



## FLORIDA DEPARTMENT of STATE

**RICK SCOTT**  
Governor

**KEN DETZNER**  
Secretary of State

November 6, 2014

The Honorable Susan Bucher  
Palm Beach County Supervisor of Elections  
240 South Military Trail  
West Palm Beach, Florida 33415

RE: DE 14-04 Provisional ballots – Poll  
Worker Failure or Improper Completion of  
Provisional Ballot Certificate, § 101.048,  
Florida Statutes

Dear Supervisor Bucher:

As the Palm Beach County Supervisor of Elections, you have asked for guidance regarding the casting and canvassing of provisional ballots. Because this answer will assist you in your duties, the Division of Elections has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2014). In your request for a formal opinion, you essentially ask the following question:

How should the canvassing board proceed when a provisional ballot is cast in a election but the poll worker fails to record the precinct number and/or ballot style, and the canvassing board, as a result, is unable to determine where the voter cast the ballot and/or the ballot style enclosed within the provisional ballot envelope?

Section 101.048, Florida Statutes, which details the procedures for casting and canvassing provisional ballots, requires a provisional ballot to be placed within a secrecy envelope, which is then inserted into a provisional ballot envelope. The outside of the provisional ballot envelope contains the voter's certificate and affirmation, on which the voter writes certain information, including the voter's name, date of birth, address, party affiliation, and signature. Official-use-only space is also provided for the election official (i.e., the poll worker assisting the voter) to write in the date, the precinct number, ballot style, and to sign as a witness to the voter's completion

### Division of Elections

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of the ballot certificate and affirmation.<sup>1</sup> The canvassing board ultimately examines this certificate and affirmation to ensure that the voter cast the ballot in the proper precinct and to ensure that the voter cast the proper ballot style. Unless the canvassing board determines that the voter was not entitled to vote, the ballot inside the secrecy envelope must be counted if the signature on the provisional ballot envelope matches the signature on the voter's registration. See § 101.048(2)(a) and (b), Fla. Stat.

In your request for an advisory opinion, you indicate that poll workers may have failed to properly record on the certificate the precinct where the voter cast the provisional ballot and/or the ballot style of the ballot cast. In such situations, the canvassing board will likely be limited in its ability to determine whether the voter was eligible to vote, because part of the analysis is whether the voter cast the vote in the proper precinct.<sup>2</sup> If the canvassing board has no other information upon which to rely or otherwise ascertain where the provisional ballot was cast, the board will be unlikely to fulfill its duty to ensure that the provisional voter was eligible to vote. For this reason, it is the opinion of the Division of Elections that, aside from providing enhanced focus on this issue in poll worker training, each supervisor of elections should be implementing or have implemented procedures to ensure that provisional ballot envelopes are properly tracked in a manner which will allow the canvassing board to know the precinct where a provisional ballot was cast even in cases where the poll workers have failed to write the precinct number on the certificate.

If the canvassing board is unable to ascertain—in the absence of a precinct number, ballot style, and/or election official's witness signature—from the certificate if the voter voted in the proper precinct, the canvassing board should still examine the voter's certificate and any other permissible evidence. See § 101.048(2)(a) (providing that the canvassing board "shall review the information provided in the Voter's Certificate and Affirmation, written evidence provided by the person pursuant to subsection (1), any other evidence presented by the supervisor of elections, and, in the case of a challenge, any evidence presented by the challenger"). The canvassing board must make a determination on the eligibility of the provisional voter in accordance with section 101.048(2)(a), which provides that the provisional ballot "shall be counted unless the canvassing board determines by a preponderance of the evidence that the voter was not entitled to vote. If the canvassing board lacks important information such as the precinct where the ballot was cast or the ballot style, this does not alter the board's duty to count the ballot unless the canvassing board determines by a preponderance of the evidence that the person was not entitled to cast the ballot."<sup>3</sup>

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<sup>1</sup> Rule 1S-2.037, Florida Administrative Code, further sets forth the format and content of the provisional ballot certificate and affirmation, and the notice of rights to be given to the provisional ballot voter.

<sup>2</sup> Another way for the canvassing board to possibly determine where the ballot was cast is to examine the signature of the poll worker and then determine to which precinct the poll worker was assigned.

<sup>3</sup> The canvassing board may not open a provisional ballot envelope to check the ballot style inside, because of the strict prohibition against revealing the secrecy of the ballot. See Art. VI, §

SUMMARY

Each supervisor of elections should implement procedures to ensure that the canvassing board will be able to determine the precinct and ballot style of each provisional ballot cast, even where the poll worker fails to record in his or her role as a witness the information on the certificate on the outside of the provisional ballot envelope. The canvassing board should consider all permissible evidence to make a decision about the eligibility of the voter. If the canvassing board is unable to determine where the provisional ballot was cast and which ballot style was used, the canvassing board should adhere to the statutory requirement that the provisional ballot is to be counted unless the canvassing board determines by a preponderance of the evidence that the voter was not entitled to vote.

Respectfully,

A handwritten signature in blue ink, appearing to read "Maria I. Matthews", with a long horizontal flourish extending to the left.

Maria I. Matthews, Esq.  
Director, Division of Elections

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1, Fla. Const. (providing for secret voting); § 101.041, Fla. Stat. (same); see also § 104.23, Fla. Stat. (making it a third-degree felony for any election official or person assisting any elector to willfully disclose how any voter voted). To ensure this secrecy, all canvassing decisions regarding provisional ballots, as in the context of the canvassing of absentee ballots, must be made prior to removal of a ballot from its envelope. Cf. § 101.68, Fla. Stat. (setting forth the procedures for canvassing absentee ballots, and including the requirement that, upon opening the mailing envelopes, the ballots must be separated and the envelopes mixed, “so as to make it impossible to determine which secrecy envelope came out of which mailing envelope”).