

DE 90-10 - March 16, 1990

Interpretation of Sections 104.071 and 104.31, F.S.

To: Ms. Patricia Baker, Candidate for State Senate, 6840 Cross Bayou Drive, Largo, Florida 34647

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 candidates.

You have asked the following question:

May an elected official of your county host a fund raiser for you, a candidate for State Senate, District 18? The elected official would have his name on the invitation, offer his contribution list and invite people to the fund raiser. Would this conflict with the provisions of either Section 104.071 or 104.31, Florida Statutes?

Section 104.31, Florida Statutes, concerns the political activities of state, county, and municipal officers and employees. This section specifically prohibits an officer or an employee from:

1. using his official authority or influence for the purpose of interfering with an election or a nomination of office or coercing or influencing another person's vote; or
2. directly or indirectly coercing or attempting to coerce, command, or advise any other officer or employee to contribute anything of value for political purposes.

This section contains several legislative mandates regarding interpretation of this section:

1. This section is not to be construed to prevent any person from becoming a candidate and actively campaigning for any elective office.
2. All persons shall retain the right to vote as they may choose and express their opinions on all political subjects and candidates.

This statute also provides that Section 104.31(1)(a), Florida Statutes, shall not be construed to:

1. Limit the political activities of elected officials or candidates for public office in any general, special, primary, bond, referendum, or other election of any kind or nature.
2. Limit the political activities of officials appointed as the heads or directors of state administrative agencies, boards, commissions, or committees or of the members of state boards,

commissions, or committees in general or special elections.

3. Limit the political activities of the Governor, the elected members of the Governor's Cabinet, or the members of the Legislature in any general, special, primary, bond, referendum, or other election of any kind or nature.

In addition, this statute provides that nothing contained in this statute or in any county or municipal charter shall be deemed to prohibit any public employee from expressing his opinions on any candidate or issue or from participating in any political campaign during his off-duty hours, so long as such activities are not in conflict with this statute or Section 110.233, Florida Statutes, which deals with political activities of state employees.

This section was interpreted by the Florida Supreme Court in State v. Stuler, 122 So.2d 1 (1960). Stuler was an employee of Pinellas County and during the first primary campaign of 1958 he "advised" the employees of the Pinellas County Sanitary Fill to pay or contribute part of their salary to the campaign fund of certain candidates. Id. at 2. Stuler contended that to the extent that Section 104.31 (1), Florida Statutes, purported to make it unlawful to "advise" another employee to make a political contribution, the statute constituted an unconstitutional infringement of freedom of speech and a violation of Section 15 of the Declaration of Rights of the Florida Constitution which provided in part:

The people shall have the right to assemble together to consult for the common good....

Id.

The trial court held that if the word "advise" appeared in the statute in isolation from the words "coerced or attempt to coerce, command..." then the statute would constitute an unlawful abridgment of the right of free speech. Id. The judge ruled that the words "coerce" and "command" colored the word "advise." Id.

The Florida Supreme Court found the issue in this case to be "whether a public employee who merely advises a fellow public employee to make a political contribution can be legally prosecuted under the statute in the absence of an element of coercion or command." Id.

The court opined that the "privilege of working for the public is not an absolute right." Id. The court found that public employment can "be made subject to such reasonable restrictions and regulations as the Legislature under the Constitution may prescribe." Id.

The Florida Supreme Court found the statute constitutional and that no coercive element was necessary.

We note there are several differences in the situation you describe and the Stuler case. Id. The Stuler case involved a governmental employee and not a governmental officer. Id. In addition, the Stuler case involved political contributions and not inviting persons who may, or may not be, governmental employees to a fund raiser. Id. And, the Stuler case involved a violation of Section 104.31(1)(b),

Florida Statutes, involving advising an employee to contribute, whereas the situation you describe seems closer related to the prohibition contained in Section 104.31(1)(a), Florida Statutes, which prohibits, among other things, an officer or employee from using his official authority to influence another person's vote.

Therefore, in reference to your questions, we note that Section 104.31(1), Florida Statutes, specifically states that the statute is not to be construed to limit the political activity of elected officials; however, in view of the Stuler decision, we urge caution that the elected official does not use his official authority to influence another person's vote.

We find no cases interpreting Section 104.071, Florida Statutes, but this section has been interpreted by the Division of Elections in previous opinions. These opinions have held that a candidate may contribute to another candidate as long as the candidate does not make the contribution to aid or promote his own nomination or election and provided the contribution is not made from campaign funds. See DE 83-16. In addition, the Division has opined that a candidate for public office may contribute to another candidate for public office by purchasing a ticket to a political dinner or benefit for the other candidate as long as it is not done in the furtherance of the second candidate's candidacy. See DE 76-12. Therefore, this section primarily regulates candidates for public office and not public officeholders or employees.

We opine that an elected official may host a fund raiser for another candidate. The elected official may have his name on the invitation, offer his contribution list and invite people to the fund raiser. However, the elected official may not use his official authority to influence another person's vote. In addition, the elected official may not advise a governmental officer or employee to contribute to a candidate.

SUMMARY

An elected official may host a fund raiser for another candidate. The elected official may have his name on the invitation, offer his contribution list and invite people to the fund raiser. However, the elected official may not use his official authority to influence another person's vote. In addition, the elected official may not advise a governmental officer or employee to contribute to a candidate.