

September 26, 2007

The Honorable Jerry Holland
Duval County Supervisor of Elections
105 East Monroe Street
Jacksonville, Florida 32202

RE: DE 07-06
Primary Elections; Open Primary; Voting;
Fla. Const. art. VI, s. 5(b);
§§ 97.021(27), 100.061, 100.181, and 101.151(7),
Florida Statutes

Dear Mr. Holland:

This letter responds to your request for an advisory opinion. You are the Supervisor of Elections for Duval County; therefore, the Division has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2007).

You ask essentially the following question:

If three or more people of the same party qualify for the same state office and have no other opposition, making the election an “open primary,” will the candidate with the highest number of votes be declared the winner, regardless if no candidate receives a majority (50% + 1) of the votes cast?

The short answer to your question is “Yes.”

With regard to your question, we first define an “open primary” as one satisfying the following constitutional provision:

Fla. Const. art. VI, s. 5(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.

Section 97.021(27), Florida Statutes (2007) states:

"Primary election" means an election held preceding the general election for the purpose of nominating a party nominee to be voted for in the general election to fill a national, state, county, or district office.

The following is the coded text¹ of the amendments made by the Legislature in 2005 to the then existing section 100.061, Florida Statutes:²

100.061 ~~First~~ Primary election.—In each year in which a general election is held, a ~~first~~ primary election for nomination of candidates of political parties shall be held on the Tuesday 9 weeks prior to the general election. ~~The~~ Each candidate receiving the highest number ~~a majority~~ of the votes cast in each contest in the ~~first~~ primary election shall be declared nominated for such office. If two or more candidates receive an equal and highest number of votes for the same office, such candidates shall draw lots to determine which candidate is nominated. ~~A second primary election shall be held as provided by s. 100.091 in every contest in which a candidate does not receive a majority.~~

So, section 100.061, Florida Statutes (2007), now reads:

In each year in which a general election is held, a primary election for nomination of candidates of political parties shall be held on the Tuesday 9 weeks prior to the general election. The candidate receiving the highest number of votes cast in each contest in the primary election shall be declared nominated for such office. If two or more candidates receive an equal and highest number of votes for the same office, such candidates shall draw lots to determine which candidate is nominated.

Effective January 1, 2006, the Legislature removed the requirement that the candidate “receive a majority of the votes cast” in a primary election. Also, only one primary election currently occurs – there is no second primary election for national, state, county, or district offices. Regardless of whether a candidate receives a majority of the votes cast, the winner of a primary election is the candidate receiving the highest number of votes.

For example, assume at a primary election that four candidates, all of the same party, are seeking nomination to be their party’s nominee for a state office. No other party has any candidates seeking the office, nor has any write-in candidate qualified for the office. The four candidates, respectively, receive 35%, 34%, 25%, and 6% of the votes cast in the "open" primary election. Thus, based upon Section 100.061, Florida Statutes (2007), the candidate who received 35% of the votes cast is the winner of the primary and becomes the party’s nominee for the office. Also this candidate wins the general election since the candidate will have been deemed to have voted

¹ A strike-through represents a deletion, while underscoring represents an addition to the section’s language.

² 2005 Laws of Florida, 2005-286, s. 11. The amendments became effective January 1, 2006.

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for himself or herself even though his or her name will not be on the ballot. This results from the application of the following two statutory provisions:

Section 101.151(7), Florida Statutes (2007):

Except for justices or judges seeking retention, the names of unopposed candidates shall not appear on the general election ballot. Each unopposed candidate shall be deemed to have voted for himself or herself.

Section 100.181, Florida Statutes (2007):

The person receiving the highest number of votes cast in a general or special election for an office shall be elected to the office.....

SUMMARY

The winner of a primary election is the candidate who receives the highest number of votes cast in the election notwithstanding that the candidate may not receive a majority of the votes cast. If the primary is an "open" primary, the winner of the primary election will also be the winner of the general election for the relevant office.

Sincerely,

Amy K. Tuck

Director, Division of Elections

Prepared by:

Gary J. Holland

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