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OPINION NO. 2017-14

OFFICE OF THE GOVERNOR;
FORFEITURE OF OFFICE;
COUNTY OFFICIAL - CONSTABLE;

Quo warranto is not the exclusive remedy to challenge the authority of a county official to hold office. Because a constable is not a state officer, his right to hold a public office, after having failed to satisfy the requirements of NRS 258.007, may also be challenged pursuant to NRS 283.440.

The Honorable Brian Sandoval
Governor, State of Nevada
State Capitol Building
101 N. Carson Street
Carson City, NV 89701

Dear Governor Sandoval:

By letter dated September 29, 2017, you have requested an opinion from the Office of the Attorney General, under NRS 228.150, on one question:

QUESTION

What legal mechanisms exist by which a county may remove a constable or other official who has failed to fulfill the statutory requirements of office?

BACKGROUND

A constable in a township whose population is 100,000 or more, when located in a county whose population is 700,000 or more, must be certified as a

category II peace officer within one year after the date on which the constable commenced his or her term of office or appointment, unless the Peace Officers' Standards and Training Commission (POST), for good cause shown, grants an extension of time not to exceed 6 months. When the constable of such a township fails to become POST certified, the board of county commissioners may declare a forfeiture of the office. NRS 258.007, 289.550. Your question concerns the legal process by which a county must formalize or adjudicate the forfeiture of office. In this case, a district court has concluded that the constable may not be removed from office except by way of a *quo warranto* action filed at the request of the Governor and prosecuted by the Attorney General pursuant to NRS 35.030. The county in question has now requested the Governor to direct that the Attorney General file a *quo warranto* action to remove the constable from office.

SUMMARY CONCLUSION

Quo warranto is not the exclusive remedy to challenge the authority of a county official to hold office. Because a constable is not a state officer, his right to hold a public office, after having failed to satisfy the requirements of NRS 258.007, may also be challenged pursuant to NRS 283.440.

ANALYSIS

An action in *quo warranto* is an action directed against a person who usurps or unlawfully holds a public office, or against a public officer who does or suffers an act which, by the provisions of law, works a forfeiture of the office. NRS 35.010. *Quo warranto* proceedings originated at common law, but the right to commence an action in *quo warranto* has since been codified at NRS Chapter 35. As codified, *quo warranto* is used at the prerogative of the government with few exceptions.¹

¹ The Attorney General is one of several persons who are expressly authorized to bring an action in *quo warranto*. Other persons who may bring an action are those who claim a right to hold, maintain, or assume a given public office when that right is disputed or contested. *See State ex rel. McMillan v. Sadler*, 25 Nev. 131, 58 P. 284 (1899). Here, our office has been informed that the constable has already filed an action that seeks to adjudicate whether the forfeiture statute is valid and enforceable. Although it is not styled in the nature of an action in *quo warranto*, it will effectively resolve any dispute concerning the constable's authority to continue to hold

It has been argued that *quo warranto* is the exclusive means of challenging a county officer's right to hold office. Although cited as authority for this proposition, *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), is not on point. *Heller* stands for the simple proposition that the separation of powers doctrine bars the exercise of *quo warranto* powers as a means to remove a legislator from his or her position in the legislature. *Id.* at 463-64, 93 P.3d at 751. In *Heller*, the Secretary of State had filed a petition for writ of mandamus, and, in dicta, the Court said the proper vehicle to challenge a legislator's title to public office is a writ of *quo warranto*. However, the Court did not hold that an action in *quo warranto* is the *exclusive* means by which to challenge a person's right to hold public office.

In fact, the Legislature has provided additional means to challenge the authority of an individual to hold public office. In 1909, the Legislature passed "an act providing for the removal from office of public officers for malfeasance or nonfeasance in office," now codified at NRS 283.440.² The statute provides in pertinent part that "[any] person who holds any office in this State and who refuses or neglects to perform any official act in the matter and form prescribed by law, may be removed pursuant to this section." Although the statute does not apply to judges, impeachable state officers, or state legislators, any person may make a certified complaint against a constable who has refused or neglected to perform his official duties as prescribed by law. Upon receipt of such a complaint the court will issue an order to show cause to consider the charges of the complaint. NRS 283.440(2).

Both NRS Chapter 35, which addresses actions in *quo warranto*, and NRS 283.440 provide methods to enforce a right that existed in the common law, namely the right of the public to ensure that public officers are qualified and fulfilling their duties under the law. A statute creating a method of enforcing a right which existed before the statute's enactment is regarded as cumulative rather than exclusive of preexisting remedies. *Ewing v. Fahey*, 86

the office. An action in *quo warranto* would tend to duplicate the purpose of the litigation that is currently underway.

² The Legislature adopted this statute to give effect to Article 7 of the Nevada Constitution, to make additional provision "for the removal from Office of any Civil Officer other than those [who are subject to impeachment]." The Governor and "other state and judicial officers" are subject to impeachment. Nev. Const., Art. 7, § 2.

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Nev. 604, 607, 472 P.2d 347, 349-50 (1970). Furthermore, there is no language in current statutes that suggests a legislative intent to abrogate common law remedies or replace them with mutually exclusive statutory remedies, *Orr Ditch & Water Co. v. Justice Court of Reno Tp., Washoe County*, 64 Nev. 138, 164, 178 P.2d 558, 571 (1947), so these remedies should be considered cumulative.

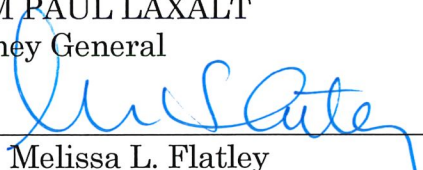
The question here concerns the removal of a constable for failing to fulfill a statutory duty, that is, becoming POST certified within the time required by statute or the reasonable extension of time. A constable's failure to become POST certified within the time required by statute is reasonably defined as "nonfeasance" or the "total neglect" of a duty necessary for the position. See *Schumacher v. State ex rel. Furlong*, 78 Nev. 167, 171, 370 P.2d 209, 211 (1962), citing *Moulton v. Scully*, 111 Me. 428, 434, 89 A. 944, 947 (1914). Nonfeasance, as such, is a basis for removal pursuant to NRS 283.440. *Id.*

It does not change the analysis that a constable's failure to become POST certified results in a "forfeiture" of the office of constable. See NRS 258.007(2) (stating that "the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030"). Whether there has been a forfeiture of office is a question of fact that must be adjudicated by a court of competent jurisdiction. The commencement of a civil action would ordinarily, but not necessarily, lead to a finding by the court that the office is vacant and available for appointment. The civil action may be commenced as an action in *quo warranto*, pursuant to NRS 35.010, or as an action alleging nonfeasance in violation of NRS 283.440, as made applicable by operation of NRS 258.007.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____


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