

The statute addressed in this opinion has changed. Please consult current Florida law.

DE 94-17 - September 16, 1994

Vacancy in Nomination

Sections 100.111(4), (4)(b), (4)(c); 106.082; 106.141(1), (4)(b); 106.33; 106.34; 627.0623; 655.019, Fla. Stat.; 25 Am. Jur. 2D Elections Section 126 (1966)

TO: Honorable Tom Slade, Chairman, Republican Party of Florida, 719 North Calhoun Street, Tallahassee, Florida 32303

Prepared by: Division of Elections

This is response to your request for an advisory opinion regarding a political party nominee for cabinet office who may withdrawal from the race after September 15. You are Chairman of the Republican Party of Florida and, therefore, the Division of Elections has authority under Section 106.23(2), Florida Statutes, to issue an advisory opinion to you relating to the Florida Election Code, Chapters 97-106, Florida Statutes.

A Republican candidate, candidate A, was a candidate for governor in 1994 who accepted public financing pursuant to the Florida Election Campaign Financing Act (Act), Sections 106.30-106.36, Florida Statutes. Candidate A is no longer a candidate for governor, either due to defeat during the first primary election or withdrawal after the election.

Another Republican candidate, candidate B, is a candidate for a cabinet office. Candidate B may withdrawal his candidacy for that cabinet office sometime after September 15.

If candidate B, in fact, withdraws his candidacy for a cabinet office, the Republican Party of Florida may designate candidate A to fill that vacancy. The Republican Party would make that designation through its executive board, which the Constitution of the Republican Party State Executive Committee has vested with all the rights of and has authorized it to act on behalf of the Republican Party State Executive Committee.

Candidate A will not accept public financing if designated the nominee for the cabinet seat.

Your questions are as follows:

1. Will candidate A have violated any provision of the election laws or be subject to any penalty or sanction for his use of public financing in his gubernatorial bid?
2. Will candidate A's expenditures in his gubernatorial bid be counted toward the \$2-million limit for cabinet officers in the Act if he is designated to fill the vacancy created by candidate B's withdrawal?
3. Will candidate A have violated any provision of the election laws or be subject to any penalty

or sanction if he accepted, during his gubernatorial bid, contributions in excess of \$100 from persons or entities that would be prohibited from making such contributions had candidate A then been a candidate for the cabinet office for which he may be designated the party's nominee?

4. Will the designation of candidate A by the party's executive board, pursuant to the party's constitution, instead of by the state executive committee, violate the requirements of Section 100.111(4), Florida Statutes, or any other provision of the election laws?

In reference to your first question, the mere fact that candidate A used public financing in his gubernatorial bid and subsequently commenced a bid for a cabinet office does not constitute a violation of the election laws of this state. Therefore, no penalty or sanction could be imposed merely for the use of public financing in the gubernatorial bid.

However, you should note that because candidate A received public financing in his gubernatorial bid, he is required to return all surplus funds from that campaign to the Fund and may not transfer these funds to his cabinet campaign. *See* Sections 106.141(1) and (4)(b), Fla. Stat.

Additionally, this should not be construed as a blanket determination that no violation of the election laws was committed by candidate A during his gubernatorial bid.

In reference to your second question, candidate A's expenditures in his gubernatorial bid will not be counted toward the \$2-million limit for cabinet officers in the Act if he is designated to fill the vacancy created by candidate B's withdrawal. Contributions received by candidate A in his gubernatorial bid are irrelevant to a later bid for a cabinet office, inasmuch as such funds must either have been spent in pursuit of the gubernatorial bid or be returned to the Fund.

The campaign expenditure limitations for a candidate requesting contributions from the Fund are found in Section 106.34, Florida Statutes. These expenditure limits provide that a candidate for governor must limit his total expenditures to \$5-million, and a candidate for cabinet office must limit his total expenditures to \$2-million. The expenditure limits are for each race and are not cumulative if a former candidate is a candidate for another office under the circumstances you have described.

While you state that candidate A will not accept public financing if designated the nominee for the cabinet seat, the Act does not preclude candidate A from accepting public financing for the cabinet office. Pursuant to Section 100.111(4)(c), Florida Statutes, when a vacancy in nomination is filled by a political party committee, "such nominee shall pay the same filing fee and take the same oath he would have taken had he regularly qualified for election to such office." If candidate A is nominated and qualifies for the cabinet office, pursuant to Section 106.33, Florida Statutes, he may at that time request for contributions from the Act. Under these circumstances if he files a request for contributions, the candidate would have to again reach the threshold amount, \$100,000 for a candidate for cabinet, and could thereafter receive matching funds.

In reference to your third question, candidate A will not have violated any provision of the election

laws or be subject to any penalty or sanction if he accepted, during his gubernatorial bid, contributions in excess of \$100 from persons or entities that would have been prohibited from making such contributions had candidate A then been a candidate for the cabinet office for which he may be designated as the party's nominee.

In 1993 the Florida Legislature prohibited contributions in excess of \$100 from certain persons for the offices of commissioner of agriculture, state treasurer, and comptroller. The specific limitations are as follows:

1. Section 106.082, Florida Statutes, prohibits contributions in excess of \$100 for commissioner of agriculture candidates from the following:

- a. a business which is inspected, licensed or otherwise authorized to do business as a food outlet or convenience store pursuant to Chapter 500, Florida Statutes;
- b. any director, officer, lobbyist, or controlling interest of that business; or
- c. a political committee or committee of continuous existence representing the interest of such business.

2. Section 627.0623, Florida Statutes, prohibits contributions in excess of \$100 to a candidate for treasurer from:

- a. an insurer, affiliate, or other officer of an insurer or affiliate; or
- b. a political committee or committee of continuous existence representing the interest of such insurer, affiliate, or officer.

3. Section 655.019, Florida Statutes, prohibits contributions in excess of \$100 to a candidate for comptroller from:

- a. a financial institution which is licensed or otherwise authorized to do business pursuant to Chapters 655-665, Florida Statutes;
- b. an officer, executive officer, affiliate, subsidiary or service corporation of such a financial institution; or
- c. a political committee or committee of continuous existence representing the interest of any such financial institution.

However, as stated above, if candidate A becomes the party's nominee for a cabinet office, such race will be completely independent of that candidate's former race for governor, and no funds from candidate A's gubernatorial campaign will be allowed to be used in that candidate's race for cabinet

office.

In reference to your fourth question, whether the designation of candidate A by the party's executive board, pursuant to the party's constitution, instead of by the state executive committee, violates the requirements of Section 100.111(4), Florida Statutes, or any other provision of the election laws, Florida law contains specific provisions for filling a vacancy in a nomination which occurs after September 15.

[T]he Department of State shall notify the chairman of the appropriate...political party executive committee; and, within 7 days, the chairman shall call a meeting of his executive committee to consider designation of a nominee to fill the vacancy. The name of any person so designated shall be submitted to the Department of State within 14 days of notice to the chairman...

Section 100.111(4)(b), Fla. Stat.

When...vacancies in nomination are required to be filled by committee nominations, such vacancies shall be filled by party rule.

Section 100.111(4)(c), Fla. Stat.

These provisions must be construed in pari-materia. The above statute appears to require that vacancies be filled by executive committee, but in accordance with party rules. If the party does construe its rules to allow the party's executive committee to undertake this activity through its executive board, that determination would comply with statutory requirements unless it is an unreasonable and clearly erroneous construction of the party's constitution and rules.

The Legislature has deferred the regulation of filling vacancies in nomination to political party rule. The courts appear to have no power to interfere with the judgments of a political party in matters involving the nomination of its candidates for public office. *See 25 Am. Jur. 2d Elections* Section 125 (1966).

It is generally held, where questions relating to party policies or organization have been submitted to and determined by the proper party tribunal, according to the rules and customs of the party, that the courts will give effect to, and will not attempt to review, such decision and, in the absence of fraud, will regard it as conclusive.

Id.

SUMMARY

The mere fact that candidate A used public financing in his gubernatorial bid and subsequently commenced a bid for cabinet office does not constitute a violation of the election laws in this state.

However, because candidate A used public financing in his gubernatorial bid, he is required to return

all surplus funds from that campaign to the Fund and may not transfer these funds to his cabinet campaign.

Candidate A's expenditures in his gubernatorial bid will not be counted toward the \$2-million limit for cabinet officers in the Act if he is designated to fill the vacancy created by candidate B's withdrawal. The expenditure limits are for each race and are not cumulative if a former candidate is a candidate for another office under the circumstances you have described.

Sections 100.111 (4)(b) and (4)(c), Florida Statutes, must be construed in pari- materia. This statute appears to require that vacancies be filled by the party executive committee, but in accordance with party rules. If the party does construe its rules to allow the party's executive committee to undertake this activity through its executive board, that determination would comply with statutory requirements unless it is an unreasonable and clearly erroneous construction of the party's constitution and rules.