IN THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY

MICHAEL MCDERMOTT, ANN MCFALL and PATRICIA NORTHEY, as the CANVASSING BOARD OF VOLUSIA COUNTY, FLORIDA,

Plaintiff,

v.

CASE NO.: 00-2700

HONORABLE KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and HONORABLE KATHERINE HARRIS, HONORABLE BOB CRAWFORD and HONORABLE LAURENCE C. ROBERTS as the ELECTIONS CANVASSING COMMISSION,

Defendants.

ALBERT A. GORE,
Nominee of the Democratic Party for President of the United States,

Plaintiff,

v.

CASE NO.: 00-2717

ELECTIONS CANVASSING COMMISSION OF FLORIDA and FLORIDA SECRETARY OF STATE KATHERINE HARRIS,

Defendants.

NOTICE OF SUPPLEMENTAL AUTHORITY

Intervenor/Plaintiff/Appellant, Albert A. Gore, by and through undersigned counsel, gives notice of filing the following authorities:

1. *Gary Nikolits v. Greg Nicosia, Jackie Winchester, as Supervisor of Elections of Palm Beach County, Florida*, 682 So.2d 663, 1996 Fla. App. LEXIS 11651; 21 Fla. Law W.D 2365.

2. Attorney General Opinion No. 00-65 dated November 14, 2000.

Copies are attached to this Notice.

Respectfully submitted this 14th day of November, 2000.

John D.C. Newton, II
Berger Davis & Singerman
215 South Monroe Street, Suite 705
Tallahassee, Florida 32301
Telephone: 850/561-3010
Facsimile: 850/561-3013

W. Dexter Douglass
Douglass Law Firm
211 East Call Street
Tallahassee, Florida 32302
Telephone: 850/224-6191
Facsimile: 850/224-3644

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original of foregoing has been furnished by facsimile to the following on this 14th day of November, 2000:

Frank B. Gummy, III
Assistant County Attorney
123 West Indiana Avenue
DeLand, Florida 32720-4613

Deborah Kearney, General Counsel
Florida Department of State
400 South Monroe Street, PL 02
Tallahassee, Florida 32399

Barry Richard
Greenberg Traurig
101 East College Avenue
Tallahassee, Florida 32302

Attorney

25TH CASE of Level 1 printed in FULL format.

GARY NIKOLITS, Appellant, v. GREG NICOSIA, JACKIE WINCHESTER, as Supervisor of Elections of Palm Beach County, Florida, Appellees.
CASE NO. 96-3208
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
682 So. 2d 663; 1996 Fla. App. LEXIS 11651; 21 Fla. Law W. D 2365
November 6, 1996, Filed

SUBSEQUENT HISTORY: [**1] Released for Publication November 22, 1996.

PRIOR HISTORY: Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Kenneth A. Marra, Judge; L.T. Case No. CL 96-8026 AB.

DISPOSITION: Temporary injunction entered by trial court affirmed.

CORE TERMS: ballot, incumbent, designation, candidate, general election, supervisor, election, specifications, voter, primary ballot, primary election, printed, temporary injunction, directory, affiliation, defer, failure to amend, statutory scheme, uniformity, injunction, prescribe, designate, amend

COUNSEL: Kenneth D. Stern of Kenneth D. Stern, P.A., Boca Raton, for appellant.

Bruce F. Silver of Bruce F. Silver, P.A., and Curtis G. Levine of Levine & Associates, Chartered, Boca Raton, for appellees.

JUDGES: WARNER, J., GLICKSTEIN and POLEN, JJ., concur.

OPINIONBY: WARNER

OPINION:
[*664] WARNER, J.

When the Supervisor of Elections prepared to print the ballots for the general election, she decided to include the designation of "incumbent" next to the name of the incumbent property appraiser, appellant Gary Nikolits. According to the testimony, the inclusion of this designation was to distinguish Mr. Nikolits from his Democratic challenger, Greg Nicosia, whose name the Supervisor felt was sufficiently similar so as to cause voter confusion. Appellee-Nicosia filed a complaint for permanent injunction, claiming that the Supervisor had no authority to add that language to the ballot. The trial court entered[**2] a temporary injunction enjoining the Supervisor of Elections from placing the designation of "incumbent" next to appellant's name on the ballot. The appellant challenges the injunction in this appeal. We affirm the trial court's order.

The conduct of elections, including the specifications of ballots, is controlled by statute. The specifications for primary election ballots are found in section 101.141(4), Florida Statutes (1995), which provides in pertinent part: "When two or more candidates running for the same office have the same or similar surname and one candidate is currently holding that office, the word "Incumbent" shall be printed next to the incumbent's name." However, the specifications for the general election ballot, which parallel the primary ballot specifications in most respects, contain no authorization for the designation of "incumbent" on the ballot under any circumstance. § 101.151, Fla. Stat. (1995). Instead, the abbreviation of party affiliation of the candidate is placed next to the candidate's name.

After appellee-Nicosia questioned whether there would be any designation of appellant as the "incumbent" on the ballot, the Supervisor of Elections asked for[**3] an opinion of the Division of Elections regarding her authority to include the designation on the general election ballot. The Division issued a written opinion advising the Supervisor that she had the discretion to designate the incumbent on the ballot in a general election, where voter confusion could be caused by the similarity of the candidates' names. In the opinion of the Assistant General Counsel, the language regarding ballot specifications was directory only. Given the statutory requirement compelling uniformity and consistency with respect to the operation and interpretation of the election law, the Assistant General Counsel concluded, "we see no reason why someone can have the word incumbent printed next to their name in one election and when the same two candidates are on the ballot in a subsequent election, that person cannot use the term incumbent in that election."

[*665] Appellee-Nicosia filed suit to enjoin the Supervisor from including the designation of "incumbent" on the ballot. Following an evidentiary hearing,

the trial court orally ruled to grant the injunction. The oral rulings were incorporated by reference in the temporary injunction. As we concur in the trial [**4] court's reasoning, we set forth the oral ruling:

Historically, the legislature has indicated its obvious recognition that Statutes 101.141 and 101.151 are a part of the same statutory scheme; and they have been amended and revised repeatedly over the years together.

For example, in 1969, Chapter 69-281 of The Laws of Florida, both of those sections of the statute dealing with the electoral process were amended by the legislature at one time and in one act.

The next year, 1970, [in] Chapter 70-268 of The Laws of Florida, the legislature chose, in its wisdom, to amend only Chapter 101, Section 101.141 of The Florida Statutes, and included in that amendment the express provision that allowed the word, "incumbent," to be printed next to an incumbent's name in a primary election.

The legislature chose not to make that same amendment with respect to Section 101.151, dealing with general elections.

If you examine the further revisions to these statutes in 1973: Chapter 73-333, The Laws of Florida; Chapter 77-101 of The Laws of Florida; Chapter 77-175 of The Laws of Florida; Chapter 79-400 of The Laws of Florida; and Chapter 89- 338 of The Laws of Florida[**5] ; the legislature again amended both 101.141 and 101.151 in the same statutes at the same time.

This indicates to me that the legislature intended to only modify the primary election statute, the ballot statute in 1970, by virtue of Chapter 70-268.

And by virtue of that -- by virtue of the failure to amend the general ballot statute, [the legislature] demonstrated its intent that that same discretion or authority not be given to the Supervisor of Elections in general elections.

I rely on [the case] of St. George Island Ltd. versus Rudd, 547 So. 2d 958, where the First District Court of Appeal in 1989 stated:

The presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted.

The Fourth District Court of Appeal in Frank J. Rooney, Inc. versus Leisure Resorts, Inc., 624 So. 2d 773, 777, basically reiterated that same rule -- statutory construction:

When the legislature has carefully employed a term in one section of a statute, but omits it in another section of the same act, it should not be implied where it is excluded.

This is one statutory scheme, and it appears to me that the[**6] legislature understands how to amend the statutes, both of them, when it chooses to do so. And the failure to amend Section 101.151 was an indication that the same right or remedy or discretion, relative to the Supervisor of Elections and the use of the word "incumbent," was not intended to be used during the general election. It is not for me to second-guess the legislature in this regard.

I don't believe that the advisory opinion in letter form from the Assistant General Counsel rises to the level of an opinion of the state agency to which deference of this Court should be given, in the same sense as a formal opinion of a legislative executive branch interpreting [the application of] the statute.

Also I note whatever discretion is authorized under Subsection 8 of 101.151, n1 those criteria were not met here. The department did not determine that the word "incumbent," should be included in this ballot. They have not prescribed anything. They have only given an opinion that--and again, an opinion of one attorney in the office--that it was within the supervisor's discretion to do so. But they have not [*666] made any prescription one way or the other in this instance.

n1 Section 101.151(8) provides: Should the above directions for complete preparation of the ballot be insufficient, the Department of State shall determine and prescribe any additional matter or form. Not less than 60 days prior to a general election, the Department of State shall mail to each supervisor of elections the format of the ballot to be used for the general election.

[**7]

In addition to the court's well-reasoned opinion, we additionally note that the issue of voter confusion on the general ballot is considerably less than on the primary ballot. On the primary ballot, two persons running in

the same party with similar names have no way to distinguish themselves on the ballot. Thus, the Legislature deemed it appropriate to allow the Supervisor to designate the incumbent where similar names could confuse voters. In the general election, the candidate is identified by party affiliation. Therefore, even if the two candidates have the same name, voters have a method of distinguishing between the two. Thus, there is a rational basis for the distinction between the designation of incumbency on the primary ballot and the lack of designation on the general ballot.

Finally, we too agree that the trial court did not have to defer to the opinion of the Assistant General Counsel on the issue of the construction of these statutes. Where the interpretation of a statute is clearly erroneous, the court does not have to defer to the agency's interpretation of a statute. Baeza v. Pan American/National Airlines, Inc., 392 So. 2d 920, 923 (Fla. 3d DCA 1980). We[**8] disagree with the Assistant General Counsel that the ballot statutes are directory only. Moreover, even if they are directory only, it is the department, and not every Supervisor of Elections in each of the 67 counties of the state, which may prescribe additional matter or forms of ballots. See § 101.151(8). The opinion of the Assistant General Counsel that discretion is left to the individual supervisor of elections regarding language which may appear on a ballot is contrary to section 101.151(8) and to achieving uniformity in interpretation and operation of the election laws. See § 97.012(1), Fla. Stat. (1995).

For the foregoing reasons, we affirm the temporary injunction entered by the trial court.

GLICKSTEIN and POLEN, JJ., concur.

To	From	pages
John Burton	PAUL B	
Co./Dept.	Co.	
Phone #	Phone #	
Fax #	Fax #	

STATE OF

OFFICE OF ATTORNEY GENERAL
ROBERT A. BUTTERWORTH

November 14, 2000

INFORMATION COPY

The Honorable Charles E. Burton
Chair, Palm Beach County Canvassing Board
County Courthouse
West Palm Beach, Florida 33401

00-65

Dear Judge Burton:

On behalf of the Palm Beach County Canvassing Board, you have asked this office's opinion as to the meaning of "error in voting tabulation which could affect the outcome of" an election as that phrase is used in section 102.166(5), Florida Statutes.

I am answering your request fully mindful that just yesterday the Division of Elections rendered Division of Elections Opinion 00-11 to the Chairman of the Republican Party, interpreting the duties of a county canvassing board pursuant to section 102.166(5), Florida Statutes.[1] Because the Division of Elections opinion is so clearly at variance with the existing Florida statutes and case law, and because of the immediate impact this erroneous opinion could have on the on-going recount process, I am issuing this advisory opinion.

Section 102.166(4), Florida Statutes, permits a local canvassing board, upon request of a candidate or political party, to authorize a manual recount to include at least three precincts and at least 1 percent of the total votes cast for such candidate.[2] Section 102.166(5), Florida Statutes, provides "[i]f the manual recount indicates an error in vote tabulation which could affect the outcome of the election, the county canvassing board shall" among other options, manually recount all ballots.

Division of Election Opinion 00-11 concludes that the language "error in the vote tabulation" in section 102.166(5), Florida Statutes, refers only to a counting error in the vote tabulation system. The opinion concludes that the inability of a voting system to read an "improperly marked marksense or improperly punched punchcard ballot" is not an "error in the voter

tabulation system" and would not, therefore, trigger a recount of all ballots.

The division's opinion is wrong in several respects.[2]

The opinion ignores the plain language of the statute which refers not to an error in the vote tabulation system but to an error in the vote tabulation. The Legislature has used the terms "vote tabulation system" and "automatic tabulating equipment" elsewhere in section 102.166, Florida Statutes, when it intended to refer to the system rather than the vote count. Yet the division, by reading "vote tabulation" and "vote tabulation system" as synonymous, blurs the distinctions that the Legislature clearly delineated in section 102.166.[3]

The error in vote tabulation might be caused by a mechanical malfunction in the operation of the vote counting system, but the error might also result from the failure of a properly functioning mechanical system to discern the choices of the voters as revealed by the ballots. The fact that both possibilities are contemplated is evidenced by section 102.166(7) and (8), Florida Statutes. While subsection (8) addresses verification of tabulation software, subsection (7) provides procedures for an examination of the ballot by the canvassing board and counting teams to determine the voter's intent.

The division's opinion, without authority or support, effectively nullifies the language of section 102.166(7), Florida Statutes. Nothing in subsection (7) limits its application to the recount of all ballots. Rather, the procedures for a manual recount in subsection (7) equally apply to the initial sampling manual recount authorized in section 102.166(4)(d). Section 102.166(7)(b) states:

> If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

Yet under the division's interpretation, such language is rendered superfluous. It is fundamental principle of statutory construction that statutory language is not to be assumed to be surplusage; rather a statute is to be construed to give meaning to all words and phrases contained within statute.[4]

Section 102.166(7) clearly recognizes that an examination by a person of the ballot will occur to determine whether the voter complied with the statutory requirement, i.e., marked the marksense or punched the punchcard ballot. The statutes do not specify how a punchcard must be punched. Clearly, there may be instances where a punchcard or marksense ballot was not punched or marked in a manner in which the electronic or electro-mechanical equipment was able to read the ballot. Such a deficiency in the equipment in no way compromises the voter's intent or the canvassing board's ability to review the ballot and determine the voter's intent. In fact, section 101.5614(5) and (6), Florida Statutes, contemplate that such an examination will occur. Section 101.5614(6) provides that the ballot will not be counted if it is impossible to determine the elector's choice or the elector marks more than one name than there are persons to be elected.

Clearly, the manual count of the sampling precincts which reveals a discrepancy between votes counted by the automatic tabulating equipment and valid ballots which were not properly read by the equipment but which constitute ballots in which the voter complied with the statutory requirements and in which the voter's intent may be ascertained, constitutes an "error in vote tabulation." If the error is sufficient that it could affect the outcome of the election, then a manual recount of all ballots may be ordered by the county canvassing board.

The division's opinion fails to acknowledge the longstanding case law in Florida which has held that the intent of the voters as shown by their ballots should be given effect. Where a ballot is marked so as to plainly indicate the voter's choice and intent, it should be counted as marked unless some positive provision of law would be violated.[5]

As the state has moved toward electronic voting, nothing in this evolution has diminished the standards first articulated in such decisions as *State ex rel. Smith v. Anderson*[6] and *State ex rel. Nuccio v. Williams*[7] that the intent of the voter is of paramount concern and should be given effect if the voter has complied with the statutory requirement and that intent may be determined. For example, if a voter has clearly, physically penetrated a punchcard ballot, the canvassing board has the authority to determine that the voter's intention is clearly expressed even though such puncture is not sufficient to be read by automatic tabulating equipment.

In *State ex rel. Carpenter v. Barber*,[8] the Court stated:

> The intention of the voter should be ascertained from a study of the ballot and the vote counted, if the will and intention of the voter can be determined, even though the cross mark 'X' appears before or after the name of said candidate. *See Wiggins, Co. Judge, v. State ex rel. Drane*, 106 Fla. 793, 144 So. 62; *Nuccio v. Williams*, 97 Fla. 159, 120 So. 310; *State ex rel. Knott v. Haskell*, 72 Fla. 176, 72 So. 651.

The Florida Statutes contemplate that where electronic or electromechanical voting systems are used, no vote is to be declared invalid or void if there is a clear indication of the intent of the voter as determined by the county canvassing board.[9]

In light of the plain language of section 102.166(5), Florida Statutes, authorizing a manual recount of all ballots when the sampling manual recount indicates an error in vote tabulation which could affect the outcome of the election and the general principles of election law, I must express my disagreement with the conclusions reached in Division of Election Opinion 00-11. Rather I am of the opinion that the term "error in voter tabulation" encompasses a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes.

Sincerely,

/ Robert A. Butterworth

Robert A. Butterworth
Attorney General

RAB/t

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[1] The validity of the opinion of the Division of Elections is questionable since it appears to exceed the authority granted to the division by Florida law. Section 106.23(2), Florida Statutes, provides the division with the authority to render advisory opinions interpreting the election code to, among

others, a political party relating to actions such party has taken or proposes to take. Division of Elections Opinion 00-11, however, erroneously seeks to advise a political party about the responsibilities of the supervisor of elections and local canvassing board under section 102.166(5).

[2] *See*, s. 102.166(4)(d), Fla. Stat., stating that the person requesting the recount "shall choose three precincts to be recounted."

[3] *See, e.g., Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So. 2d 515 (Fla. 1st DCA 1984) (legislative use of different terms in different portions of same statute is strong evidence that different meanings were intended).

[4] *See, Terrinoni v. Westward Ho!*, 418 So. 2d 1143 (Fla. 1st DCA 1982); *Pinellas County v. Woolley*, 189 So. 2d 217 (Fla. 2d DCA 1966); Ops. Att'y Gen. Fla. 95-27 (1995); 91-16 (1991) (operative language in a statute may not be regarded as surplusage); 91-11 (statute must be construed so as to give meaning to all words and phrases contained within that statute).

[5] *See, State ex rel. Smith v. Anderson*, 8 So. 1 (Fla. 1890); *Darby v State*, 75 So. 411 (Fla. 1917); *State ex rel. Nuccio v. Williams*, 120 So. 310 (Fla. 1929) (in performing their duty of counting, tabulating, and making due return of ballots cast in an election, the inspectors may, in some cases of ambiguity or apparent uncertainty in the name voted for, determine, from the fact of the ballot as cast, the person for whom a vote was intended by the voter).

[6] 8 So. 1 (Fla. 1890).

[7] 120 So. 310 (Fla. 1929).

[8] 198 So. 49, 51 (Fla. 1940).

[9] *See, Wiggins v. State ex rel. Drane*, 144 So. 62, 63 (Fla. 1932) (separate tabulation and return of what may be deemed regular ballots does not mean that only regular ballots are to be counted; if the marking of the ballot should be irregular, but the voter casting such ballot has clearly indicated by an X-mark the candidate of his choice, the ballot should be counted as intended).

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
DIVISION OF ELECTIONS

November 13, 2000

INFORMATION ONLY

Mr. Al Cardenas
Chairman
Republican Party of Florida
Post Office Box 311
Tallahassee, Florida 32302

DE 00-11
Definition of Error in Vote Tabulation
§ 102.166(5), Fla. Stat.

Dear Mr. Cardenas:

This is in response to your request for an opinion relating to section 102.166(5), Florida Statutes. You are the Chairman for the Republican Party of Florida and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask:

1. What is the meaning of the term "error in the vote tabulation" as used in section 102.166(5), Florida Statutes?

2. What is the meaning of "affecting the outcome of the election" as used in section 102.166(5), Florida Statutes?

3. What manner of "error" and what type and/or degree of effect on the outcome would serve as a lawful predicate for a manual recount of all ballots under section 102.166(5)(c), Florida Statutes?

Your questions involve the interpretation of election laws and can be answered with an advisory opinion. Section 102.166(5), Florida Statutes, provides in pertinent part that if the manual recount indicates an error in the vote tabulation which could affect the

outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting systems to read an improperly marked marksense or improperly punched punchcard ballot is not a "error in the vote tabulation" and would not trigger the requirement for the county canvassing board to take one of the actions specified in subsections 102.155(5)(a) through (c), Florida Statutes.

An error that could "affect the outcome of the election" is an error of a magnitude sufficient to make a difference as to which candidate wins the election.

SUMMARY

An "error in the vote tabulation," means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. An error that could "affect the outcome of the election" is an error of a magnitude sufficient to make a difference as to which candidate wins the election.

Sincerely,

L. Clayton Roberts
Director, Division of Elections

LCR/KRB

COUNTY COURT
PALM BEACH COUNTY FLORIDA

CHAMBERS OF
CHARLES E. BURTON
COUNTY COURT JUDGE
November 13, 2000

COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA 33401
PHONE 561/355-2172

Honorable Robert A. Butterworth
Attorney General
400 Monroe Street
Tallahassee, Florida 32399

RE: Request for Attorney General Opinion

Dear General Butterworth:

I have been authorized by the Palm Beach County Canvassing Board to request an opinion from your office on the following issues:

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(6), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system/software?

2. May a county canvassing board do a partial certification of the votes pursuant to Section 102.151, Florida Statutes for the November 7, 2000 election that excludes the votes for the candidates for the presidential election which will be certified by the county canvassing board at a later date?

A memorandum of law follows.

MEMORANDUM OF LAW

Question 1.

Section 102.166(5) provides:

If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

See also, Broward County Canvassing Board v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992) (stating "the statutes clearly leave the decision to conduct a manual recount within the discretion of the board.")

The Palm Beach County Canvassing Board has voted to conduct a manual recount of the votes for the presidential election based on Section 102.166(5), Florida Statutes.

Question 2.

Section 102.151, Florida Statutes does not indicate whether a county canvassing board may certify the votes for less than all of the elections held on the November 7, 2000. The Palm Beach County Canvassing Board would like to exclude the votes for the presidential election based on an ongoing manual recount of the ballots for that election.

Respectfully submitted,

DMDytrych for

Judge Charles Burton
Chairperson, Palm Beach County Canvassing Board

cc: Denise Dytrych, Palm Beach County Attorney
Katherine Harris, Secretary of State

A:\clayroberts