

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

AUG 2 9 37 AM '00



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 2, 2000

AGENDA ITEM
For Meeting of: 8-10-00

MEMORANDUM

TO: The Commission

-THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Paul Sanford
Staff Attorney

Richard Ewell
Legal Intern

SUBJECT: Draft AO 2000-19

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 10, 2000.

Attachment

DRAFT

1 ADVISORY OPINION 2000-19

2
3 Benjamin Ginsberg
4 Patton Boggs LLP
5 2550 M Street, NW
6 Washington, DC 20037-1350

7 Dear Mr. Ginsberg:

8 This responds to your letter of June 20, 2000, requesting an advisory opinion on
9 behalf of the Republican Party of Florida ("RPF"), concerning the application of the Federal
10 Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the
11 allocation of administrative and get-out-the-vote drive expenses incurred by RPF during the
12 2000 election cycle.

13 You state that on March 5, 1999, Senator Connie Mack, whose current term in the
14 U.S. Senate expires in January of 2001, announced that he would not seek another term.
15 Shortly thereafter, two Florida state officeholders expressed an interest in seeking Senator
16 Mack's seat. According to your request, Bill Nelson, Florida State Treasurer and Insurance
17 Commissioner, filed a statement of candidacy for the Senate seat on March 22, 1999, and
18 Tom Gallagher, Florida State Education Commissioner, "established the structure to begin
19 accepting contributions to run for the Senate seat" in April of 1999.

20 You also explain that Florida has a "resign to run" law that requires state
21 officeholders to resign from state office in order to run for Federal office. Thus, by seeking
22 the Senate seat, Commissioners Nelson and Gallagher would, at some point, create vacancies
23 in their state offices. Under Florida law, elections for those offices would be held in
24 conjunction with the next general election. FLA. STAT. ch. 100.111(1)(a). According to your
25 request, "the State Governor could not officially declare these elections until federal ballot

1 qualification week, which did not commence until noon May 8, 2000.” Nevertheless, not
2 long after Commissioners Nelson and Gallagher expressed an interest in pursuing the Senate
3 seat, state candidates began registering for the anticipated vacancies in the two state offices.

4 You state that, in accordance with applicable Commission regulations, the Republican
5 Party of Florida calculated its ballot composition ratio for the 1999-2000 election cycle based
6 on the offices that were expected to be on the November 2000 ballot as of January 1, 1999.
7 At that time, RPF’s ratio was 3 Federal points and 4 nonfederal points, resulting in a ratio of
8 43% Federal and 57% nonfederal. You further state that, notwithstanding Senator Mack’s
9 announcement and the resulting actions of the state officeholders and the would-be state
10 candidates, RPF did not adjust its ballot composition ratio to reflect the vacancies in the two
11 state offices until they were officially added to the ballot in May of 2000.¹

12 Nonetheless, you state that RPF was “compelled to give consideration to the elections
13 and begin devoting fixed resources to the campaigns” on the date that the state officers
14 announced their candidacies for Federal office and filed their papers, and thus has been
15 supporting candidates for the two state offices since May of 1999. Consequently, you assert
16 that the 43% Federal, 57% nonfederal ratio used by RPF prior to the “official” announcement
17 of the ballot composition in May of 2000 did not accurately reflect the “administrative and
18 generic expenses that were in fact devoted to state elections” by RPF. Therefore, you ask
19 whether the RPF may now adjust its ballot composition ratio to retroactively include the two
20 nonfederal points for the period between June 1, 1999, and May 8, 2000.²

¹ Your request indicates that on May 8, 2000, RPF began using a ballot composition ratio of 33% Federal and 67% nonfederal.

² You state that although RPF began its activities on behalf of candidates during the month of May, 1999, for administrative convenience, the party seeks permission to re-allocate its expenses from June 1, 1999.

1 State and local party committees are required to allocate their administrative
2 expenses and costs of generic voter drives using the "ballot composition method."
3 11 CFR 106.5(d). Under this method, committees determine their ballot composition ratios
4 at the start of the election cycle "based on the ratio of federal offices expected on the ballot to
5 total federal and non-federal offices expected on the ballot in the next general election to be
6 held in the committee's state or geographic area." 11 CFR 106.5(d)(1)(i). The regulations
7 explain how Federal and state offices should be counted for purposes of the ratio. When
8 anticipated on the next general election ballot, the offices of President, U.S. Senator, and U.S.
9 Representative each count as one Federal point, while the offices of Governor, State Senator,
10 and State Representative are counted as one nonfederal point each. The rules require
11 committees to count the total of all other partisan statewide executive candidates expected on
12 the ballot as a maximum of two nonfederal offices and include up to two points for those
13 offices in their ratios. State party committees may also include an additional nonfederal
14 point. 11 CFR 106.5(d)(1)(ii).

15 Your request emphasizes that under Florida's "resign to run" law, both Commissioner
16 Nelson and Commissioner Gallagher were required to resign from their state offices in order
17 to run for the U.S. Senate seat. Florida's resign to run law provides that any state
18 officeholder who "qualifies for federal public office must resign from the office he or she
19 presently holds if the terms or any part thereof run concurrently with each other."³
20 FLA. STAT. ch. 99.012(4)(a). Once submitted, these resignations are irrevocable.
21 FLA. STAT. ch. 99.012(4)(b).

³ The failure of a candidate who qualifies for Federal office to submit a resignation in accordance with the law constitutes an "automatic irrevocable resignation, effective immediately, from the office he or she presently holds." FLA. STAT. ch. 99.012(4)(f)(1).

1 However, the resign to run law does not require state officeholders to submit their
2 resignations until the start of the qualifying period for the office they intend to seek.
3 FLA. STAT. ch. 99.012(4)(c). In Florida, the qualifying period for U.S. Senate candidates is
4 from “the 120th day prior to the first primary, but not later than noon of the 116th day prior to
5 the date of the first primary,” which, for the 1999-2000 election cycle, was from May 8 to
6 May 12, 2000. FLA. STAT. ch. 99.061(1). Thus, neither Commissioner Nelson nor
7 Commissioner Gallagher was required to submit a resignation prior to May 8, 2000.

8 Furthermore, the resign to run law also states that “the resignation creates a vacancy
9 in office to be filled by election, thereby permitting persons to qualify as candidates for
10 nomination and election as if the officer’s term were otherwise scheduled to expire.”
11 FLA. STAT. ch. 99.012(4)(g). Thus, prior to the officeholder’s submission of his or her
12 resignation, or his or her resignation by operation of law,⁴ no vacancy exists.

13 Commissioner Nelson submitted his resignation on May 8, 2000, and Commissioner
14 Gallagher submitted his resignation on May 12, 2000. Thus, regardless of whether they were
15 actively campaigning for the Senate seat in 1999, Commissioner Nelson and Commissioner
16 Gallagher did not vacate their state offices until May of 2000. On the contrary, prior to the
17 submission of their resignations, they retained the option of remaining in their state offices
18 and completing their terms.⁵ If either state officeholder chose to remain in office, no vacancy
19 would be created in that office, and no election to fill that vacancy would be held.
20 Consequently, for the purposes of 11 CFR 106.5(d)(1), no state candidates were expected to

⁴ See footnote 3, above.

⁵ Both of these terms would have expired in January of 2003.

1 be on the ballot in the next general election until the state officeholders submitted their
2 resignations in May of 2000.

3 You cite Advisory Opinion 1991-25 as support for RPF's reallocation of its
4 administrative expenses. However, this opinion is distinguishable from your situation.
5 Advisory Opinion 1991-25 involved a vacancy in office resulting from the death of an
6 incumbent U.S. Senator. As of the date of the Senator's death, the vacancy was certain to
7 exist. Consequently, the Commission required the state party to adjust its ballot composition
8 ratio for the period from the date of the Senator's death until the date of the special election.

9 Similarly, Advisory Opinion 1991-15 involved a state officeholder-elect who had
10 announced, shortly after his election in November of 1990 and prior to January 1, 1991, that
11 he would not assume the office to which he had been elected. Because he never took office,
12 the vacancy existed at the start of the election cycle. Since the vacancy was scheduled to be
13 filled in the November 1992 general election, the Commission allowed the requester to adjust
14 its ballot composition ratio for the entire election cycle.⁶

15 Therefore, the Commission concludes that RPF may not retroactively adjust its ballot
16 composition ratio for the period from June 1, 1999, to May 8, 2000.⁷ The Commission notes

⁶ Advisory Opinion 1991-6 is also distinguishable. That opinion involved a U.S. Senator who vacated his U.S. Senate seat following his election as governor of California. The Commission required the requester, a state party committee, to include the Senate seat in its ballot composition ratio. In issuing the opinion, the Commission assumed that the Senate office would be filled in the November 1992 general election, although state election officials admitted that a special election on another date was a "technical possibility." Advisory Opinion 1991-6, n.2. If the election had been scheduled for another date, the Commission might well have concluded, as it did a short time later in Advisory Opinion 1991-25, that the party was only required to adjust its ratio for the period prior to the special election. However, such a change would not have altered the fact that the Governor-elect had vacated his Senate office, and that an election to fill that office would be required.

⁷ Your request indicates that on May 8, 2000, RPF began using an adjusted ratio that includes points for both state offices. We note that Commissioner Gallagher did not submit his resignation until May 12, 2000. Consequently, his office did not become vacant until that date. However, rather than require RPF to use a different ratio for the intervening four days, the Commission will allow RPF to use May 8, 2000 as the vacancy date for both offices.

1 that if either Commissioner Nelson or Commissioner Gallagher had taken the affirmative step
2 of submitting a letter of resignation from his state office at the time he first expressed interest
3 in seeking the Senate seat, a vacancy in that office would have been assured, since such a
4 letter of resignation is irrevocable under Florida law. Under those circumstances, the office
5 would have been expected on the ballot for the purposes of section 106.5(d), and RPF would
6 have been entitled to adjust its ballot composition ratio as of the date of the resignation.
7 However, absent this further assurance that the office would be on the ballot, RPF must use
8 the ratio determined at the start of the election cycle for the period from June 1, 1999 to
9 May 8, 2000.

10 This response constitutes an advisory opinion concerning application of the Act, or
11 regulations prescribed by the Commission, to the specific transaction or activity set forth in
12 your request. See 2 U.S.C. §437f.

13 Sincerely,

14
15 Darryl R. Wold
16 Chairman
17
18

19 Enclosures (AOs 1991-25, 1991-15, 1991-6)