9, 1983.”). Given the judicial interpretation of the term “election,” and the constitutional requirement that legislators’ terms begin before canvassing can occur, this Office concludes that the term of office of newly elected Mobile County Commissioners commences at 12:01 A.M. on the first Tuesday following their election as provided in section 11-3-1(b). The newly elected commissioners may take the oath of office and file the oath, along with any required bond, and assume the office before the county election canvassing board certifies the election results. If there is significant doubt as to the validity of a commissioner’s election, however, it might be advisable for that commissioner to abstain from acting on official business before the Commission until the canvassing board certifies the results of the election.

Honorable Don Davis
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Page 6

CONCLUSION

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I hope this opinion answers your questions. If this Office can be of further assistance, please contact Charles B. Campbell of my staff.

Sincerely,

TROY KING
Attorney General
By:


BRENDA F. SMITH
Chief, Opinions Division

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