

**DE 78-44 - October 25, 1978**

**Candidates; Time Of Election When Unopposed; Campaign Contribution; Deadline For Receipt Of Contributions.**

**ss. 97.021, 98.321, 101.151, 102.111-.131, 106.011, 106.07, 106.08, 106.11, 106.141, F.S.; Chs. 77-175, 78-403, Laws Of Florida.**

*To: Mr. Jim Smith, 1720 Tarpon Drive, Tallahassee, Florida 32312*

*Prepared by: Division of Elections*

As a candidate for public office, your recent letter requested an opinion of this office in answer to substantially the following question:

May a candidate who has no opposition in the November general election accept campaign contributions and make expenditures from the campaign account prior to that election?

The facts of your particular situation are that you qualified as a Democratic candidate for the office of Attorney General of the State of Florida. As a result of contested primary elections you received the nomination of the Democratic Party. No one has qualified as a candidate for that office as the representative of any other political party or as an independent. Therefore, you are unopposed in the November, 1978 general election.

As a result of your being an unopposed candidate for the office of Attorney General your name will not appear on the general election ballot, s. 101.151(6), F.S. (1977). The law provides that each unopposed candidate "shall be deemed to have voted for himself." Id.

Therefore, even though an unopposed candidate does not appear on the general election ballot, he/she is not considered elected until that election. By definition, the general election is "for the purpose of filling national, state, county, and district offices...." s. 97.021(4), F.S. (1977). By contrast, a primary election (such as you have just participated in) is held "for the purpose of nominating a party nominee to be voted upon in the general election to fill a national, state, county, or district office." s. 97.021(2), F.S. (e.s.). The first and second primary elections are for nomination or elimination purposes only, and do not result in any candidate's election.

Of course, in the event a nominee has no general election opposition the primary election is tantamount to election. The fact that an unopposed candidate's name does not appear on the ballot does not alter the fact that the candidate is not actually elected until the general election. A certificate of election is not issued by the Department of State in the case of a state officer until the results of the general election are certified by the Elections Canvassing Commission following that election, ss. 98.321 and 102.111-.131, F.S. (1977).

Chapter 106 of the Election Code imposes certain restrictions and limitations upon the contributions

which may be received and utilized by a candidate. In the case of a candidate for statewide office, such as attorney general, the amount of contributions from any one person or political committee is limited to \$3,000 for any election, s. 106.08(1)(c), F.S. The statute goes on to provide that the limitations on contributions "apply to each election" and that:

"For the purposes of this subsection the first primary, second primary, and general election shall be deemed separate elections or election time segments, whether or not the candidate has opposition in the respective elections." s. 106.08(1), F.S. (1977).

The law contains no provision expressly providing that the above quoted language is inapplicable to a candidate without opposition in the general election. In fact the very language employed indicates that the receipt of contributions is contemplated for all three possible elections subject to the statutorily mandated limits for each. It should be noted that for appellate judges subject to retention there is only one election (the general election), and for all other judicial candidates there are only two elections (the first primary and the general election). Id.

The Attorney General has previously opined that a candidate unopposed in the general election is considered to participate in that election. Furthermore, it was found that the language of s. 106.08(1), F.S. (1973), leads to the conclusion that:

"The regulation of the amount of contributions which may be received during an election time segment presupposes the right of the candidate to receive contributions during each election time segment; and. . . a candidate who has been nominated in the primaries may receive contributions subsequent to his or her nomination 'whether or not the candidate has opposition.'" Op. Att'y Gen. Fla. 074-380 (December 20, 1974).

The 1977 revision of Florida's election laws did not alter the language of s. 106.08(1), F.S., so as to result in a differing conclusion. See s. 48, ch. 77-175, Laws of Florida. However, subsection (2) thereof did lead to some confusion as to the final date on which contributions could be received. It provided that any contribution received on election day or "less than 5 days prior to any election shall be returned. . . ." s. 106.08(2), F.S. (1977).

To clarify the law, the 1978 Legislature amended subsection (2) of that section to more clearly prohibit contributions after certain dates, s. 1, ch. 78-403, Laws of Florida. The amendment reads in pertinent part:

"Any contribution received by a candidate or the campaign treasurer or a deputy treasurer of a candidate after the date at which the candidate withdraws his candidacy, or after the date the candidate is defeated or elected to office, shall be returned to the person or political committee contributing it and shall not be used or expended by or on behalf of the candidate." Id.

As stated above, a candidate without opposition following the primary elections is not considered elected until the date of the general election. Therefore, this amendment would apply to such candidate and prohibit any contributions subsequent to the date of election. However, when read together with

previous language, the cut-off of contributions for all candidates, including those unopposed, is the fifth day preceding the general election. In 1978, no contributions may be received by any candidate, campaign treasurer, or deputy campaign treasurer later than the fifth day before the general election, or November 2, 1978.

Accordingly, in answer to your question, a candidate for public office without opposition in the general election may receive campaign contributions subsequent to the primary elections until the end of the fifth day preceding the general election at which he or she is actually elected. All such contributions must be subject to the limitations provided in s. 106.08(1), F.S. (1977), and must be reported in accordance with s. 106.07, F.S. (1977).

Your question also appears to inquire as to the permissible use of the campaign account subsequent to the primary election at which you were nominated. The election law provides this account may only be used for "the purpose of depositing contributions and making expenditures for the candidate. . . ." s. 106.011(1), F.S. (1977).

The law defines "expenditure" to be:

". . . a purchase, payment, distribution, loan, advance, or gift of money or anything of value made for the purpose of influencing the results of an election." s. 106.011(4), F.S. (1977).

Such expenditures from a candidate's campaign account may only be made by means of a bank check drawn upon that account, s. 106.11(1), F.S. (1977). As the definition indicates, any withdrawal from the campaign account is an expenditure and must be reasonably related to the candidate's campaign for public office.

The Legislature has provided a statutory procedure for the disposition of surplus funds. Unrestricted expenditures unrelated to the campaign may not be made so as to avoid that procedure. Within ninety (90) days of withdrawal, elimination, or election, each candidate must dispose of those funds remaining in the campaign account which "have not been spent, or obligated to be spent." s. 106.141, F.S. These surplus funds must be returned to contributors on a pro rata basis or given to the state (or political subdivision in the case of a local candidate) for deposit in the general revenue fund. s. 106.141(4), F.S. (1977).

A candidate who is elected to office may retain up to a certain amount in the campaign account to be used during his or her term of office to defray only "legitimate expenses in connection with his public office." s. 106.141(5), F.S. All candidates required to dispose of campaign funds or choosing to retain such for office expenses are required to file a report describing such disposition no later than the deadline for completing the disposition, i.e., ninety (90) days from one's withdrawal or elimination as a candidate, or the date of election. In the case of a candidate unopposed in the general election, this time period would not begin until the date of the general election. The disposition procedure and designation of the retained funds for office expense purposes may occur at any time prior to that deadline, yet subsequent to the withdrawal, elimination, or election of that candidate.

This statute dramatically altered the provisions concerning the use of excess campaign funds which was in effect prior to the 1977 revision. Before then, as was pointed out in an earlier opinion of this office (DE 77-22, September 30, 1977), a candidate was not restricted in the disposal of such funds and could even convert them to private use. By virtue of the Legislature's adoption of s. 106.141, F.S. (1977), opinion DE 77-22 is overruled and no longer of any effect.

A distinction does exist between funds in a campaign account which are utilized for expenditures relating to the campaign and funds retained by the candidate therein for legitimate expenses in connection with the office. The two may not overlap except to the extent of campaign funds which have previously been obligated for campaign purposes and remain in the account to be expended in order to satisfy any expenses incurred in accordance with s. 106.11(3), F.S. (1977), as amended by s. 2, ch. 78-403, Laws of Florida. Once again it is reiterated that section 106.011(4), F.S., states that expenditures are made "for the purpose of influencing the results of an election."

Any funds to be used for expenses not associated with the campaign are restricted to the amount permitted to be retained by the candidate elected to office. No funds may be spent from the campaign account for legitimate office expenses prior to the filing of the report required by s. 106.141(6), F.S., reflecting compliance with the disposition procedure and the amount retained. So long as any funds retained remain in the campaign account a supplemental report reflecting all expenditures must be filed on the first Monday of each calendar quarter until the account no longer has an unexpended balance, s. 106.07(5), F.S. (1977). No post-election contributions may be made to this account.

Accordingly, so long as your campaign staff is "engaged in the process of winding up campaign business" which includes "activities basic to and inseparable from the campaign," as stated in your letter, such expenses incurred would appear to be campaign related and, therefore, payable from the campaign account. However, as discussed above, extreme care should be exercised with regard to any such expenditure to insure compliance with the election law and any expenses in connection with your soon to be acquired office are not to be paid from campaign funds prior to your compliance with s. 106.141, F.S. (1977),

## **SUMMARY**

A candidate without opposition in the general election is not elected for the purpose of the Election Code until the date of the general election. Such an unopposed candidate may continue to receive campaign contributions until the end of the fifth (5th) day preceding the general election. Expenditures may be made from the campaign account subsequent to the primary elections so long as they are for expenses incurred pursuant to s. 106.11(3), F.S., and are campaign related. Within ninety (90) days of the general election an unopposed candidate must dispose of all surplus funds or may retain up to an amount as specified in s. 106.141(5), F.S., for legitimate expenses in connection with his/her public office. The use of campaign funds for campaign expenses and office expenses may not overlap, except to the extent of those campaign funds previously obligated, but not yet expended, at the time of the filing of the surplus funds report required by s. 106.141(6), F.S.