

DE 02-19 - November 14, 2002

**Provisional Ballots and Challenge Statute
Sections 101.048 and 101.111(3), F.S. respectively**

*To: Mr. Joseph S. Geller, Mr. Benedict P. Kuehne, Miami-Dade Democratic Executive Committee,
2411 Hollywood Boulevard, Hollywood, Florida 33020*

Prepared by: Division of Elections

Dear Sirs:

This is in response to your request for an advisory opinion as expressed in your letter dated November 4, 2002. You represent a political party and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you. You ask the following:

"Are voters who are challenged pursuant to the provisions of Section 101.111, Florida Statutes, and who are determined by precinct officials to be ineligible to cast a vote, then entitled to cast a provisional ballot pursuant to the provisions of Section 101.048, Florida Statutes?"

The short answer to your question is no. A voter whose eligibility to vote was challenged pursuant to section 101.111, Florida Statutes, and where the precinct clerk and inspectors have determined that the voter is not eligible to vote, is not entitled to cast a provisional ballot pursuant to section 101.048, Florida Statutes.

Section 98.481, Florida Statutes, provides that in a county using a precinct register in lieu of registration books at the polls, the right to vote of any person desiring to do so may be challenged. Section 101.111, Florida Statutes, establishes the procedure to be followed by the challenger, voter, clerk and inspectors when a voter's right to cast a ballot is challenged pursuant to section 98.481, Florida Statutes.

A provisional ballot is defined by section 97.021(26), Florida Statutes, as a ballot issued to a voter by the election board at the polling place on election day because (a) the voter's name does not appear on the precinct register and verification of the voter's eligibility cannot be determined; or (b) because there is an indication on the precinct register that the voter has requested an absentee ballot and there is no indication whether the voter has returned the absentee ballot¹. Both situations included in section 97.021(26), Florida Statutes, are situations where the voter's eligibility remains in question. Section 101.048, Florida Statutes, sets forth the procedure to be followed by the voter when casting a provisional ballot and by the county canvassing board when determining if the ballot was legally cast and therefore should be counted.

The distinction between the statutory provisions for challenging the eligibility of a person desiring to

vote and the statutory provisions pertaining to provisional ballots lies in that the latter law is only applicable to the limited circumstances included in the statute. The laws pertaining to challenging a voter's right to cast a ballot are applicable to situations where, for whatever reason set forth in the challenger's oath, the challenger questions the voter's right to cast a ballot. The challenging process encompasses the execution of an oath by the challenger stating their name and other identifying information as well as the specific grounds for the allegation that the voter is attempting to vote illegally at the particular precinct. The challenged elector has the opportunity to review the challenger's oath and to execute their own oath stating their identifying information and that they are a qualified voter registered to vote in that precinct. The inspector or clerk will then compare the information on the affidavits to the information in the registration books or precinct register, and by a majority vote of the clerk and inspectors, will determine if the challenged voter will be allowed to vote.

The Legislature had the opportunity to include, and did include, references to the newly created provisional ballot provisions in other specific sections of the Election Code. The Legislature did not amend section 101.111, Florida Statutes, to include the use of provisional ballots. The lack of express correlation between the challenge and provisional ballot sections of the law leads to the conclusion that the Legislature did not intend for such sections to be used in unison. Furthermore, if an eligibility determination has already been made by the clerk and inspectors as established in section 101.111, Florida Statutes, there is no longer an issue as to whether the particular voter is or is not eligible to vote. Therefore, a provisional ballot may not be issued to the challenged voter whose eligibility has already been unfavorably determined by the Election Board.

SUMMARY

If a voter's eligibility is challenged in accordance with sections 98.481 and 101.111(3), Florida Statutes, and a determination of non-eligibility is made, the challenged voter does not have the right to receive, vote or cast a provisional ballot as set forth in sections 97.021(26) and 101.048, Florida Statutes.

Sincerely,

Edward C. Kast
Director, Division of
Elections

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¹ Section 101.69, Florida Statutes, also states the requirements to receive a provisional ballot when a voter wishes to vote at the precinct although they have requested and received an absentee ballot.