

January 23, 2003

The Honorable David C. Leahy
Supervisor of Elections
Miami-Dade County
111 NW 1st Street, Suite 1910
Miami, Florida 33128-1962

RE: DE 03-01
Conduct of Municipal Elections
§100.3605(1), §101.5604, and §101.62 et. seq., F.S.

Dear Mr. Leahy:

This is in response to your request for an advisory opinion as expressed in your letters dated December 5, 2002 and December 9, 2002. You are the Supervisor of Elections for Miami-Dade County, and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you. In the interest of providing a clearer answer to your inquiry, we have inverted the order in which your questions were originally posed. You ask the following:

1. Does a municipality have the authority pursuant to section 100.3605(1), Florida Statutes, to use paper ballots designed to be counted manually for both absentee ballot voting and polling place voting?
2. Does a municipality have the authority pursuant to section 100.3605(1), Florida Statutes, to use paper ballots designed to be counted manually for absentee ballot voting, as opposed to the county's electromechanical paper ballot tabulating system, even though the municipality will be using the county's touch screen voting system for polling place voting?

The short answer to question one is no unless the municipality by charter or ordinance provides for the use of paper ballots and the municipality does not use the county's voting equipment.

The short answer to question two is yes. Section 100.3605(1), Florida Statutes, does not preclude the use of paper absentee ballots to be manually counted by a municipality that

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has a charter or ordinance allowing such use, even though polling place voting will take place using the county's touch screen or other voting systems.

In order to assist you in understanding my response, let me first provide you with some general background information directly related to question number one. As set forth in section 100.3605(1), Florida Statutes, and in the Division of Election's formal opinion DE 02-01, the Florida Election Code generally applies to the conduct of municipal elections only in the absence of an applicable special act, charter or ordinance provision. However, there are a number of provisions in the Election Code that are expressly applicable to municipal elections and because of this, municipalities may not opt out of their application.

While section 101.5604 of the Florida Statutes requires that counties use an electronic or electromechanical precinct tabulation voting system, it does not expressly require the same of municipalities. As a result, in accordance with the provisions of section 100.3605(1), Florida Statutes, a municipality with a charter or ordinance provision authorizing the use of paper ballots for municipal elections may legally do so except when it chooses to use the county's voting system to conduct the municipal election.

However, with regard to question two, and as stated in formal opinion DE 90-18, municipal governments are not statutorily required to provide absentee ballots for municipal elections. But, if a municipality chooses to provide absentee ballots, they must still comply with the absentee ballot provisions contained in sections 101.041 and 101.62 et. seq., of the Florida Election Code. Compliance with sections 101.041 and 101.62 et. seq., Florida Statutes, is required for municipal elections providing absentee ballots whether the municipal election is being conducted by the municipality or by the county supervisor of elections. These absentee ballot provisions do not contain any requirements relating to the use of a county's electromechanical paper ballot tabulating system.

Municipalities that use the county voting system to conduct a municipal election usually contract with the county for the use of the equipment, and may or may not contract for additional services such as training and recruitment of poll workers, designation of precinct locations, etc. Therefore, supervisors of elections and municipalities may come to a variety of contractual arrangements for the conduct of a single or multiple municipal election. Mandating the use of optical scan absentee ballots for municipal elections where the county is providing the voting system could impact the aforementioned contractual relationships.

We also recognize that many municipal charters provide for compressed timetables when it comes to deadlines relevant to municipal elections. Requiring the use of absentee

paper ballots capable of being scanned and tabulated by the county's voting system for municipal elections would strain what are oftentimes already tight schedules. The printing process for any paper ballot capable of being scanned and tabulated by the county's voting system may require contracting with private specialty companies, the mailing of a sample ballot to the vendor, creation of a printing template, proofing of the ballot and, finally, shipment of the end product back to the municipality or county. These activities must occur within the time constraints set forth in the municipal charter and/or ordinances. Furthermore, many municipalities have limited budgets and the printing process for such ballots can be costly as well as time consuming.

The purpose of using electronic and electromechanical voting systems that reject over and under voted ballots is to allow the voter the opportunity to correct his or her voted ballot and have the vote counted. Any voter casting his or her ballot at the precinct can benefit in that manner from the use of optical scan ballots and optical scan or other electronic or electromechanical voting system. Such a safeguard is naturally lost when dealing with a mailed absentee ballot. Even when the voting system rejects an over or under voted absentee ballot, the voter is not present and does not have the opportunity to correct his or her ballot in order to have the vote counted. In light of this fact, we are of the opinion that there is no substantive legal right or statutory provision that would preclude the use of paper absentee ballots to be manually counted in a municipal election held by a municipality with a charter or ordinance providing for the use of paper ballots. This is the case even when precinct voting will take place using the county's voting system.

Given that (1) requiring the exclusive use of paper absentee ballots capable of being scanned and tabulated by the county's voting system would likely strain compliance with charter and ordinance imposed deadlines relevant to municipal elections, and burden municipal budgets; and (2) Election Code provisions do not expressly require such exclusive use, a municipality with a charter or ordinance allowing the use of manually counted paper ballots may do so for absentee voting even though polling place voting will take place using the county's touch screen or other voting systems.

SUMMARY

A municipality may only conduct its own paper ballot election for both absentee voting and polling place voting if its charter or an ordinance provision permits it. If a municipality chooses to use the county's voting system to conduct the municipal election, the municipal polling places must use, at a minimum, an optical scan precinct count

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system. Whether the municipality or the county supervisor of elections conducts the municipal election, if the municipality provides for absentee voting, sections 101.041 and 101.62 et. seq., Florida Statutes, regarding absentee voting are applicable. However, a municipality with a charter or ordinance that specifically provides for the use of paper ballots may use manually counted paper absentee ballots even when polling place voting will take place using the county's touch screen or other voting system.

Sincerely,

Edward C. Kast
Director, Division of Elections

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EK/MTD