

DE 00-06 - May 11, 2000

Open Primary Elections
§ 100.061, 100.901, 100.191, Fla. Stat. (1999); Art. VI, § 5(b), Fla. Const.

TO: The Honorable Dee Brown, Supervisor of Elections, Marion County, Post Office Box 289, Ocala, Florida 34478-0289

Prepared by: Division of Elections

This is in response to your request for an opinion regarding Constitutional Revision 11, amending Article VI, Section 5 of the Florida Constitution. The Division is authorized to provide advisory opinions pursuant to section 106.023(2), Florida Statutes, when requested by any supervisor of elections. That section reads in pertinent part:

The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take.

Essentially, you have asked the following questions:

1. If two or more people of the same party qualify for the same office and have no other opposition, do all registered voters participate in this primary election, thus making this part of the ballot a "universal" ballot? If there are more than two candidates, is the winner determined like that in a general election, i.e., the candidate with the highest number of votes is declared the winner?

2. If two or more people of the same party qualify for the same office and a write-in candidate also qualifies for this office, do all registered voters participate or does this become a closed party primary?

Your questions are prompted by the following Constitutional language:

If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified electors, regardless of party affiliation, may vote in the primary elections for that office.

See Art. VI, §5(b), Fla. Const. (Emphasis added.)

Question No. 1 involves the interpretation of election laws and can be answered with an advisory

opinion as follows. If two or more people from the same party qualify for the same office and have no other opposition, all registered voters may participate in the primary elections, regardless of party affiliation. Based upon the reference to "primary elections" in Article VI, Section 5(b), it is the Division's opinion that the proponents intended there to be universal participation by the voters in the first primary, and if necessary, a second primary. Thus, a candidate must obtain a majority of the votes cast in the first primary to be declared the winner. See §§ 100.191, 100.061, Fla. Stat. Otherwise, a second primary must be held which will also be open to all eligible voters. That primary will consist of a run-off between the two candidates placing first and second in the first primary. See § 100.091, Fla. Stat.

To my knowledge, the amendment does not affect the generally accepted election process, i.e., first primary, second primary and general election, nor does it transform an "open primary" into something akin to a non-partisan, municipal election, whereby the candidate receiving the most votes is declared the winner without a run-off.

A typical "open primary" election would proceed as did the recent special election to fill a vacancy in Florida Senate District 34. In that election, there were four Republican candidates who ran in the first primary on December 14, 1999. Because the winner would face no opposition in the general election scheduled for January 25, 2000, the primary was open to all voters, regardless of party affiliation. Alex Diaz de la Portilla received a majority (57.7%) of the votes cast in the December 14th primary, thereby avoiding a second primary election. He was deemed to have voted for himself at the general election on January 25, 2000, and elected on that date. See § 101.151, Fla. Stat.

The Division has declined on several occasions to opine on provisions of the Florida Constitution, but because Question No. 2 involves the interpretation of a provision relating to election laws, the Division will provide you with an advisory opinion under section 106.23(2), Florida Statutes. You have asked if an election remains a closed party primary when two or more people of the same party qualify for an office and a write-in candidate also qualifies for this office.

As created by Constitutional Revision No. 11, Article VI, Section 5(b), reads:

Primary, general, and special elections.-

(b) If all candidates for an office have the same party affiliation and the winner will have *no opposition in the general election*, all qualified electors, regardless of party affiliation, may vote in the primary elections for that office.

The language in section 5(b) does not qualify the type of opposition required in a general election to prohibit all qualified electors, regardless of party affiliation, to vote in the primary election, nor does it require that the opposition be viable or have a realistic chance of success. If the framers of Revision 11 had wished specifically to exclude write-in candidates as opposition in the general election, they could have done so. Thus, it is the opinion of the Division that a write-in candidate constitutes opposition in a general election. If a write-in candidate will participate in the general election, the first and if necessary, the second primary will remain closed.