



FLORIDA DEPARTMENT OF STATE
Glenda E. Hood
Secretary of State
DIVISION OF ELECTIONS

March 13, 2003

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

RE: DE 03-03
Substitute Ballots
§101.43, F.S.

Dear Mr. Leahy:

This is in response to your request for an advisory opinion as expressed in your letter dated December 18, 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. You ask the following:

“Is it permissible to use paper ballots that are not utilized in conjunction with an electronic or electromechanical vote tabulation system, but are manually counted, as substitute ballots provided for in Section 101.43, F.S.?”

During our telephone conversation on February 10, 2003, you elaborated on the context of your question stating that the Miami-Dade County Board of County Commissioners had passed a resolution regarding the use of optical scan ballots in county elections. The county resolution apparently requires that the county manager make certain that substitute ballots in an amount equal to 25 percent of the registered voters of each precinct be prepared in accordance with the provisions of section 101.43, Florida Statutes, to be used if necessary in accordance with that statute for the November 5, 2002 election. However, our response is framed exclusively in the context of section 101.43, Florida Statutes, and without attempting to interpret the Miami-Dade County resolution.

The short answer to your question is yes. It is permissible to use paper ballots which will be manually counted as substitute ballots pursuant to section 101.43, Florida Statutes.

The origins of section 101.43 of the Florida Statutes date back to 1929 when it was enacted into law under the title “non-delivery, loss or theft of official ballots.” That provision stated that in lieu of the official ballots not delivered in time, lost, destroyed or stolen, the official whose duty it was to provide the official ballots shall “cause other ballots to be prepared, printed or written as nearly as may be of the form and description of the official ballots, and the board of election shall cause the ballots so submitted to be used at the election in the same manner, as nearly as may be, as the official ballots would have been.” The 1929 version of the substitute ballot statute was not substantially altered until 1951. The only difference between the current language of section 101.43, Florida Statutes, and the 1951 language is that the current statute does not limit the applicability of the section to situations where a “voting machine” is used. The reference to voting machines was removed from the substitute ballot section by the Legislature in 2001. Section 101.43, Florida Statutes (2002), reads as follows:

When the required official ballots for a precinct are not delivered in time to be used on election day, or after delivery, are lost, destroyed or stolen, the clerk or other officials whose duty it is to provide ballots for use at such election, in lieu of the official ballots, shall have substitute ballots prepared, conforming as nearly as possible to the official ballots, and the board of election shall substitute these ballots to be used in the same manner as the official ballots would have been used at the election.

Provisions for substitute ballots were originally adopted in 1929 when the state allowed the optional use of voting machines by precincts and counties. The concern addressed by the requirement that officials provide substitute ballots in lieu of official ballots when those are not delivered on time or are lost, destroyed, or stolen, was to provide some medium in which registered voters would still be able to cast their vote. This continues to be the purpose behind section 101.43, Florida Statutes.

The law requires that the substitute ballot conform as nearly as possible to the official ballots. Although this could be interpreted as requiring that counties using Direct Recording (DRE) voting systems use optical scan ballots as substitute ballots, the practical implications of such requirement precludes us from adopting this position. For counties using DRE voting systems, if the emergency causing the need to use substitute ballots occurs shortly before election day, the clerk or official with the duty to provide the substitute ballots may not have sufficient time to order them from a vendor, proof the necessary template, and receive the printed optical scan ballots in time for election day.

In the case of counties that use optical scan voting systems, there is simply no viable alternative to providing a paper substitute ballot which will be manually counted if the optical scan ballots are not delivered on time or are lost, destroyed or stolen.

SUMMARY

When official ballots for a precinct are not delivered in time to be used on election day, or after delivery are lost, destroyed or stolen, section 101.43, Florida Statutes, requires that substitute ballots conforming as nearly as possible to the official ballot be provided. It is permissible that the substitute ballots provided be paper ballots that will be manually counted.

Sincerely,

Edward C. Kast
Director, Division of Elections

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EK/MTD