

January 24, 2008

The Honorable Kathy Dent
Sarasota County Supervisor of Elections
P.O. Box 4194
Sarasota, Florida 34230-4194

RE: DE 08-01
Testing of Tabulating Equipment; Public
Access to Tabulation Room,
§§ 101.5612(2) and 102.141,
Florida Statutes

Dear Ms. Dent:

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

As background to your questions, section 101.5612(2), Florida Statutes (2007), states:

101.5612 Testing of tabulating equipment.-- . . .

(2) On any day not more than 10 days prior to the commencement of early voting as provided in s. 101.657, the supervisor of elections shall have the automatic tabulating equipment publicly tested to ascertain that the equipment will correctly count the votes cast for all offices and on all measures. If the ballots to be used at the polling place on election day are not available at the time of the testing, the supervisor may conduct an additional test not more than 10 days before election day. Public notice of the time and place of the test shall be given at least 48 hours prior thereto by publication once in one or more newspapers of general circulation in the county or, if there is no newspaper of general circulation in the county, by posting the notice in at least four conspicuous places in the county . . . The Department of State shall give written notice to each statewide candidate at the time of qualifying, or immediately at the end of qualifying, that the voting equipment will be tested and advise each candidate to contact the county supervisor of elections as to the time and location of the public preelection test. The supervisor or the municipal elections official shall, at least 15 days prior to the commencement of early voting as provided in s. 101.657, send written notice

by certified mail to the county party chair of each political party and to all candidates for other than statewide office whose names appear on the ballot in the county and who did not receive written notification from the supervisor or municipal elections official at the time of qualifying, stating the time and location of the public preelection test of the automatic tabulating equipment. The canvassing board shall convene, and each member of the canvassing board shall certify to the accuracy of the test. For the test, the canvassing board may designate one member to represent it. The test shall be open to representatives of the political parties, the press, and the public. **Each political party may designate one person with expertise in the computer field who shall be allowed in the central counting room when all tests are being conducted and when the official votes are being counted.** The designee shall not interfere with the normal operation of the canvassing board. [*Emphasis supplied.*]

You ask essentially the following questions based upon the above provision:

1. Does the provision in bold apply to an election in which there are no partisan races, such as a nonpartisan municipal election or a county referendum?
2. Does the fact that this provision is found in a section entitled, "Testing of tabulating equipment," indicate that the statement, "and when official votes are being counted," applies only to public testing, or does it apply to any time votes are being counted including preelection, absentee processing pursuant to section 101.68(2), Florida Statutes (2007), and election night counting?
3. Who is legally permitted in the tabulation room when votes are tabulated?

With regard to your first question, the short answer is "Yes."

Section 101.5612(2), Florida Statutes (2007), does not distinguish between partisan and nonpartisan elections. Therefore, the plain wording of the statute must control. A qualified person from each political party is entitled to be present in the tabulation room during testing of the tabulating equipment and when official votes are being counted, regardless of the type of election.

With regard to your second question, the short answer is that notwithstanding the title of section 101.5612 as "Testing of tabulating equipment," a political party may designate a person with expertise in the computer field to be present in the central counting (tabulation) room at anytime the official votes from an election are being counted by automatic tabulating equipment.

In the context of section 101.5612, Florida Statutes (2007), we interpret the phrase "official votes are being counted" to mean whenever ballots are run through automatic tabulating equipment. For example, if on election night, the canvassing board uses automatic tabulating equipment to count absentee ballots and the political party has designated a person with expertise in the computer field to be present, then that person must be allowed in the tabulation room when the

ballots are counted by the automatic tabulating equipment; however, the political party does not have a right to designate a person with computer expertise to be present in the tabulation room when no computer activity is occurring. Also, the political party's designee may not be present in the tabulation room if the only activity is a modem transfer of the votes recorded earlier at the precincts. In the situation of a modem transfer, no "counting" of the votes occurs, but merely a tabulation of ballots already counted at the precincts. Additionally, in response to your particular question regarding pre-election day absentee processing under section 101.68(2)(a), Florida Statutes (2007), the political party's designated person with expertise in the computer field must be given the opportunity to be present when those ballots are counted via automatic tabulating equipment.

With regard to your third question, the short answer is that the Election Code is silent on who is legally entitled to be in the tabulation room during official vote counting other than the political parties' designated persons who have expertise in the computer field. However, the activities of the canvassing board in the tabulation room must be observable by members of the public to comply with the requirement in section 102.141, Florida Statutes (2007), that the votes be "publicly canvassed."

Section 102.141(2), Florida Statutes (2007), prescribes that the county canvassing board meeting must occur "in a building accessible to the public" in the county where the election occurred and the meeting must be publicly noticed. Otherwise, the law does not specify where specific canvassing board activities must occur. For example, there is no requirement that the tabulation, ballot inspection, and other activities of the canvassing board occur in the same room. Also, although the law does not expressly so provide, it is implicit that the canvassing board, like any other committee or commission, must be able to maintain control and ensure the integrity of its procedures and process. This may mean that the canvassing board cannot physically accommodate all members of the public in the tabulation room or any other room used by the canvassing board, or that the board may find it necessary to remove someone whose behavior is disruptive to the orderly conduct of a meeting. In any event, the Election Code appears to give the canvassing board wide discretion regarding the logistics and procedures for conducting its meetings. However, in keeping with the public nature of the canvassing activities, the canvassing board should permit the public to see and hear the activities of the canvassing board to the maximum extent possible. So, when the canvassing board performs any of its functions and wherever those functions are performed in a room (*e.g.*, the tabulation room) not large enough to accommodate all the members of the public who desire to view and hear the proceedings, then the canvassing board should transmit the audio of its proceedings to another room or rooms where the public may gather to listen even though the public may be unable to fully observe the activities.

SUMMARY

A designated person with expertise in the computer field from each political party is entitled to be present in the tabulation room during testing of the tabulating equipment and when official votes are being counted by automatic tabulating equipment, regardless of the type of election. The Election Code is silent on who is legally entitled to be in the tabulation room during official

The Honorable Kathy Dent

January 24, 2008

Page 4 of 4

vote counting other than the political parties' designated persons who have expertise in the computer field when the official votes are being counted by automatic tabulating equipment; however, the activities of the canvassing board in the tabulation room must be observable by members of the public to comply with the requirement in section 102.141, Florida Statutes (2007), that the votes be "publicly canvassed."

Sincerely,

Sarah Jane Bradshaw

Interim Director, Division of Elections

Prepared by:

Gary J. Holland

Assistant General Counsel