

Filed in Probate Cou.

MAY 28 2008

Alan L. King, Judge of Probate

IN THE PROBATE COURT OF JEFFERSON COUNTY, ALABAMA

DAVID WHEELER, JEFFERSON )  
COUNTY REPUBLICAN )  
PARTY and ANDREW A. SMITH )

Petitioners, )

v. )

ROBERT YARBROUGH, JEFFERSON )  
COUNTY DEMOCRATIC )  
PARTY, RON YARBROUGH and )  
ANDREW BENNETT )

Respondents. )

CASE NUMBER: -200744 - -

PETITION REGARDING BALLOT AND OFFICE OF ASSISTANT TAX ASSESSOR

Comes now the Jefferson County Republican Party ("Republican Party"), David Wheeler and Andrew A. Smith (collectively, the "petitioners") and file this petition to request: (1) the Probate Judge place Mr. Smith on the November, 2008 general election ballot for the Office of Assistant Tax Assessor for Bessemer (including all terms of said office that are available during said election) or, in the alternative (2) to determine that the election for the remainder of the current term of said office not be had because Local Act 1957-429 is ineffective to end the appointed term of Mr. Smith. As grounds for this petition, the petitioners state:

**PARTIES**

1. David Wheeler is the chairperson of the Jefferson County Republican Party. Mr. Wheeler has authorized the action of the Republican Party in regards to the petition. Mr. Wheeler timely submitted a certification of candidates for certain offices for the November 2008 election including a certification for the "office[]" of assistant tax assessor. His certification is attached as Exhibit 1.

2. Andrew A. Smith was appointed by the Governor to the unexpired term of Assistant Tax Assessor of Jefferson County for Bessemer ("Assistant Tax Assessor"). Mr. Smith filed a declaration of candidacy form for the "office" of Assistant Tax Assessor with the Republican Party. His form is attached as Exhibit 2 and was submitted as an attachment to Mr. Wheeler's certification to the Probate Judge.

3. Robert Yarbrough is the Chairperson of the Jefferson County Democratic Party and the Jefferson County Democratic Party may be served by service upon Mr. Yarbrough.

4. Ron Yarbrough is an announced candidate of the Democratic Party for the unexpired term of Assistant Tax Assessor.

5. Andrew Bennett is an announced candidate of the Democratic Party for the office of Assistant Tax Assessor.

#### **FACTS**

6. The office of Assistant Tax Assessor became vacant and the Governor appointed Mr. Smith to the unexpired term of such office under his authority in, among other places, Ala. Code § 36-9-17. The current term expires in, or about, October, 2009. Therefore an election for the full term to begin at such time is to be conducted in November, 2008.

7. The petitioners understand that the Office of Probate Judge has determined that under Local Act 1957-429, that an election must also be held for the remainder of the unexpired term of the Assistant Tax Assessor.

8. On or about February 6, 2008, the Office of Probate Judge issued a list of the "Offices Up For Election 2008 Election Year" and listed the office of Assistant Tax Assessor one time. This document is attached as Exhibit 3.

9. On or about April 7, 2008, David Wheeler timely certified Andrew Smith as a candidate for the "office[]" of Assistant Tax Assessor. This certification is attached as Exhibit 1. Before such certification, Mr. Smith timely submitted a form declaring himself a candidate for the "office" of Assistant Tax Assessor. Such declaration was attached to the certification form submitted by Mr. Wheeler and is attached hereto as Exhibit 2.

10. Upon information and belief, on or about the same date, Robert Yarbrough submitted a certification of Ron Yarbrough as the candidate for the unexpired term of Assistant Tax Assessor and Andrew Bennett as the candidate of the Democratic Party for the full term of the office of Assistant Tax Assessor.

11. As discussed below, the certification by Mr. Wheeler complied with the certification statute and was effective to certify Mr. Smith as the Republican candidate for the office of Assistant Tax Assessor for the November, 2008 election, including any terms available for such election.

12. Mr. Wheeler submitted a second letter on or about May 23, 2008 to the Probate Judge's office to make clear that the certification was for all available terms of the Office of Assistant Tax Assessor. (Attached as Exhibit 4).

13. Based upon discussions with the Office of Probate Judge and based upon newspaper reports, the petitioners understand that there is uncertainty about whether the Office of Probate Judge will place the name of Mr. Smith on the November, 2008 ballot as a candidate for all terms available for the office for the Assistant Tax Assessor on the November, 2008 ballot.

#### **STATUTORY DUTY OF JUDGE OF PROBATE TO LIST ON BALLOT**

14. It is the responsibility for the Judge of Probate to place each name on the ballot that has been certified – such as Mr. Smith. This is a ministerial duty. Ala.Code 17-13-5(b) requires the party to certify to the "judge of probate the names of all candidates for nomination to county offices..." Ala.Code 17-13-5(d) then states that "judge of probate of each county shall have the ballots prepared for the primary election."

15. The Judge of Probate is then required to prepare the ballot for the general election. Ala.Code 17-9-3(b) states that the "judge of probate shall then prepare the ballot with the names of each candidate qualified..."

16. Therefore, it is the responsibility of the Judge of Probate to place the names that have been certified onto the ballot and this petition requests that the Judge of Probate do exactly what the statute requires.

**CLAIM FOR RELIEF 1 – List Mr. Smith On Ballot For Office of Assistant Tax Assessor For All Terms Available in November, 2008 Election**

17. The petitioners request that the Probate Judge list Mr. Smith on the November, 2008 ballot for all terms available for the office of Assistant Tax Assessor. As grounds for this relief, petitioners state:

18. **Statute Only Requires Certification Of “Offices” Not Each “Term Of Office” and the Republican Party Complied With Such Statute:** The Republican Party has complied with the certification statute. This statute only requires that it certify a candidate for an “office.” The statute does not require a certification for each “term”.

19. A contrary construction would read the words “term of office” into the certification statute when those words are not there. When the Legislature wanted to use the word “term,” it has done so – and it did not in § 17-13-5. Ala. Code § 17-13-5(b) states:

... The county party chair shall, not later than 5:00 P.M. 55 days prior to the date of the primary election, certify to the judge of probate the names of all candidates for nomination to county offices or election to county party offices.

20. The certification statute does not require the Republican Party to certify candidates for a specific term – it requires such certification for “offices.” The Local Act which first established this office used the word “term” to indicate a particular term of office and used the word “office” to indicate the position that was being established – which is completely consistent with § 17-13-5 which intentionally uses the word “office” and not the word “term.” Local Act 65-186 (authorizing Assistant Tax Assessor for Bessemer and stating that he “shall hold office for the same term as the Tax Assessor” and further noting that the “office of Deputy Tax Assessor in the Bessemer Division ... is hereby abolished”) (emphasis added).

21. **Statutory Construction Rules Support the “Office” not the “Term of Office”**

**Construction of § 17-13-5:** Statutory construction rules are clear – when the legislature has used different words (particularly when it has used different words in related statutes), it is presumed to have meant different meanings. For instance, the Alabama Supreme Court recently wrote:

The use of different terms within related statutes generally implies that different meanings were intended.” 2A Norman Singer, Sutherland on Statutes and Statutory Construction § 46:06, at 194 (6th ed. 2000) (footnotes omitted). We presume that the use of two different words indicates that the legislature intended the two words be treated differently.

*Trott v. Brinks, Inc.*, 972 So. 2d 81, 85 (Ala. 2007).

22. When the Legislature intended a law to apply to a “term of office”, it uses those words – something it has done frequently – but something it did not do here. Had the Legislature wanted to require a certification for each “term,” it certainly could have included such a

requirement – and the Legislature frequently refers to a “term” when it intends to refer to a “term of office” rather than an office. *E.g.*, Local Act 84-604 (“Those deputy or assistant county officials servicing in the branch offices in the City of Bessemer ... shall ... be elected ... each of such officials shall at the time of his election and **during his term of office** ...” and then referring to the Assistant Tax Assessor) (emphasis added); Local Act 75-458 (same); Local Act 78-607(same); Local Act 89-1009 (referring to the salary of the Assistant Tax Assessor and stating “Effective at the beginning of the next **term of office**”) (emphasis added); Ala. Const. Art. IV, § 96.01 (legislature may not increase or decrease salary “**during any term**” of tax assessor but legislature may provide for “alteration **of the offices** of tax assessor”) (emphasis added); Local Act 65-629 (referring to Jefferson County ... “as to the time of the general election to **fill such offices**. This Action shall apply to the **offices** held by the following ... Tax Collector; the Tax Assessor ... the deputy of any of the foregoing officers ... The general elections **of such offices** shall be held ... next preceding the expiration of the **terms of the persons then holding said offices.**”) (emphasis added); Local Act 96-541 (referring to salary of assistant tax assessor “Effective at the beginning of the **next term of office...**”) (emphasis added); Ala. Code § 11-3-44 (statute on County Commissioners referring to how to fill a “**vacant office during a term**”) (emphasis added); Ala. Code § 11-43B-17 (providing authority to establish “offices”); A.G. Opinion No. 92-00237 (April 7, 1992) (trustee to university board “**holds office until the expiration of his or her term and holds over beyond the expiration until his or her successor is elected ...**”) (emphasis added); Ala. Code § 36-9-17 (“Vacancies in all state, county

or municipal offices shall be filled by appointment of the Governor for the unexpired term of such office, unless otherwise provided by law ...”) (emphasis added).<sup>1</sup>

23. **Statutory Construction - Greater (“Office”) Includes the Lessor (a specific “term” of that “office”)**: Another statutory construction rule that supports the “office” not the “term” construction of § 17-13-5 is the rule that the greater (the word “office”) includes the lessor (a particular “term” of that “office”). As the Alabama Supreme Court just stated last term, “the greater typically includes the lesser.” *Federated Mut. Ins. Co. v. Vaughn*, 961 So. 2d 816, 819 (Ala. 2007).

24. **“Office” not “Term” Construction Supported By Actions of Jefferson County Election Officials**: Construing § 17-13-5 to require certification of an “office” not each “term”, is consistent with the statements of Jefferson County Election Officials previously to the Republican Party wherein election offices listed the “Office” of Assistant Tax Assessor once – because there is one office of Assistant Tax Assessor and because there is only a requirement for certification of an “Office” not each “term”. The listed stated:

#### COUNTY OFFICES

- Assistant Tax Assessor, Bessemer – 6r  
o Karen Tucker

25. **“Office” not “Term” Construction Supported by Statutory Declaration Requirement**. § 17-13-5(a) states “candidates for nomination or election to a county office shall

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<sup>1</sup> These long line of statutes and local acts would not have needed to include the words “term” if “office” meant the same thing. It has always been Alabama law that a Court must construe statutes “to give effect to every word, phrase, clause and sentence of the act.” *E.g. Ex parte Uniroyal Tire Co.*, 779 So.2d 227, 233 (Ala. 2000). Likewise, it is the Court’s duty “to construe a statute so that no part will be inoperative, superfluous, void, or insignificant.” *Id.*

file their declaration with the county party chair not later than 5:00 P.M. 60 days before the date of the primary election.” Again, the statute does not require a candidate to file a separate declaration for each term of office. It merely requires one declaration for an office.

26. **Certification And Qualifying Form Were For The “Office” That Was On The “2008 Republican Primary” – Not a Specific “Term” of Such Office:** Here, the candidate and the Republican Party made clear that the qualification and certification was for the office – not for only one term of the office. Here, the certification stated:

“Listed below are the candidates that qualified for the June 3, 2008 Republican Primary and **the offices sought**.... Andrew A. Smith, Asst. Tax Assessor.” (emphasis added).

27. The Republican Party certified for the “office” of “Asst. Tax Assessor.” The certification for this office was “for the June 3, 2008 Republican Primary.” The “June 3, 2008 Republican Primary” included both terms of this office.

28. The Candidate’s qualifying form was also attached to the certification. The form stated that he wished to be a candidate “for the 2008 Republican nomination (or election) for the **office of Assistant Tax Assessor.**” (emphasis added).

29. Further, the qualifying form explains that the candidate should “Describe office with completeness” – and Mr. Smith did so – he described the “office” of Assistant Tax Assessor. Clearly, the candidate intended to qualify as a candidate for the “office” and intend all available terms that were part of the “2008 Republican nomination.”

30. **Qualifying And Certification Methods Are Within Party’s Discretion – Provided They Do Not Violate State Law Therefore Party May Choose To Certify For Office Rather Than Each Term Of Office:** It has long been the law that each political party

has the discretion to determine its own qualifications and procedures for qualifications for its nominees. This is part of its First Amendment right of association and has recently been endorsed by the Alabama Supreme Court. *Alabama Republican Party v. McGinley*, 893 So.2d 337, 346 - 7 (Ala. 2004) (political party “has full right, power and authority to fix and prescribe the political and other qualifications of its own members and to determine who shall be entitled and qualified to be candidates...” “very broad discretion a political party has to, ‘in its own way,’ determine who is qualified to be a candidate. The only caveat ... is that ... cannot ‘run afoul of some statutory or constitutional provision.’”).

31. Here, the Republican Party chose to certify a candidate for the “office” of assistant tax assessor. The Republican Party might have required a separate candidacy form for each term; the Republican Party might have certified separately for each term of that office – but it did not. It had the right to certify for an entire office – rather than each term. The Republican Party takes no position on the apparent decision of the Democratic Party to certify candidates for particular terms of the office of Assistant Tax Assessor.

32. **Intent Of Candidate, Party And Legislature – Certification For “Office” Not For Specific “Terms Of Office”:** This plain language construction of the statute meets the commonsense intent of § 17-13-5. It would be the rare instance that a candidate only wished to run for an unexpired term of an office – but not wish to run for the full term. It should certainly be assumed that the Legislature did not intend such a strange result and instead intended the default position under § 17-13-5 to be that the certification is for every term of the office that is available for election.

33. This intent is particularly clear under the facts that are present here -- where the candidate is the current holder of the office. It would be bizarre to assume that the candidate, the Party or the State Legislature, intended that the candidate be in office, then take 10 months off the job, and then reassume the position. While the voters might choose this result, it would make no sense that the candidate, the Party or the State Legislature intended this result to be the default.

34. **No Basis For County To Disregard Party Choice Or Assign Candidate:** The County is required to honor the certification by the Republican Party of Mr. Smith for election to the “office” of Assistant Tax Assessor. A contrary result would mean that the County was choosing for the Republican Party – and choosing for Mr. Smith which “term” that he should be a candidate for – despite the Republican Party’s clear statement that he was a candidate for the “office” not particular terms of that office.

35. **Compliance With Intent Of Statute:** Case law is clear that compliance with the intent and purpose of the certification statute is sufficient – something that is clearly present here. There is no requirement that the “term” be specified – either in the wording of the certification statute or in its purpose. *E.g., Dipple v. Devine*, 218 A.D.2d 918 (N.Y.3d Dept. 1995) (description of office sought was sufficient because it did not have a reasonable probability of deceiving or confusing signers of petition for candidate); *State ex. rel. Cofall v. Bd. of Election of Cuyahoga County*, 198 N.E.2d 459 (Ohio 1964) (same reasoning and result where office name not specific); *Korman v. Strohm*, 545 N.Y.S.2d 655 (Sup. 1989) (same result based upon same situation); *Stevenson v. County Officers Electoral Bd.*, 373 N.E.2d 1043 (Ill.3d 1978) (same result); *Marsh v. Haw*, 526 P.2d 161 (Ariz. 1974) (same).

36. Alabama case law is the same. *E.g., White v. Knight*, 424 So.2d 566, 569 (Ala. 1982) (citing and quoting § 17-16-86 (now 17-13-86) that certifications by parties in connection with primaries “shall be made so as to get the nominee on the ballots for the general election in November” and holding that indicated the “overall intent of the legislature” that if strict construction of the primary statutes would “thwart the basic and underlying purpose of the pertinent statutes, which is to get the candidates on the November ballots” then the statutes were to be construed to be directory rather than mandatory) (emphasis in the original by the Court).

WHEREFORE, PREMISES CONSIDERED, the petitioners request that the Probate Judge place Mr. Smith on the November, 2008 general election ballot for the Office of Assistant Tax Assessor for Bessemer (including all terms of said office that are available during said election) as per the certification by the Republican Party.

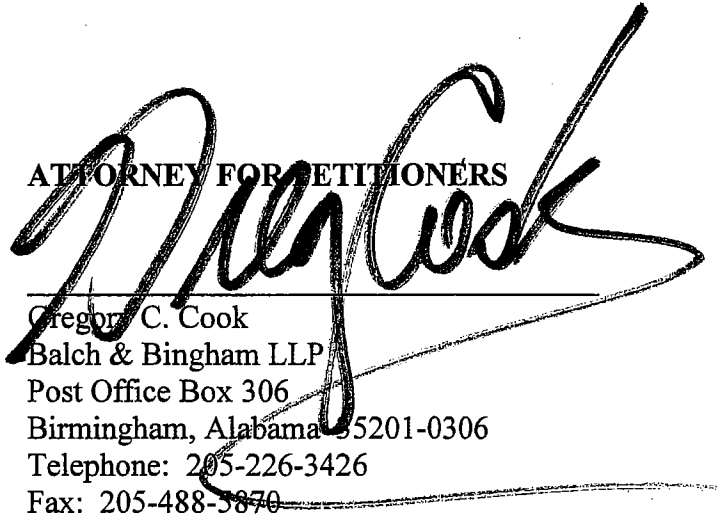
**CLAIM FOR RELIEF 2 – Remove the Unexpired Term From the November, 2008 Election Ballot**

37. In the alternative, the petitioners request that the unexpired term of the Assistant Tax Assessor be removed from the ballot. As grounds for this relief, the petitioners state:

38. Under *Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988) and subsequent cases, no election is necessary for the remainder of the unexpired term of Assistant Tax Assessor because such appointment has been made by the Governor’s office and no local act can avoid a statute of general application. See Ala. Code § 36-9-17 (providing such authority to the Governor).

WHEREFORE PREMISES CONSIDERED, the petitioners request that the unexpired term of the Assistant Tax Assessor be removed from the ballot.

ATTORNEY FOR PETITIONERS

A large, stylized handwritten signature in black ink, appearing to read "Gregory C. Cook". The signature is written over a horizontal line and extends across the contact information below.

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