

DE 00-09 - August 22, 2000

**Resign-to-Run Law
§ 99.012, Fla. Stat.**

TO: The Honorable Katherine Harris, Secretary of State, PL 02 The Capitol, 400 South Monroe Street, Tallahassee, Florida 32399-0250

Prepared by: Division of Elections

This is in response to your request for an opinion relating to the resign-to-run law, section 99.012, Florida Statutes. You are the Secretary of State and Chief Elections Officer of the State of Florida and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask:

1. Did Commissioner Gallagher and Treasurer Nelson cite the correct date of their respective resignations as required by section 99.012, Florida Statutes?
2. If either candidate did not cite the correct resignation date as required by section 99.012, Florida Statutes, what is the legal effect on the qualification for the office that they seek and on their ability to continue in their current office?
3. What action, if any, is required by Florida law?

SHORT ANSWER

The resignation letters submitted by Commissioner Gallagher and Treasurer Nelson cited the correct date of their respective resignations as required by section 99.012, Florida Statutes.

ISSUE

You received a letter from Ms. Karen Gievers alleging that Commissioner Gallagher erred in computing the date of his resignation when he selected the date of January 3, 2001, as the effective date of his resignation. Ms. Gievers states that the correct date is January 2, 2001, the date she alleges that the terms of cabinet offices begin. Ms. Gievers' letter requests that you "not certify him [Commissioner Gallagher] to the Supervisors of Elections in Florida's 67 counties, because of his non-compliance with section 99.012, Florida Statutes." In other words, you have been asked to remove Commissioner Gallagher's name from the November general election ballot.

BACKGROUND

Tom Gallagher is the Commissioner of Education of the State of Florida. He was elected to that office on November 3, 1998, and was sworn in on January 5, 1999. The Commissioner of Education is one of the six members of the Florida Cabinet as prescribed by the Florida Constitution. As Commissioner of Education, he serves as the agency head of the Florida Department of Education, which is the

agency responsible for the entire system of public education in the State of Florida, from kindergarten through graduate school. In addition to his role as agency head and member of the Cabinet, the Commissioner of Education serves on several advisory and policy-making boards and commissions such as the Board of Regents, State Board of Community Colleges, Education Technology Foundation, Partnership for School Readiness, SMART Schools Clearinghouse, and Enterprise Florida, Inc.

Bill Nelson is the Treasurer of the State of Florida. He was elected to this office on November 8, 1994, and subsequently re-elected on November 3, 1998, and was sworn in on January 5, 1999. The State Treasurer is a member of the Florida Cabinet as prescribed by the Florida Constitution. In addition to his duties as Treasurer, he holds the statutory posts of Insurance Commissioner and State Fire Marshal. As Insurance Commissioner, he is head of the Department of Insurance, which regulates insurance companies, insurance agencies, insurance agents, solicitors, adjusters and bail bondsmen, investigates fraud in all lines of insurance and violations of the Insurance Code. As Fire Marshal, he has the responsibility to investigate fires and suppress arson, survey state-owned property, service stations, prisons, and other buildings to determine compliance with fire safety codes, and administer a state certification and training program for firefighters, conduct workshops and seminars across the state for law enforcement and fire service professionals. Additionally, he serves as a member of the State Board of Administration and the Florida Financial Information Board. These two entities have direct responsibility to oversee and govern the Florida Financial Information System and make the financial investment and management decisions of the State of Florida. In 1996, the Legislature created the Inland Protection Financing Corporation for the purpose of financing the rehabilitation of petroleum contamination sites, payment, purchase and settlement of reimbursement obligations. Mr. Nelson serves as a member of this Corporation.

Together with the Governor, the Florida Cabinet holds the executive power in the State of Florida. The Governor and Cabinet serve as the State Board of Executive Clemency which usually meets quarterly. The Governor and three members of the Cabinet have the authority to grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

The Cabinet meets every two weeks, eleven months of each year. The meetings begin with preliminary matters such as resolutions in recognition of deserving individuals and groups and occasionally address substantive current issues such as pending legislation. There may be status reports, announcements or votes relative to appointments prior to beginning the agendas from the agencies consisting of the State Board of Administration, the Financial Management Information Board, the Administration Commission, the Board of Trustees of the Internal Improvement Trust Fund, the Florida Land and Water Adjudicatory Commission, the State Board of Education, the State Board for Career Education, the Division of Bond Finance, the Electrical Power Plant and Transmission Line Siting Board, the Department of Highway Safety and Motor Vehicles, the Florida Department of Law Enforcement, the Department of Revenue, and the Department of Veterans Affairs. These issues include the sale of bonds for capital projects, land acquisition for conservation and recreation, siting of power plants and transmission lines, appeals of development orders for developments of regional impact, areas of critical state concern, creation of community development districts, authority over sovereignty lands, approval of educational issues including appointments to

educational boards and commissions, rules of the State University System, Board of Regents, and Community Colleges, decision to accept or reject charter school applications, and hearing Sheriff's Budget Appeals as well as budget appeals from Property Appraisers.

During the months of May, June and July, 2000, one Clemency meeting and six Cabinet Meetings were held. Fifty-seven cases were heard and acted upon by the Clemency Board in June. Twenty-two resolutions were presented honoring individuals or groups and one resolution authorizing a Management Study for the Florida Parole Commission. The Governor and Cabinet also voted to approve the assignment of temporary duty to former Parole Commissioners. Other items handled include Charter School Appeals, Charter School District presentations concerning Volusia, Hillsborough and Sarasota Counties with approval for Volusia County to be a Charter School District, college reach-out funding, performance contracts for FDLE Commissioner, numerous budget issues, bond issues, optional retirement system, defined contribution plan, State Board of Administration performance report for the past year, Hurricane Catastrophe Fund, rules approved from the Department of Management Career Service Personnel, Department of Revenue, Highway Safety and Motor Vehicles, Florida Department of Law Enforcement, Education, and Board of Regents, approved several lease modifications and use of sovereign submerged lands for docks, piers, boat ramps and fiber optic cable, approved appointments to Community Colleges and the Post-secondary Education Planning Commission, approved power plant siting, approved purchase of land for prison site in Suwannee County, more than thirty purchases of land for conservation or preservation, received the National Marine Sanctuary Annual Status Report, and approved delegation for the Commissioner of Agriculture to manage aqua-cultural activities pursuant to legislation.

On March 2, 2000, the Department of State, Division of Elections published a notice of General Election as required by section 100.021, Florida Statutes. That notice of general election was published in newspapers of general circulation in each of Florida's 67 counties to give notice to the public and potential candidates of the offices to be filled at the 2000 general election. Among these offices were President of the United States, one of Florida's two United States Senate seats, all 23 of the Congressional seats from Florida, one-half of the state Senate seats, all of the seats in the Florida House of Representatives, 161 circuit judges, 133 county judge seats, and all of the county constitutional offices such as sheriff, clerk of the court, and supervisor of elections.

On May 8, 2000, Bill Nelson filed his papers to qualify for the office of United States Senator with the Department of State, Division of Elections. Along with those papers was a resignation from the office of State Treasurer with an effective date of January 3, 2001. On May 12, 2000, Tom Gallagher filed with the Department of State, Division of Elections, his papers to qualify for the office of United States Senator. Along with these qualifying papers was his resignation from the office of State Education Commissioner with an effective date of January 3, 2001.

On July 12, 2000, the Department of State, Division of Elections, published in each county in Florida an Amended Notice of General Election. The amended notice listed the offices of State Treasurer and State Commissioner of Education, which had impending vacancies due to the resignations of Treasurer Nelson and Commissioner Gallagher.

On July 17 through July 21, 2000, the Florida Department of State, Division of Elections, qualified candidates for all state offices that would be filled by the year 2000 elections. Two candidates qualified for the office of State Treasurer, Tom Gallagher and John Cosgrove.

1 Four candidates qualified for the office of State Commissioner of Education, Charlie Crist, James Bush, Vasselia Gazetas, and George Sheldon. The Division certified these qualified candidates for the offices of State Treasurer and State Commissioner of Education to the 67 county supervisors of elections on July 24, 2000.

THE RESIGN-TO-RUN LAW **SECTION 99.012, FLORIDA STATUTES**

In 1970, the Florida Legislature passed, and the Governor signed into law, section 99.012, Florida Statutes, (Ch. 70-90, Laws of Florida), the "resign-to-run" law. As stated in the prefatory or "whereas" clauses:

... it is generally agreed that by providing for prospective resignation the people of the state of Florida would not be compelled to bear unnecessary cost of special elections occasioned by elected or appointed official who while holding one office, seek and obtain another elective office.

Section 99.012, Florida Statutes, is divided into two major subsections. Subsection (3) of section 99.012, Florida Statutes, governs state officers who seek to run for a different state office. It provides:

No officer may qualify as a candidate for another public office, whether state, district, county, or municipal, if the terms or any part thereof run concurrently with each other, without resigning from the office he or she presently holds.

Such a resignation for an officer seeking another state office must meet several standards. It must be irrevocable, submitted at least ten days prior to the first day of qualifying for the office he or she intends to seek, and be effective no later than the earlier of the following dates:

1. The date the officer would take office if elected; or
2. The date the officer's successor is required to take office.

Finally, with regard to an elective office, the resignation creates a vacancy in office to be filled by election. Persons may qualify as candidates for nomination and election as if the public officer's term were otherwise scheduled to expire.

Subsection (4) of section 99.012, Florida Statutes, applies to state officers who seek to run for federal office. It states that, "[a]ny officer who qualifies for federal public office must resign from the office he or she presently holds if the terms or any part thereof run concurrently with each other." The resignation must meet several standards. It must be irrevocable, submitted no later than the day of qualifying for the office he or she intends to seek, and be effective no later than the earlier of the following dates:

1. The date the officer would take office if elected; or
2. The date the officer's successor is required to take office.

Section 99.012(4)(g), Florida Statutes, provides:

The provisions of any special act to the contrary notwithstanding, with regard to an elective office, the resignation creates a vacancy in office to be filled by election, thereby permitting persons to qualify as candidates for nomination and election as if the officer's term were otherwise scheduled to expire The office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation.

In addition, subparagraph (4)(f)1. of section 99.012, Florida Statutes, provides that "failure of an officer who qualifies for federal public office to submit a resignation pursuant to this subsection constitutes an automatic irrevocable resignation, effective immediately, from the office he or she presently holds." (Similar language is absent from subsection (3).)

DISCUSSION

Question 1

Did Commissioner Gallagher and Treasurer Nelson cite the correct date of their respective resignations as required by section 99.012, Florida Statutes?

The answer to this question is yes. It is clear that pursuant to Article XX of the United States Constitution, United States Senators and Representatives take office at noon on the third day of January. On the other hand, it is also readily apparent that the general constitutional and statutory provisions governing when a cabinet officer's successor will take office do **not** apply to the facts at hand. Section 5(a), Article IV, Florida Constitution, provides in pertinent part:

At a state-wide general election in each calendar year the number of which is even but not a multiple of four, the electors shall choose a governor and a lieutenant governor and members of the cabinet each for a term of four years beginning on the first Tuesday after the first Monday in January of the succeeding year.

This provision is not applicable for the obvious reason that the year 2000 is an even numbered year that is a multiple of four. Section 100.041, Florida Statutes, which essentially mirrors section (5)(a), Article IV, Florida Constitution, is not applicable for the same reason. Further, the law cited clearly establishes the term of office for the regularly-scheduled election cycle and was not designed to apply in the case of a special election to fill the remainder of a term.

Section (1)(f), Article IV, Florida Constitution, provides:

When not otherwise provided for in this constitution, the governor shall fill by appointment any vacancy in state or county office for the remainder of the term of an appointive office, and for

the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election.

Although a vacancy is created or becomes operative at the time an irrevocable resignation is submitted, *Spector v. Glisson*, 305 So.2d 777 (Fla. 1974), the office is not "vacant" until the date a resignation becomes effective. See *Tappy v. State ex rel Byington*, 82 So.2d 161 (Fla. 1955) and *State ex rel Landis v. Baxter*, 122 Fla. 312, 165 So. 271 (Fla. 1936). The public officer's tender of a resignation before qualifying creates a vacancy in office effective at a future date, which permits persons to qualify as candidates for nomination and election to that office as if the public officer's term were otherwise scheduled to expire. However, there is no vacancy in the office until the effective date of the resignation. When a resignation is submitted with a future effective date, the "remainder of the term" is the term of office remaining after the effective date of the resignation.

Here, the remainder of the term is less than 28 months (January 2001 to January 2003). However, under *Holley v. Adams*, 238 So.2d 401, 407 (Fla.1970), if the remainder of the term is less than 28 months, the governor's power to appoint a successor to fill a vacancy created by the resign-to-run law is applicable only if no one qualifies for election to the office. In this case, two candidates qualified for the office of Treasurer/Insurance Commissioner. Further, as the remainder of the term is less than 28 months, the language "until the first Tuesday after the first Monday following the next general election" is not applicable either.

Section 100.111(1)(a), Florida Statutes, provides:

If any vacancy occurs in any office ***which is required to be filled pursuant to s. 1(f), Art. IV of the State Constitution and the remainder of the term of such office is 28 months or longer***, then at the next general election a person shall be elected to fill the unexpired portion of such term, commencing on the first Tuesday after the first Monday following such general election.

(Emphasis added.) Again, this section is not applicable in that the "remainder of the term" is not 28 months or longer.

Because neither the constitutional nor the statutory provisions establishing the time that a cabinet officer's successor is required to take office are applicable to the facts of this case, the second contingent effective date set forth in sections 99.012(3)(d) and (4)(d), Florida Statutes, is absent. Thus, the only operative date in the case at hand is "the date the officer would take office if elected." Therefore, Treasurer Nelson's resignation letter must have an effective date on or before the date he would take office as a United States Senator, which is January 3, 2001. **As January 3, 2001, is the date cited by Treasurer Nelson, his letter complies with section 99.012(4)(d), Florida Statutes.**

With regard to Commissioner Gallagher, it is logical that a successor cannot take office until the office is vacant. Section 99.012(4)(g), Florida Statutes, provides that "[t]he office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation." Commissioner Gallagher would not be required to take office if elected to the Treasurer/Insurance Commissioner's office until the effective date set forth in Treasurer Nelson's resignation letter. Thus,

Commissioner Gallagher's resignation from the office of Education Commissioner must be effective no later than January 3, 2001. **As January 3, 2001, is the date cited by Commissioner Gallagher in his letter of resignation, his letter complies with section 99.012(3)(d), Florida Statutes.**

Question 2

If either candidate did not cite the correct resignation date as required by section 99.012, Florida Statutes, what is the legal effect on the qualification for the office that they seek and on their ability to continue in their current office?

As the Division has answered your first question in the affirmative, it is not necessary to answer question two or three. However, the Division realizes that this situation could arise in the future. Therefore, we will answer questions two and three **hypothetically** as if the resignation dates were incorrect.

An incorrect date in the resignation letters provided by Commissioner Gallagher and Treasurer Nelson has no effect on these officers' qualifications as candidates for the office they seek nor on their ability to continue in their current office. The Florida Supreme Court has concluded that the resign-to-run law "is simply a limitation upon the right to retain the office already held when seeking another office. It is not a limitation upon the right to seek another office." *Holley*, at 408. As stated previously, the overall purpose and intent of the resign-to-run law is to avoid unnecessary special elections. In applying the resign-to-run law, one should be cognizant of its announced purpose and its intended limitations on public officeholders.

In *State ex rel. Shevin v. Stone*, 279 So.2d 17 (Fla. 1972), the Florida Supreme Court was asked to remove two elected officials seeking other offices who had failed to file letters of resignation. The court refused to remove the candidates from the ballot and permitted the late filing of resignation letters which were to be deemed, "[in accordance with the statute] '... effective not later than the date upon which he would assume office, if elected to the office to which he seeks to qualify.'"

Shevin incorporated the rule of "substantial compliance" into the construction of the resign-to-run law. Observing that the failure to timely copy the Governor and the Secretary of State with resignation letters violated the strict provisions of the law, Justice Boyd wrote, "[t]his [failure to copy] does not comply with the letter of the law but seems to satisfy the basic legislative intent. **At this date in the election campaigns, names of candidates should not be stricken from the ballot whenever there is substantial compliance with law as in these resignations.**" *Shevin* at 22. (Emphasis supplied). See also, *Gonzalez v. Vogel*, 616 So.2d 473, 477 (Fla. 2d DCA 1993) (following the "substantial compliance" rule and citing to *Shevin*).

As in *Shevin*, and *Gonzalez*, the resignation letters in question substantially comply with section 99.012, Florida Statutes. The resignations were submitted in such a manner as to create vacancies in office to be filled at the next general election. Thus, there is no question that the purpose of the resign-to-run law is adequately served. Further, it is the Division's opinion that a letter submitted pursuant to the resign-to-run law is not required to contain a specific effective date. A candidate may choose to

resign earlier than the dates specified in section 99.012, Florida Statutes. However, by operation of law, a candidate's resignation date is effective no later than the earlier of those dates.

Regardless of whether the resignations in question "substantially comply" or are so flawed that they do not comply with section 99.012, Florida Statutes, Treasurer Nelson's and Commissioner Gallagher's qualifications as candidates for United States Senate and Treasurer/Insurance Commissioner are **not** in question. Section 99.012(6), Florida Statutes, provides that "[t]he name of any person who does not comply with this section may be removed from every ballot on which it appears when ordered by a circuit court upon the petition of an elector or the Department of State." This section, however, is not applicable to the facts of this case. Section 99.012(4)(f)1., Florida Statutes, provides that the failure of an officer who qualifies for federal public office to submit a resignation pursuant to this subsection constitutes an automatic irrevocable resignation, effective immediately, from the office he or she presently holds. Accordingly, if Treasurer Nelson's and Commissioner Gallagher's resignations, submitted on May 8 and 12, 2000, respectively, did not comply with this subsection, both were simultaneously removed from office by operation of law on their respective dates of qualifying for United States Senate. This would be the **exclusive** remedy with regard to both Treasurer Nelson and Commissioner Gallagher.

With regard to Treasurer Nelson, if he were removed from office by operation of law pursuant to section 99.012(4)(f)1., Florida Statutes, he would then have qualified for United States Senate as a nonofficeholder. There would be an immediate vacancy that would be filled pursuant to section (1)(f), Article IV, Florida Constitution. Thus, the governor would fill the vacancy for a term ending on the first Tuesday after the first Monday following the November 7, 2000 election.

If for the same reason, Commissioner Gallagher was removed from office by operation of law on May 12, 2000, he would then have qualified for United States Senate as a nonofficeholder. There would be an immediate vacancy that would be filled pursuant to section (1)(f), Article IV, Florida Constitution. Thus, the governor would fill the vacancy for a term ending on the first Tuesday after the first Monday following the November 7, 2000 election. Further, he would have qualified as nonofficeholder on July 18, 2000, for the office of Treasurer/Insurance Commissioner. Pursuant to section 99.012(3)(g), Florida Statutes, a nonofficeholder is not required to comply with the provision of section 99.012(3), Florida Statutes.

With regard to Commissioner Gallagher's and Treasurer Nelson's ability to continue in their current office, letters of resignation that substantially comply with the requirements of the resign-to-run law would not trigger the provision in section 99.012(4)(f), Florida Statutes, regarding automatic irrevocable resignation. If the letters were determined to be fatally flawed such that Commissioner Gallagher and Treasurer Nelson were removed from office by operation of law, the legality of all actions taken by these officers in the last several months, both in their capacity as individual officers and as members of the cabinet and various boards, could be called into question. Fortunately, this did not happen.

Question 3

What action, if any, is required by Florida law?

As in question two, we will address this question as if our answer to question one were that the effective dates in the letters in question were incorrect. With this in mind, it would be the Division's opinion that no action on behalf of your office is required. Florida law makes it very clear that a qualifying officer's responsibilities are regarded as ministerial in nature. Your duty as a qualifying officer is to examine a candidate's qualifying papers, and if in proper order accept them. *See Op. Att'y Gen. 76-130* (June 10, 1976). As stated in Attorney General opinion 58-231, the filing officer has no duty to look beyond the four corners of the qualifying instruments to ascertain the validity of the statements.

A review of Commissioner Gallagher's qualification papers for the office of Treasurer/Insurance Commissioner indicates that all qualifying documents required by section 99.061(7), Florida Statutes, were submitted in the proper form in a timely manner. *The resignation letter is not an item designated in this section.* In *Shevin*, the Florida Supreme Court held:

The resign law is not Secretary Stone's to administer by such a determination, any more than the campaign spending law. His charge under the constitution and statute does not extend to the substance or correctness or enforcement of a sworn compliance with the law-with 'matters in pais', as it were. *Once the candidate states his compliance, under oath, the Secretary's ministerial determination of eligibility for the office is at an end. Any challenge to the correctness of the candidate's statement of compliance is for appropriate judicial determination upon any challenge properly made.*

Shevin, at 22. (Emphasis added.) Section 99.012(6), Florida Statutes, further confirms that with regard to the resign-to-run law, a filing officer's duties are ministerial. The language makes it clear that the name of a person who does not comply with the resign-to-run law may be removed "**when ordered by a circuit court.**" Commissioner Gallagher properly submitted a candidate's oath indicating that he had complied with the provisions of section 99.012, Florida Statutes. Therefore, absent a court order, you do not have the authority to remove Commissioner Gallagher's name from the ballot for the November general election as requested by Ms. Gievers based upon "non-compliance" with section 99.012, Florida Statutes.

The ministerial limitations regarding the acceptance of qualifying papers is also applicable to the Department of State's duty outlined in section 99.012(4)(f)2., Florida Statutes. This section provides that upon the failure of an officer who qualifies for federal public office to submit a resignation pursuant to section 99.012, Florida Statutes, the Department of State shall send a notice of the automatic resignation to the governor. If a resignation has been submitted, the Department of State does not have the authority to determine whether the resignation is correct and its duties pursuant to this section are not invoked. As both Treasurer Nelson and Commissioner Gallagher submitted resignations, the Department of State is not required to act.

SUMMARY

In the absence of any constitutional or statutory provision establishing the time that Treasurer Nelson's successor is required to take office, the effective date of his resignation must be no later than the date he would take office if elected to the United States Senate. Commissioner Gallagher's resignation date must be effective no later than the date he would be required to take office if elected, which is the effective date of Treasurer Nelson's resignation.

Once a candidate states his compliance with the resign-to-run law, under oath, a filing officer's ministerial determination of eligibility for the office is at an end. Absent a court order, a filing officer does not have the authority to remove a candidate's name from the ballot based upon non-compliance with section 99.012, Florida Statutes.

The Department of State's duty pursuant to section 99.012(4)(f)2., Florida Statutes, is invoked only if a candidate fails to submit a resignation letter.

¹ Tom Gallagher withdrew his candidacy for United States Senator in a letter to the Division of Elections dated June 16, 2000.