



FLORIDA DEPARTMENT *of* STATE

RICK SCOTT
Governor

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Secretary of State

December 5, 2014

The Honorable David H. Stafford
Escambia County Supervisor of Elections
213 Palafox Place
2nd Floor
Pensacola, Florida 32591-2601

RE: DE 14-05 Absentee ballots –
Canvassing of Federal Write-in Absentee
Ballot, § 101.6952(5), Florida Statutes

Dear Supervisor Stafford:

As the Escambia County Supervisor of Elections, you have asked for guidance regarding the canvassing and tabulation of absentee ballots in light of recently-added subdivision (5) of section 101.6952, Florida Statutes. Because this answer will assist you in your duties, the Division has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2014).

You indicate in your request for a formal opinion that you believe that there is a conflict between Florida law and federal law regarding when a federal write-in absentee ballot ("FWAB") should be canvassed. Given this apparent conflict, you ask what your office's practice should be when an overseas voter submits both a FWAB and a regular Florida absentee ballot, and the FWAB is received by the supervisor's office by 7 p.m. on election day but the Florida absentee ballot is not received until after election day, but falls within the 10-day post-election deadline in section 101.6952(5), Florida Statutes.

The federal law governing the receipt of FWAB's, 52 U.S.C. § 20303,¹ provides as follows:

(b) Submission and processing

¹ Formerly 42 U.S.C. § 1973ff-2.



Except as otherwise provided in this chapter, a Federal write-in absentee ballot shall be submitted and processed in the manner provided by law for absentee ballots in the State involved. A Federal write-in absentee ballot of an absent uniformed services voter or overseas voter shall not be counted--

...

- (3) if a State absentee ballot of the absent uniformed services voter or overseas voter is received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot under State law.

Section 101.6952, Florida Statutes, which also addresses the canvassing of absentee ballots, provides in pertinent part as follows:

(3)(b) A federal write-in absentee ballot may not be canvassed until 7 p.m. on the day of the election. Each federal write-in absentee ballot received by 7 p.m. on the day of the election shall be canvassed pursuant to ss. 101.5614(5) and 101.68, unless the elector's official absentee ballot is received by 7 p.m. on election day. If the elector's official absentee ballot is received by 7 p.m. on election day, the federal write-in absentee ballot is invalid and the official absentee ballot shall be canvassed. The time shall be regulated by the customary time in standard use in the county seat of the locality.

...

(5) An absentee ballot from an overseas voter in any presidential preference primary or general election which is postmarked or dated no later than the date of the election and is received by the supervisor of elections of the county in which the overseas voter is registered no later than 10 days after the date of the election shall be counted as long as the absentee ballot is otherwise proper.

See Chapter 2013-57, § 17, Laws of Fla. (adding subsection (5)).

Thus, under federal law, the FWAB shall not be counted if the official state absentee ballot is received by the deadline for receipt of the official state absentee ballot as provided by state law. 52 U.S.C. § 20303(b)(3). State law sets a deadline of 7 p.m. on election day for receipt of absentee ballots. § 101.67, Fla. Stat. Section 101.6952(5), Florida Statutes, provides an exception for certain elections, in which the deadline for receipt of overseas absentee ballots is extended to 10 days after the date of the election. However, section 101.6952(3)(b) requires the canvassing board

to canvass a FWAB received by 7 p.m. on election day if the same voter's official Florida absentee ballot has not yet been received by 7 p.m. on election day.²

Therefore, an inherent conflict between federal and state law arises under the circumstances described in your request. Reading 52 U.S.C. § 20303(b)(3) in conjunction with section 101.6952, Florida Statutes, a dilemma could occur where an overseas voter casts both a FWAB and an official state absentee ballot, and the FWAB reaches the supervisor's office by 7 p.m. on election day but the official state absentee ballot does not reach the supervisor's office until after 7 p.m. on election day. In such a situation, there would be at least three possible alternatives, as follows:

- (1) The FWAB is canvassed at 7 p.m. on election day in accordance with section 101.6952(3)(b), Florida Statutes, and when the official state absentee ballot is properly received after election day but before the 10-day period has expired, it is cancelled (in violation of 52 U.S.C. § 20303(b)(3) and in violation of section 101.6952(5), Florida Statutes).
- (2) The FWAB is canvassed at 7 p.m. on election day in accordance with section 101.6952(3)(b), and when the official state absentee ballot is properly received after election day but before the expiration of the 10-day period, it is also canvassed in accordance with section 101.6952(5), Florida Statutes (in violation of 52 U.S.C. § 20303(b), and in violation of the prohibition on casting more than one vote³).
- (3) The FWAB is not canvassed on election day, but is instead set aside until the 10-day period after election day has passed. At the end of the 10-day period, if the voter's official state absentee ballot has properly arrived, the official state ballot is canvassed and the FWAB is not counted. If the voter's official state absentee ballot has not arrived within the 10-day period, the FWAB is canvassed (in violation of section 101.6952(3)(b), Florida Statutes, which requires that a FWAB "shall be canvassed" unless the official Florida absentee ballot is received by 7:00 p.m. on election day).

Of the three alternatives, the Division believes that the third most reasonably effectuates the apparent public policy underlying both the federal and Florida statutes, in that the voter's official Florida absentee ballot will be counted if properly received by the 10th day after the election pursuant to section 101.6952(5), and the voter's FWAB will be counted only if the voter made a timely request for an absentee ballot and the official Florida absentee ballot is not timely and properly received by the 10th day after the election. This alternative also allows compliance with 52 U.S.C. § 20303.

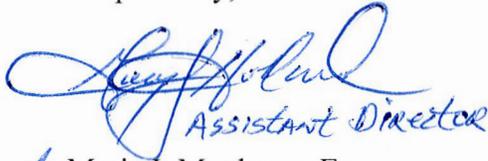
² The FWAB can be used only if the voter has already made a timely request for an absentee ballot. See 52 U.S.C. § 20303(a)(1); § 101.6952(2)(a), Fla. Stat.

³ See, e.g., § 101.64, Fla. Stat. (requiring absentee voters to sign an oath that they will not vote more than one ballot per election); § 104.18, Fla. Stat. (providing that it is a third-degree felony to cast more than one ballot at any election).

SUMMARY

In elections to which the 10-day provision in section 101.6952(5) applies, when an overseas voter who has previously requested an absentee ballot submits a federal write-in absentee ballot ("FWAB") that is received by 7 p.m. on election day, the FWAB should be set aside and should not be canvassed until 10 days after election day. If the voter's official Florida absentee ballot is received within the 10-day period and is otherwise proper, that ballot should be canvassed, and the FWAB should not be counted. If the voter's official Florida absentee ballot is not properly received within the 10-day period, the FWAB should then be canvassed. For all other elections, the FWAB shall be processed in accordance with section 101.6952(3)(b).

Respectfully,



Assistant Director

for Maria I. Matthews, Esq.
Director, Division of Elections