

DE 89-11 - March 16, 1990

**Municipal Recall
Section 100.361(B), (D), F.S.**

To: Ms. Kathryn M. O'Halloran, City Clerk, City of Sebastian, Post Office Box 780127, Sebastian, Florida 32978

Prepared by: Division of Elections

This is in reference to your request for an advisory opinion. Under Section 106.23(2), Florida Statutes, the Division of Elections has authority to issue advisory opinions relating to the Florida Election Code, Chapters 97-106, Florida Statutes, to several categories of persons including local officers having election related duties. You are City Clerk for the City of Sebastian, so that the Division has authority to issue this opinion to you.

Your questions concern amendments to the Municipal Recall Law, Section 100.361, Florida Statutes, which amendments were effective January 1, 1990.

Your questions are:

1. What is the meaning of "facially valid?"
2. Are city clerks now mandated to tell their bosses, after a municipal clerk receives a petition for recalling a city commissioner, that the city commissioner is guilty of malfeasance, misfeasance, etc.?

You point out in your letter that a number of city clerks are appointed by and work directly for the city council or city commission. You state that this could present a definite conflict, and that it also places the city clerk in a very tenuous position.

The recent changes to the municipal recall statute provide several technical changes to the law and one substantive change. The substantive change concerns Section 100.361(1)(d), Florida Statutes, which was amended to provide that when a municipal recall petition is filed with the city clerk, the city clerk must determine whether the petition contains at least one statutory ground for recalling the municipal officer. The grounds for removal by municipal recall are contained in Section 100.361(1)(b), Florida Statutes, and include the following seven items:

1. Malfeasance;
2. Misfeasance;
3. Neglect of duty;
4. Drunkenness;
5. Incompetence;

6. Permanent inability to perform official duties; and
7. Conviction of a felony involving moral turpitude.

In December 1989, the Division issued an opinion which opined that at that time a city clerk did not have authority to refuse to accept the tender of a recall petition which was not facially in compliance with requirements of Section 100.361, Florida Statutes. However, as pointed out in this opinion, this statute was amended effective January 1, 1990, and unless and until legislative or judicially determined otherwise, if the municipal clerk determines that the petition does not meet the requirements of Section 100.361(1)(b), Florida Statutes, and, therefore, is not facially valid, the clerk shall so notify the governing body of the municipality or charter county and take no further action on the recall.

In reference to your first question, "facially valid" means that a document on its face contains the proper formalities or is legally sufficient.

Apparently, the legislature responded to the 2nd District Court of Appeal opinion in Jividen v. McDonald, 14 FLW 803 (Fla. 2d DCA 1989). In that case, Appellant Jividen, the City Clerk for the City of St. Petersburg, appealed a final judgment in which the trial court held that a city clerk had no authority to determine the legal sufficiency of municipal recall petitions. The court looked to an earlier decision of the Florida Supreme Court which limited the duty of a city clerk regarding recall petitions. State ex rel. Landis v. Tedder, 106 Fla. 140, 143 So. 148 (1932). In the Landis v. Tedder decision the court found:

The only duty of the city clerk is to certify on the recall petitions whether the same were signed by the required number of registered voters. He is invested with no judicial powers to determine the sufficiency of the recall petitions, nor do anything other than comply with the statute.

Landis v. Tedder, 143 So. at 150.

The Jividen court opined "[T]he city clerk's function is ministerial only. Any change in the recall procedure must rest with the legislature."

However, with the 1989 legislative changes and subsequent to the Jividen case, Section 100.361(1)(d), Florida Statutes, reads in pertinent part:

If it is determined by the clerk that the petition does not meet the requirements of s. 100.361(1)(b) and therefore is not facially valid, the clerk shall so notify the governing body of the municipality or charter county and take no further action. The petition cannot be amended after it is filed with the clerk.

Therefore, it is the city clerk's responsibility, unless or until legislative or judicially determined otherwise, to determine that the petition for recall contains one of the seven grounds listed in Section 100.361(1)(b), Florida Statutes.

In reference to your second question, city clerks are not mandated to tell their bosses after they receive a petition for recall that they are guilty of one of the grounds for recall. In Moultrie v. Davis, 498 So.2d 993 (4th DCA 1988) the court found that "this court's sole function in the case at bar is to review the petition to determine whether the facts alleged in the recall petition are sufficient to establish any grounds for recall pursuant to Section 100.361(1)(b). It is not our providence to rule on the truth or the falsity of the charges against the official. (Emphasis added.) Id. at 996; Bent v. Ballantyne, 368 So.2d 351 (Fla. 1979). It is now the city clerk's responsibility to review a recall petition to determine whether the facts alleged in the recall petition are sufficient to establish grounds for recall pursuant to Section 100.361(1)(b), Florida Statutes. It is not for the city clerk to determine the truth or falsity of the charges against the official.

SUMMARY

Facially valid means that a document on its face contains the proper formalities or is legally sufficient. When a recall petition is submitted to a municipal clerk pursuant to Section 100.361(1)(d), Florida Statutes, a city clerk determines whether the petition contains one of the statutory grounds for recall; however, the city clerk does not determine the truth or falsity of the charges against the official.