



FLORIDA DEPARTMENT *of* STATE

CHARLIE CRIST
Governor

DAWN K. ROBERTS
Interim Secretary of State

July 26, 2010

The Honorable Deborah Clark
Pinellas County Supervisor of Elections
13001 Starkey Road
Largo, Florida 33773-1416

RE: DE 10-09
Candidate(s) – When is candidate elected?
§§ 100.041 and 100.181, Florida Statutes

Dear Supervisor Clark:

This letter responds to your request for an advisory opinion. Because you are a supervisor of elections and seek an interpretation of the Election Code, the Division has the authority to issue you an opinion under section 106.23(2), Florida Statutes (2009).

You preface the question in your request by referring to two offices: state legislator and county commissioner. You mention that section 100.041(1), Florida Statutes (2009), states, "The term or office of each member of the Legislature shall begin upon election." You also mention that *Division of Elections Opinion* 94-05 (March 3, 1994) states that a county commissioner candidate "is considered elected when all the votes are cast at a general or special election and it has been determined that the candidate has received a plurality of the votes cast."¹ You desire a clear definition as to the date on which a candidate is officially elected to office. You assert that logically a candidate should be officially elected on the date when the election results are certified as official. While this may be a proper conclusion under some circumstances, it is not possible or practicable for the Division to definitively establish this as the election date for all purposes under the Election Code.

¹ Presently, section 100.041(2)(a), Florida Statutes (2009), in part, states: "A county commissioner is "elected" for purposes of this paragraph on the date that the county canvassing board certifies the results of the election pursuant to s. 102.151." We note that this subsection specifically limits its definition of "elected" solely to the purposes of the paragraph; therefore, for example, it would have no bearing on the requirement that a candidate for county commissioner must be a resident in the district at the time of election, meaning Election Day. See, e.g., Op. Att'y Gen. Fla. 74-293 (1974), and *infra* p. 2.

The impracticability of a specific definition for when a candidate is elected is reflected in a recent Florida Supreme Court decision in which the court held that under the factual circumstances before the Court, an unopposed judicial candidate “was deemed elected” when the qualifying period ended.² The Court reached this result despite section 105.051(1)(a), Florida Statutes (2009), providing that an unopposed judicial candidate “shall be deemed to have voted for himself or herself at the general election.” So, the short answer to your question is the date that a candidate is officially elected cannot be defined without addressing a particular factual situation. Depending upon the situation, a candidate could be deemed elected on Election Day, on the date when the final canvassing board certifies the election results, on a date specified by a court in an election case, or some other date as dictated by the particular factual circumstances at issue.

Historically, the Division has generally equated the time of one’s election as being the day of the election. One basis for this interpretation has been an Attorney General opinion in which the Attorney General, when interpreting the residence requirement for a county commissioner, stated:

It seems clear . . . that the person elected to the office of county commissioner must be a resident of the district *at the time of his election*, but there is nothing in the Constitution which requires that he be a resident of the district prior to the *day of his election*.

Op. Att’y Gen. Fla. 74-293 (1974) (emphasis added). The Attorney General concluded by stating: “Accordingly, in order to be sure of complying with this constitutional provision, a candidate should establish his residence in the district he seeks to represent by no later than the day before the election.” *Id.* The Supreme Court of Florida reached a similar conclusion fourteen years later in *State v. Grassi*, 532 So. 2d 1055 (Fla. 1988). Regarding a county commissioner, the Court determined that the Constitution “requires residency at the time of election.”³

If one were to apply a definitive rule in all cases that a person is not elected until the canvassing board certifies the official results of the election, significant implications and conflicts would exist with the Constitution and Election Code. For example, the Florida Constitution provides that members of the Legislature shall be residents of the district from which “elected,” and further that the members shall take office upon “election.” Art. III, § 15, Fla. Const. These provisions have been understood and applied to mean successful candidates for the Legislature must satisfy the residency requirement *and* assume office on the day of the election. If the definition of “elected” means after the election is certified, legislators would not have to satisfy the residency requirement until the election results are certified by the canvassing board. The beginning of their term would thus be delayed until that date – otherwise, legislators would take

² *Advisory Opinion to the Governor Re: Judicial Vacancy Due to Resignation*, No. SC10-1186 (Fla. July 12, 2010).

³ *Grassi*, 532 So. 2d at 1056.

office before being “elected.” (Legislators are somewhat unique because the Constitution provides, “Each house shall be the sole judge of the qualifications, elections, and returns of its members” Art. III, §2, Fla. Const.) An all-encompassing interpretation of “elected” that requires certification of the returns before one is “elected” would also affect the offices of governor, lieutenant governor, and cabinet members. These individuals must “[w]hen elected . . . be an elector not less than thirty years of age who has resided in the state for the preceding seven years.” Art. IV, § 5(b), Fla. Const. As with the time when legislators take office, this provision has been routinely understood to apply on the day of the election.

As a practical matter, limiting a person to being “elected” to when the final results are certified would make an “election” an indefinite date from the outset – the “election” would depend upon how quickly the final certifying board certifies the election results. The impracticality of this position is readily apparent when one considers that an “election” is a trigger point in the Election Code for many deadlines and activities that occur both before and after Election Day. *See, e.g.*, § 101.657, Fla. Stat. (2009) (early voting shall begin on 15th day before an election and end on 2nd day before an election); § 97.053(6), Fla. Stat. (2006) (provisional ballot shall be counted if applicant presents evidence sufficient to verify certain information provided on the application by 5:00 p.m. on the second day following the election); § 101.68, Fla. Stat. (2009) (county canvassing board may begin canvassing absentee ballots at 7 a.m. on sixth day before election, but not later than noon on the day following the election); Art. III, § 3, Fla. Const. (Legislature shall convene on “fourteenth day following each general election” for organization and selection of officers). Obviously, these constitutionally and statutorily-mandated activities depend on an election taking place on a date certain, and that date being Election Day. If an election ends when the results are certified, it would be meaningless for a voter applicant to submit information to verify his or her application on the second day *following* the election, or to allow the county canvassing board to begin canvassing absentee ballots on the day *following* the election.

An additional concern with a definition of “elected” that includes certification of results being applied in all cases is that candidates who must reside in the area for which they seek election when “elected” would have no way of knowing the residency deadline in advance. A county canvassing board must certify its results by the twelfth day following the general election, but it can certainly do so before then. § 102.112(2), Fla. Stat. (2009). Because canvassing boards throughout the state certify their results at different times, the residency deadline would vary from county to county. This result is contrary to the goal of maintaining “uniformity in the interpretation and implementation of the election laws.” § 97.012(1), Fla. Stat. (2009).

The Division is certainly aware that practically and colloquially speaking, an “election” encompasses activities beyond those occurring on Election Day. Viewed as a practical—not legal—question, therefore, it may be appropriate to characterize a candidate as being “elected” when the official results are certified.⁴ However, the Florida Constitution, Florida Election

⁴ Admittedly, the Division has, on occasion, previously opined that a person is considered elected when the results are certified (*see, e.g., Division of Elections Opinion 82-26* (November

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Code, and related authorities conclusively establish that a candidate may be deemed "elected" on another day, *e.g.*, the day of an "election" under a particular factual situation. In fact, section 100.181, Florida Statutes (2009), entitled "Determination of person election," without mentioning the certification of results, merely states: "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 date that a candidate is officially elected cannot be defined without addressing the issue as applied to a particular factual situation. Depending upon the situation, it may occur on Election Day, on the date when the final canvassing board certifies the election results, on a date specified by a court in an election case, or some other date as dictated by the particular factual circumstances at issue.

Sincerely,

A handwritten signature in blue ink, appearing to read 'DLP', followed by a horizontal line extending to the right.

Donald L. Palmer

Director, Division of Elections

10, 1982); however, the Division thinks it is inappropriate in this opinion to provide such a definitive statement without addressing a particularized factual situation.