

IN THE SUPREME COURT OF FLORIDA

Case No.: SC06-0668

ADVISORY OPINION TO THE GOVERNOR

RE: SHERIFF AND JUDICIAL VACANCIES DUE TO RESIGNATIONS

INITIAL BRIEF OF THE FLORIDA DEMOCRATIC PARTY

MESSER, CAPARELLO & SELF, P.A.

Mark Herron, Esq.

Florida Bar No.: 0199737

Robert J. Telfer III, Esq.

Florida Bar No.: 0128694

215 South Monroe Street, Suite 701

P.O. Box 1876

Tallahassee, FL 32302-1876

Telephone: (850) 222-0720

Facsimile: (850) 224-4359

Attorneys for the Florida Democratic Party

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STATEMENT OF THE CASE AND FACTS

Pursuant to this Court's Order dated April 19, 2006 and Article IV, Section 1(c), Florida Constitution, the Florida Democratic Party submits the following Initial Brief as an interested party to the Governor's request for an advisory opinion regarding sheriff and judicial vacancies due to resignations. This Initial Brief will only address those issues related to the sheriff vacancy.

On February 2, 2006, the Division of Elections rendered an advisory opinion pursuant to Section 106.23(2), Florida Statutes, which concluded that a Sheriff Stephen Oelrich, the Alachua County Sheriff, whose current term of office would overlap with that of the office of a state senator, would in accordance with the provisions of Section 99.012(3)(a), Florida Statutes, have to resign from his current office of sheriff in order to qualify to run for the office of state senator. *See* Division of Elections Advisory Opinion, No. DE 06-01 (Feb. 2, 2006), a copy of which is included in the Appendix to this Initial Brief at Tab "A." Section 99.012(3)(a), Florida Statutes, provides as follows:

(3)(a) No officer may qualify as a candidate for another public office, whether state, district, county, or municipal, if the terms or any part thereof run concurrently with each other, without resigning from the office he or she presently holds.

(b) The resignation is irrevocable.

(c) The written resignation must be submitted at least 10 days prior to the first day of qualifying for the office he or she intends to seek.

(d) The resignation must be effective no later than the earlier of the following dates:

1. The date the officer would take office, if elected; or
2. The date the officer's successor is required to take office.

(e)1. An elected district, county, or municipal officer must submit his or her resignation to the officer before whom he or she qualified for the office he or she holds, with a copy to the Governor and the Department of State.

2. An appointed district, county, or municipal officer must submit his or her resignation to the officer or authority which appointed him or her to the office he or she holds, with a copy to the Governor and the Department of State.

3. All other officers must submit their resignations to the Governor with a copy to the Department of State.

(f)1. With regard to an elective office, the resignation creates a vacancy in office to be filled by election. Persons may qualify as candidates for nomination and election as if the public officer's term were otherwise scheduled to expire.

2. With regard to an elective charter county office or elective municipal office, the vacancy created by the officer's resignation may be filled for that portion of the officer's unexpired term in a manner provided by the respective charter. The office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation.

(g) Any officer who submits his or her resignation, effective immediately or effective on a date prior to the date of his or her qualifying for office, may then qualify for office as a nonofficeholder, and the provisions of this subsection do not apply.

The advisory opinion from the Division of Elections further concluded that pursuant to Section 99.012(3)(f)1., Florida Statutes, the submission of that resignation would create a vacancy in office to be filled by election.

On April 19, 2006, the Governor requested an advisory opinion from this Court as to whether the resignation of the Sheriff Oelrich, serving a four year term that will expire on January 6, 2007 and who, the Governor has been advised, will tender his resignation in May of 2006 to be effective in October of 2006, creates a

vacancy that should be filled by appointment pursuant to Article IV, Section 1(f), Florida Constitution, or by election.¹

Because of the impending qualifying period, the Governor requested that this Court expedite its consideration of his request for an advisory opinion. By order entered April 19, 2006, this Court directed that interested parties shall submit briefs on or before April 24, 2006.

This Initial Brief is submitted on behalf of the Florida Democratic Party. The Florida Democratic Party is interested in the outcome of the Court's advisory opinion because three of its members are currently "candidates" for the office of sheriff discussed in the Division of Elections' advisory opinion and will thus be affected by this Court's advisory opinion. In addition, it is likely that this issue will arise in the future, and will most certainly affect members of the Florida Democratic Party seeking office.

¹ In his April 19, 2006 filing with this Court, the Governor raised similar questions with respect to the resignation of a circuit judge of the Eighteenth Judicial Circuit, which are governed by Article V, Section 11(b), Florida Constitution. The Florida Democratic Party will not address any issues raised by this portion of the Governor's request for an advisory opinion regarding circuit judge vacancies.

SUMMARY OF THE ARGUMENT

In its Advisory Opinion, the Division of Elections concluded that there should be an election for the unexpired remainder of the term of Sheriff Oelrich. *See* DE 06-01 (App. Tab A). This opinion is consistent with the law of this state and is not contrary to Article IV, Section 1(f), Florida Constitution. The Florida Democratic Party urges this Court to adopt the reasoning and conclusion of the Division of Elections used in DE 06-01 and hold that an election is necessary and appropriate to fill unexpired remainder of the term that will be created by Sheriff Oelrich's resignation.

ARGUMENT

I. PURSUANT TO SECTION 99.012(3)(f)1., FLORIDA STATUTES, THE SUBMISSION OF A RESIGNATION BY THE SHERIFF WOULD CREATE A VACANCY IN OFFICE TO BE FILLED BY ELECTION.

The advisory opinion rendered by the Division of Elections was based on the following factual predicate presented by the Supervisor of Elections of Alachua County:

You have advised that the incumbent Sheriff of Alachua County, Steve Oelrich, has announced his candidacy for election to a Florida Senate seat in 2006 and has filed papers with the Division of Elections. You also advise that as of the time of your request you have not received a letter from Sheriff Oelrich. A check of the Division of Election's records shows that Sheriff Oelrich is an active candidate for State Senator, District 14. Sheriff Oelrich is currently serving a four year term of office which ends on January 6, 2009. Pursuant to Article III, Section 15, of the Constitution of the State of Florida, the four year term of office of State Senator, District 14, would commence on November 7, 2006. Finally, you advise that your county charter does not speak to this matter, but refers to state law.

See DE 06-01, at 1 (App. Tab A).

In response, the Division of Elections opined:

As Sheriff Oelrich's current term of office would overlap with the term of office of State Senator, District 14, section 99.012(3)(a), Florida Statutes, would require Sheriff Oelrich to submit his resignation from the office of Sheriff in order to qualify to run for the office of State Senator, District 14. Pursuant to section 99.012(3)(f)1., Florida Statutes, the submission of that resignation would create a vacancy in office to be filled by election. Persons may then qualify with the Supervisor of Elections' Office as candidates for election to the office of Sheriff of Alachua County as if the Sheriff's term were otherwise scheduled to expire. The winner of that election would

serve the remainder of Sheriff Oelrich's current term of office which expires on January 2, 2009.

Id. at 3 (App. Tab A).

The conclusion of the Division of Elections--that there should be an election for the unexpired remainder of the term of Sheriff Oelrich--is consistent with the law of this state and is not contrary to Article IV, Section 1(f), Florida Constitution. Thus, the Florida Democratic Party urges this Court to adopt the reasoning and conclusion of the Division of Elections used in DE 06-01 and hold that an election is necessary and appropriate.

Pursuant to Article VIII, Section 1(d), Florida Constitution, "[t]here shall be elected by the electors of each county, for terms of four years, a sheriff" Plainly stated, the sheriff should be elected by the electors of each county.

Long ago, this Court recognized that

any construction of the Constitution which restricts by implication the right to exercise the elective franchise in the selection of this officer, and extends executive power in that direction, is inconsistent with the intent and purpose of the framers of the Constitution in creating this office. Their view plainly expressed is that its incumbent should be the choice of the people

Weeks v. Gamble, 13 Fla. 9 (1870).

Recognizing the primacy of the electoral process, Section 99.012(3)(f)1., Florida Statutes, provides as follows:

With regard to an elective office, the resignation creates a vacancy in office to be filled by election. Persons may qualify as candidates for

nomination and election as if the public officer's term were otherwise scheduled to expire.

The issue of whether a vacancy can be created now, but take effect *in futuro*, has been well settled law in this state. In *Spector v. Glisson*, 305 So. 2d 777, 780 (Fla. 1975), this Court ruled:

if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date. Thus the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people, either directly or through their elected representatives in their Legislature, which are not delegated, and also consistent with the priority of the elective process over appointive powers except where explicitly otherwise provided. We thereby continue the basis premise of our democratic form of form of government, that it is a 'government of the people, by the people and for the people.'

Spector, 305 So. 2d at 782.

In the event that Sheriff Oelrich submits his resignation in order to qualify as a candidate for election to the State Senate, district 14, as posited in the Division of Elections opinion or in the Governor's request for an advisory opinion, the resignation will be unconditional and fixed. See Fla. Stat. § 99.012(3)(b) ("The resignation will be irrevocable."). In this context, a vacancy in the office of Sheriff of Alachua County will occur which should be filled by an election. As this Court has held,

To hold otherwise would frustrate the plain requirements of our constitution and the public policy of this state for over 100 years As to the argument that no vacancy could exist until the actual,

physical departure from the bench on January 6, it would seem that to take this strained view as to a known vacancy in order to provide for Executive appointment would almost be creating an artificial appointment in violation of the constitutionally required elective process.

Spector, 305 So. 2d at 784. Permitting the Governor to fill the unexpired remainder in the term by appointment is not compatible with Section 99.012(3)(f)1., Florida Statutes, or the public policy of this state which gives the people the right to elect their public officials.

CONCLUSION

Based on the foregoing, the Florida Democratic Party urges this Court to adopt the reasoning of the Division of Elections in its advisory opinion, number DE 06-01, and hold that an election, rather than an appointment, is the necessary and appropriate procedure to fill the unexpired remainder in the term caused by the impending resignation of Sheriff Oelrich.

Respectfully submitted,

MESSER, CAPARELLO & SELF, P.A.

215 South Monroe Street, Suite 701

P.O. Box 1876

Tallahassee, FL 32302-1876

Telephone: (850) 222-0720

Facsimile: (850) 224-4359

By: _____

Mark Herron, Esq.

Florida Bar No.: 0199737

Robert J. Telfer III, Esq.

Florida Bar No.: 0128694

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 24th day of April 2006 to the following:

The Honorable Charles J. Crist
Attorney General
PI-01, The Capitol
Tallahassee, FL 32399-1050

The Honorable Sue M. Cobb
Secretary of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

Raquel A. Rodriquez, Esquire
General Counsel
Office of the Governor
Room 209, The Capitol
Tallahassee, FL 32399

The Honorable Kerry I. Evander
Chief Judge
18th Judicial Circuit
Brevard County Justice Center
2825 Judge Fran Jamieson Way
Viera, FL 32940

Mark Herron, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Mark Herron, Esq.

IN THE SUPREME COURT OF FLORIDA

Case No.: SC06-0668

ADVISORY OPINION TO THE GOVERNOR

**RE: SHERIFF AND JUDICIAL VACANCIES DUE TO
RESIGNATIONS**

**APPENDIX TO THE INITIAL BRIEF OF THE FLORIDA
DEMOCRATIC PARTY**

**MESSER, CAPARELLO & SELF,
P.A.**

Mark Herron, Esq.

Florida Bar No.: 0199737

Robert J. Telfer III, Esq.

Florida Bar No.: 0128694

215 South Monroe Street, Suite 701

P.O. Box 1876

Tallahassee, FL 32302-1876

Telephone: (850) 222-0720

Facsimile: (850) 224-4359

Attorneys for the Florida Democratic Party

APPENDIX

TAB "A"

Division of Elections Advisory Opinion DE 06-01

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
was furnished by U.S. mail this 24th day of April 2006 to the following:

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Secretary of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

Raquel A. Rodriquez, Esquire
General Counsel
Office of the Governor
Room 209, The Capitol
Tallahassee, FL 32399

The Honorable Kerry I. Evander
Chief Judge
18th Judicial Circuit
Brevard County Justice Center
2825 Judge Fran Jamieson Way
Viera, FL 32940

**MESSER, CAPARELLO & SELF,
P.A.**

215 South Monroe Street, Suite 701

P.O. Box 1876

Tallahassee, FL 32302-1876

Telephone: (850) 222-0720

Facsimile: (850) 224-4359

By: _____

Mark Herron, Esq.

Florida Bar No.: 0199737

Robert J. Telfer III, Esq.

Florida Bar No.: 0128694

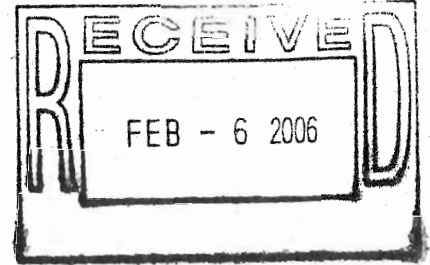


STATE OF FLORIDA
DEPARTMENT OF STATE

JEB BUSH
Governor

SUE M. COBB
Secretary of State

February 2, 2006



The Honorable Pam Carpenter
Alachua County Supervisor of Elections
P.O. Box 1496
Gainesville, Florida 32602-0250

RE: DE 06-01
Resign to Run; Sheriff Running for
State Senate: § 99.012, Florida
Statutes

Dear Ms. Carpenter:

This is in response to your request for an advisory opinion regarding a potential vacancy in the office of Sheriff of Alachua County and related resign to run questions. You are the Supervisor of Elections for Alachua County and as such are the filing officer for candidates for the office of Sheriff of Alachua County. Pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you.

You have advised that the incumbent Sheriff of Alachua County, Steve Oelrich, has announced his candidacy for election to a Florida Senate seat in 2006 and has filed papers with the Division of Elections. You also advise that as of the time of your request you have not received a letter of resignation from Sheriff Oelrich. A check of the Division of Election's records shows that Sheriff Oelrich is an active candidate for State Senator, District 14. Sheriff Oelrich is currently serving a four year term of office which ends on January 6, 2009. Pursuant to Article III, Section 15, of the Constitution of the State of Florida, the four year term of office of State Senator, District 14, would commence on November 7, 2006. Finally, you advise that your county charter does not speak to this matter, but refers to state law.

Given these facts, you essentially ask what procedure would be used to fill the vacancy in the office of Sheriff of Alachua County should Sheriff Oelrich submit his resignation in conjunction with qualifying to run for the office of State Senator, District 14.

Section 99.012(3), Florida Statutes, commonly referred to as Florida's Resign to Run Law, states that:

(3)(a) No officer may qualify as a candidate for another public office, whether state, district, county, or municipal, if the terms or any part thereof run concurrently with each other, without resigning from the office he or she presently holds.

(b) The resignation is irrevocable.

(c) The written resignation must be submitted at least 10 days prior to the first day of qualifying for the office he or she intends to seek.

(d) The resignation must be effective no later than the earlier of the following dates:

1. The date the officer would take office, if elected; or
2. The date the officer's successor is required to take office.

(e)1. An elected district, county, or municipal officer must submit his or her resignation to the officer before whom he or she qualified for the office he or she holds, with a copy to the Governor and the Department of State.

2. An appointed district, county, or municipal officer must submit his or her resignation to the officer or authority which appointed him or her to the office he or she holds, with a copy to the Governor and the Department of State.

3. All other officers must submit their resignations to the Governor with a copy to the Department of State.

(f)1. With regard to an elective office, the resignation creates a vacancy in office to be filled by election. Persons may qualify as candidates for nomination and election as if the public officer's term were otherwise scheduled to expire.

2. With regard to an elective charter county office or elective municipal office, the vacancy created by the officer's resignation may be filled for that portion of the officer's unexpired term in a manner provided by the respective charter. The office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation.

(g) Any officer who submits his or her resignation, effective immediately or effective on a date prior to the date of his or her qualifying for office, may then qualify for office as a nonofficeholder, and the provisions of this subsection do not apply.

[Emphasis added.]

As Sheriff Oelrich's current term of office would overlap with the term of office of State Senator, District 14, section 99.012(3)(a), Florida Statutes, would require Sheriff Oelrich to submit his resignation from the office of Sheriff in order to qualify to run for the office of State Senator, District 14. Such resignation must be submitted at least 10 days prior to the first day of qualifying for the office of State Senator, District 14. The qualifying period for that office begins on July 17, 2006. See section 99.061(2), Florida Statutes.

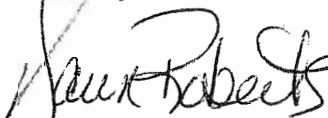
Pursuant to section 99.012(3)(f)1., Florida Statutes, the submission of that resignation would create a vacancy in office to be filled by election. Persons may then qualify with your office as candidates for nomination and election to the office of Sheriff of Alachua County as if the Sheriff's term were otherwise scheduled to expire. The winner of that election would serve the remainder of Sheriff Oelrich's current term of office which expires on January 6, 2009.

It is important to note that the terms of the two offices in question do create a unique situation which could result in a gap in time between the required effective date of the Sheriff's resignation from his current office and the date that his successor would take office to serve the remainder of his term. Under state law the Sheriff's successor would take office on the first Tuesday after the first Monday in January following his or her election. i.e. January 2, 2007. See section 100.041(4), Florida Statutes. However, state senators take office upon election, i.e. on the date of the General Election, which in this scenario would be on November 7, 2006. Pursuant to section 99.012(3)(d), Florida Statutes, Sheriff Oelrich's resignation would be required to be effective no later than November 7, 2006. Thus a vacancy in the office of Sheriff of Alachua County would be created from November 7, 2006 to January 2, 2007. That brief vacancy could be filled by appointment by the Governor pursuant to Article IV, Section 1(f), of the Constitution of the State of Florida.

SUMMARY

As Sheriff Oelrich's current term of office would overlap with the term of office of State Senator, District 14, section 99.012(3)(a), Florida Statutes, would require Sheriff Oelrich to submit his resignation from the office of Sheriff in order to qualify to run for the office of State Senator, District 14. Pursuant to section 99.012(3)(f)1., Florida Statutes, the submission of that resignation would create a vacancy in office to be filled by election. Persons may then qualify with the Supervisor of Elections' Office as candidates for nomination and election to the office of Sheriff of Alachua County as if the Sheriff's term were otherwise scheduled to expire. The winner of that election would serve the remainder of Sheriff Oelrich's current term of office which expires on January 6, 2009.

Sincerely,



Dawn K. Roberts
Director, Division of Elections

Prepared by:
Sharon D. Larson
Deputy General Counsel

DKR/SDL/lmg