

DE 83-06 March 25, 1983

DELIVERY OF ABSENTEE BALLOT, s. 101.65 and 101.67, F.S. (1981)

To: Honorable Robin C. Krivanek, Supervisor of Elections, Room 107, Hillsborough County Courthouse, Tampa, Florida 33602

Prepared by: Division of Elections

This is in response to your request for an advisory opinion pursuant to Section 106.23, Florida Statutes, on essentially the following question:

“Will the delivery of a voted absents ballot to a polling place by 7 p.m. of the day of the election satisfy the requirements of Sections 101.65 and 101.67, F.S., (1981)?”

Section 101.65, Florida Statutes states in pertinent part:

“(7) VERY IMPORTANT. The supervisor of elections of the county in which your precinct is located must receive your ballot no later than 7 p.m. on the day of the election.” (emphasis added).

Section 101.67, Florida Statutes states:

“(1) The supervisor of editions shall safely keep in his office any envelopes received containing marked ballots of absentee electors, and he shall, before the canvassing of the election returns, deliver the envelopes to the county canvassing board along with his file or list kept regarding said ballots.

(2) All marked absent electors' ballots to be counted must be received by the supervisor by 7 p.m. the day of the election. All ballots received thereafter shall be marked with the time and date of receipt and filed in his office.” (emphasis added).

Here, the issue is whether delivery of a marked absentee ballot to a polling place rather than to the supervisor of elections would comply with Sections 101.65 and 101.67, Florida Statutes.

After many years of requiring strict compliance with absentee ballot statutes, the Supreme Court of Florida has established that "substantial compliance with absentee voting laws is all that is required to give validity to the ballot." Boardman v. Esteva, 323 So.2d 259, 264 (Fla. 1976). In Boardman v. Esteva, the Supreme Court of Florida acknowledged that absentee voting statutes are in derogation of the common law and therefore must be strictly construed; but the court said that strict construction does not necessarily mean strict compliance in all cases:

In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, a fundamental inquiry should be whether or not the irregularity complained of has prevented a full and fair expression of the public will. Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot or election. Id at 265.

The Court suggested that the following factors be used to determine the validity of absentee ballots cast:

- (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing.
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election. Id at 269.

Accordingly, this opinion must apply the principles established in Boardman v. Esteve as to whether an irregular form of delivery of a marked absentee ballot comports with the statute.

Since this is a hypothetical question, there is nothing to suggest that fraud, gross negligence or intentional wrongdoing is involved. Therefore, the fundamental inquiry is whether the receipt of marked absentee ballots by the supervisor no later than 7 p.m. on the day of the election is so essential as to be a mandatory requirement and whether any irregularity in the delivery of such ballot would adversely affect the sanctity of the ballot and the integrity of the election.

In Papy v. Englander, 267 So.2d 111 (Fla. 3rd D.C.A. 1972) the issue was whether absentee ballots postmarked before the second primary but delivered after 7 p.m. of the election were timely. The Third District Court of Appeals held that the return of a marked absentee ballot to the supervisor of elections by 7 p.m. on election day was mandatory; it serves to accomplish a timely and orderly canvassing of ballots which is essential to a fair election. Ballots received after 7 p.m. of the day of the election were untimely and invalid.

Similarly, in Spradley v. Bailey, 292 So.2d 27 (Fla. 1st D.C.A. 1974) the court held that Section 101.65, F.S. (1973) which required that absentee ballots must be returned to the supervisor of elections either by mail or personal delivery was mandatory. The court invalidated absentee ballots which were delivered by a campaign aide to the supervisor of elections.

Spradley v. Bailey and Papy v. Englander stand for the proposition that timeliness and the proper form of delivery are essential to the validity of absentee ballots so as to be mandatory requirements.

If delivery of a marked absentee ballot to the polling place would result in an untimely delivery to the supervisor of elections, then, I conclude, that such irregular delivery does not conform to the mandatory requirements of Sections 101.65 and 101.67, F.S. If timely and orderly receipt of absentee ballots is essential to the validity of the ballot, then delivery of a marked absentee ballot must be to the supervisor of elections by 7p.m. of the election day, and delivery to some other location derogates from the essential requirements of law within the meaning of Boardman v. Esteva, supra.

As to whether the irregular form of delivery would affect the sanctity of the ballot and the integrity of the election, I cannot say. Such a determination can only be made by the courts on a case by case basis. But, I offer the following observations: First, the statute expressly requires delivery to the supervisor. Delivery to a polling place creates a chain of custody problems which might raise serious questions as to whether the security of the ballot has been maintained. Cf. Spradley v. Bailey, 292 So.2d 27 (1st D.C.A. 1974). Secondly, delivery to polling places is an unnecessary administrative step which does nothing to further timely and orderly canvassing of ballots. Thirdly, it is the duty of a supervisor of elections to carry out the requirements mandated by statute. To suggest that there is an alternative way to deliver marked absentee ballots creates a discretion which is not expressly found in the law. If there is no clear legal duty to accept an absent ballot delivered to a polling place, the supervisor should not do so. Cf. State ex rel. Cherry v. Stone, 265 So.2d 56 (F1a. 1972). Ultimately, the courts, not the Division of Elections or the supervisor of elections, should determine if irregular delivery of an absentee ballot comports with the essential requirements of law.

SUMMARY

The delivery of a marked absentee ballot to the supervisor of elections by 7 p.m. of the election day is a requirement essential to the validity of the ballot. Delivery to the polling place rather than to the supervisor would derogate from the law and would render the ballot invalid.