

# Flagler County Commission Agenda

August 6, 2010 Special Meeting • 9:00 a.m.

## 1. Pledge to the Flag and Moment of Silence

### **GENERAL BUSINESS**

*General Business Presentations Limited to 15 Minutes with Individual Speaker Comments  
Limited to 3 Minutes Each Speaker per Adopted Commission Meeting Procedures*

2. **Authorize Temporary Appointment for the Flagler County Canvassing Board When the Chairman is Unavailable:** Select a Commissioner to serve as a temporary appointee to the Flagler County Canvassing Board to serve when Commission Chairman Hanns is unavoidably absent from Canvassing Board meetings.

## 3. **ADJOURNMENT**

If a person decides to appeal any decision made by the Board of County Commissioners with respect to any matter considered at the meeting, a record of the proceedings may be needed and, for such purposes, the person may need to ensure that a verbatim record is made, which record includes the testimony and evidence upon which the appeal is to be based.

**FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS  
GENERAL BUSINESS / AGENDA ITEM # 2**

**SUBJECT:** Authorize Temporary Appointment for the Flagler County Canvassing Board When the Chairman is Unavailable

**DATE OF MEETING:** August 6, 2010

**OVERVIEW/SUMMARY:** The Supervisor of Elections is requiring the County Commission to formally meet and designate a temporary appointment to the Canvassing Board when Commission Chairman Hanns is unavoidably absent for Canvassing Board meetings. The Supervisor would not accept a ratifying action at the next meeting of the County Commission. To minimize any problems with the election process, a Special Meeting is the only viable option. The timing is necessary because the first meeting of the Canvassing Board for this election is this Friday, August 6<sup>th</sup>, and its purpose is to test and certify the voting equipment, an important function for the election process.

Background: Per Florida law, the Chairman of the County Commission is the designated representative from the County Commission to the Canvassing Board, unless the Chair is unable to serve due to active support in a political campaign or because the Chair is on the ballot himself. Chairman Hanns is unable to attend Friday's Canvassing Board meeting which commences at 12 noon. He will be unavoidably out of state on family business.

Following past practice, the Chairman advised the Supervisor of his absence and that he had confirmed that Commissioner Holland could serve in his place. Commissioner Holland served on the last Canvassing Board and had gone through the testing and certification of voting machines. He confirmed in writing to the Supervisor that County Administration would arrange to have Commissioner Holland attend in his absence.

The Supervisor requested Chairman Hanns to sign the testing and certification for the vote counting equipment in advance of the meeting so that his absence would not have any effect on the certification process. Chairman Hanns declined to sign any formal document certifying something that he either would not witness and that had not yet occurred as of the date of his signature. The Supervisor then requested that the County Commission affirm a formal substitute. This can only be done at a meeting of the County Commission. In light of the time frame, County Administration offered to ratify a temporary appointment at the next County Commission meeting which is scheduled for August 9<sup>th</sup>. The Supervisor declined to agree to ratification and would not follow past practice.

There was no option to postpone the Canvassing Board meeting to another time. Friday, August 6, 2010, is the last day that the voting machines can be tested and certified under state law. The following Monday begins early voting. The schedule for Canvassing Board meetings is set by the Supervisor.

When the machines are tested, there is a log that confirms the testing, and each member of the Canvassing Board must sign the certification that goes to the State. The certification report also identifies any machines that fail the testing. (At the last election, several of the machines failed and, accordingly, were not certified.) The machines that do pass and are certified are then sealed. The seals are broken only when the machine is put into service to receive and count ballots. This assures no tampering of the machines after certification.

The task of testing and certifying the machines is expected to take several hours.

The County Commission is free to name whoever is willing to serve as a temporary appointee to the Canvassing Board subject to the eligibility standards of not being on the ballot and not being actively involved in a campaign..

The Commission is requested to select a member who can be available as a temporary appointee whenever the Chairman is unavoidably absent, not only for this upcoming meeting but for the balance of the election season. There is no option acceptable to the Supervisor for a temporary appointment needed to cover an absence except by having County Commission action. There is no way to anticipate when the Chairman might be absent for future meetings due to illness, accidents, out of area travel, etc. To avoid a repeat of a short notice situation, the Commission is requested to select an ongoing temporary appointment.

To be qualified by law, the selected Commissioner cannot be an active participant of any campaign, nor can the Commissioner be on the ballot. The State has defined active participation as serving on an election committee for a candidate or issue, publicly endorsing a candidate or issue on the ballot, waving signs, or otherwise taking an active role in a campaign. The State has ruled that merely giving a contribution to a candidate or issue does not constitute active participation.

Also, please be advised that relative to the upcoming August 6 meeting, Judge Atack likewise was unavoidably out of state and could not attend. The Judge declined to sign the certification in advance as also requested by the Supervisor. The Supervisor in turn requested formal action to name a temporary substitute for Judge Atack. Attached for the Commission's information is the administrative order that appoints Judge Hammond for this temporary role.

Finally, please be advised that the County Attorney attends the Canvassing Board meetings as its counsel and will be attending the upcoming August 6 testing of equipment. Attached as Exhibit 2 is the standard for testing voting machines from the manual of the Florida Association of Supervisors of Elections. Also attached as Exhibit 3 are the two decisions of the State re "active participation in a campaign."

Each step in the election process for the Canvassing Board is set out in the manual and whoever serves in the temporary appointee slot will receive relevant manual pages as needed should the Chair not be available.

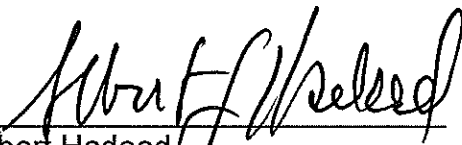
**FUNDING INFORMATION:** N/A

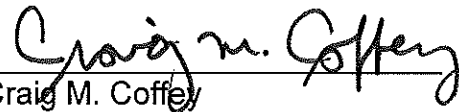
**DEPT./CONTACT/PHONE #:** County Attorney /Albert Hadeed / 386-313-4005

**RECOMMENDATION:** Select a Commissioner to serve as a temporary appointee to the Flagler County Canvassing Board to serve when Commission Chairman Hanns is unavoidably absent from Canvassing Board meetings.

**EXHIBITS:**

- 1) Administrative Order appointing Judge Hammond in temporary role for Judge Atack
- 2) Standards for Testing Voting Machines from manual of the Florida Association of Supervisors of Elections
- 3) State Decisions regarding "Active participation in a campaign".

  
\_\_\_\_\_  
Albert Hadeed  
County Attorney  
8-05-10  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Craig M. Coffey  
County Administrator  
5 August 2010  
\_\_\_\_\_  
Date

**IN THE CIRCUIT COURT OF FLORIDA, SEVENTH JUDICIAL CIRCUIT  
IN AND FOR FLAGLER COUNTY**

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**RE: CANVASSING BOARD ASSIGNMENT ORDER**

**REF: W-2010-129**

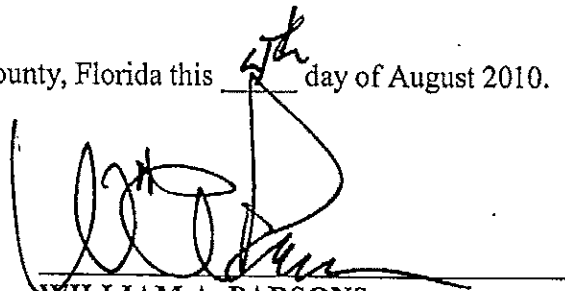
**WHEREAS**, a Flagler County Court judge is needed to serve on the Flagler County Canvassing Board on August 6, 2010 for purposes of testing ballot counting equipment;

**NOW THEREFORE, I, WILLIAM A. PARSONS**, Acting Chief Judge of the Seventh Judicial Circuit of Florida, hereby assign and designate the **HONORABLE KIM C. HAMMOND**, Acting Flagler County Court Judge, to serve on the Flagler County Canvassing Board on August 6, 2010.

**IT IS FURTHER ORDERED** that Judge Hammond shall assume such duties and responsibilities as set forth in Florida Statutes as a member of the Canvassing Board on August 6, 2010.

**TO BE RECORDED** in Flagler County.

**DONE AND ORDERED** in Daytona Beach, Volusia County, Florida this 6<sup>th</sup> day of August 2010.

  
**WILLIAM A. PARSONS**  
**ACTING CHIEF JUDGE**

cc: Judge Hammond  
Kimberle Weeks, Supervisor of Elections  
Mark Weinberg, Court Administrator

## II. Testing of Voting Systems - Chapter 101.5612, FS

- A. Prior to the Public Test - s. 101.5612(1)
  - (1) All Electronic or electromechanical voting systems shall be thoroughly tested at the conclusion of maintenance and programming.
  - (2) Tests must determine that the voting system is properly programmed, that the election is correctly defined, and that all of the voting system input, output, and communication devices are working properly.
- B. Preparing for the Public Test - s. 101.5612(2)
  - (1) On any day not more than 10 days prior to the commencement of early voting the voting equipment must be tested publicly.
    - a. The canvassing board shall convene.
    - b. Each member of the canvassing board shall certify to accuracy of the test although the canvassing board may designate one member to represent it.
    - c. If the polling place ballots are not ready at the time of the public test for early voting, another test may be conducted not more than 10 days before election day.
  - (2) Public notice of the time and the place must be given at least 48 hours prior to the meeting by publication once in one or more newspapers of general circulation in the county. If there is no such newspaper, notices must be posted in four conspicuous places in the county.
  - (3) The Supervisor of Elections or Municipal Elections Official may, at the time of qualifying, give each candidate a copy of the notice specifying the time and place of the public test and obtain a written receipt from the candidate for the notice.
  - (4) The Department of State shall give each statewide candidate a written notice informing the candidate that the voting equipment will be tested and advising the candidate to contact the Supervisors of Elections for the time and place of the tests.
  - (5) The Supervisor of Elections or Municipal Elections Official shall, at least 15 days prior to the commencement of early voting, give written notice via certified mail to the county party chair of each political party and to all candidates for other than statewide office whose names appear on the ballot in the county and who did not receive written notification from the Supervisor of Elections or Municipal Elections Official at the time of qualifying, stating the time and place of the public test.
  - (6) The test shall be open to representatives of the political parties, the media, and the public. Each political party may designate one person with expertise in the computer field who shall be allowed in the central counting room when all tests are being conducted. Such designee shall not interfere with the normal operation of the canvassing board.

- C. Conducting the Public Test - s. 101.5612
- (1) For electronic or electromechanical voting systems configured to tabulate absentee ballots at a central or regional site (101.5612(3), FS).
    - a. The public testing shall be conducted by processing a preaudited group of ballots through the tabulating equipment.
    - b. The ballots must have been marked so as to produce a predetermined outcome for each candidate or measure of the ballot.
    - c. The test ballots must include one or more which have activated voting positions in excess of those allowed in order to test the ability of the equipment to reject such ballots.
  - (2) If an error is found during the test
    - a. The cause of the error must be corrected.
    - b. An errorless count shall be made before the tabulating equipment is approved.
    - c. The test shall be repeated and errorless results obtained immediately before the count of the ballots and again after the completion of the official count.
    - d. The programs and ballots used for testing shall be sealed and retained in the custody of the county canvassing board.
  - (3) For electronic or electromechanical voting systems configured to include electronic or electromechanical tabulation devices which are distributed to the precincts (101.5612(4)(a), FS).
    - a. All or a sample of the devices must be tested.
    - b. If a sample is to be tested, it must consist of a random selection of
      1. at least 5 percent of the devices for an optical scan system  
**OR**
      2. 2 percent of the devices for a touchscreen system  
**OR**
      3. 10 of the devices for either system, as applicable, whichever is greater.
    - c. The test shall be conducted by processing a group of ballots through the voting equipment, obtaining the results, and comparing the results of the test to the anticipated results.
    - d. The group of ballots used for the test must be marked so as to record a predetermined number of valid votes for each candidate and on each measure and to include for each office one or more ballots which have activated voting positions in excess of the number allowed by law in order to test the ability of the voting equipment to reject such ballots.

- D. If an error is found in tabulation during the test - s. 101.5612(4)(a)2
- (1) It shall be deemed unsatisfactory.
  - (2) For each device deemed unsatisfactory
    - a. the canvassing board shall take steps to determine the cause of the error,
    - b. shall attempt to identify and test other devices that could reasonably be expected to have the same error,
    - c. and shall test a number of additional devices sufficient to determine that all devices are satisfactory.
  - (3) Upon deeming any device unsatisfactory, the canvassing board may require all devices to be tested or may declare that all devices are unsatisfactory.
  - (4) If the operation or output of any tested tabulation device, such as spelling or the order of the candidates on a report, is in error, such problem shall be reported to the canvassing board. The canvassing board shall then determine if the report problem warrants its deeming the device unsatisfactory. s. 101.5612(4)(a)3.
- E. At the conclusion of the test - s. 101.5612(4)(b)-(e).
- (1) The canvassing board or its representative, the representatives of the political parties, and the candidates or their representatives who attended the test shall witness the resetting of each device that passed to a preelection state of readiness and the sealing of each device that passed in such a manner as to secure its state of readiness until the opening of the polls.
  - (2) The Canvassing board or its representative shall execute a written statement specifying
    - a. the devices that were tested
    - b. the results of the testing
    - c. the protective counter numbers, if applicable
    - d. the number of the seal securing each device at the conclusion of the test
    - e. any problems reported to the board
    - f. whether or not each device tested is satisfactory or unsatisfactory
  - (3) Any device deemed unsatisfactory shall be recoded, repaired or replaced and made available for retesting. Such device must be deemed satisfactory by the canvassing board or its representative prior to being used in an election. The date, time and place of any retesting must be announced by the canvassing board at the conclusion of the first test. As an alternative, the canvassing board may contact via telephone any person who was present at the first test to give notice of the retesting.



- (4) Records must be kept of all preelection testing of electronic or electromechanical tabulation devices used in any election. They must be available during the public test for any member of the public who wishes to inspect them.
  - a. Records must include, for each device
    1. the name of the person who tested the device
    2. the date, time and place of test
    3. the results of the test
  - b. These records are part of the official records of the election



## FLORIDA DEPARTMENT OF STATE

CHARLIE CRIST  
Governor

KURT S. BROWNING  
Secretary of State

September 26, 2008

Ms. Debra E. Eastman  
Town Clerk, Town of Miami Lakes  
15700 NW 67<sup>th</sup> Avenue  
Miami Lakes, Florida 33014

RE: DE 08-10  
Canvassing Board – Disqualification of Member  
§ 102.141(1), Florida Statutes

Dear Ms. Eastman:

This letter responds to your request for an advisory opinion. You are the Town Clerk for the Town of Miami Lakes, and you serve as the supervisor of elections for its municipal elections. As a local officer having election-related duties, the Division has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2008). In the absence of a town charter provision, you state that Miami Lakes follows section 102.141, Florida Statutes (2008), concerning the composition and selection of its canvassing board members.

You ask essentially the following question:

Does a contribution by a canvassing board member to a candidate in a contested race to be canvassed by the canvassing board member disqualify that member from serving on the canvassing board under the provisions of section 102.141(1), Florida Statutes (2008)?

The short answer to your question is “no” if the contribution is the extent of the canvassing board member’s participation in the campaign of the candidate.

Section 102.141(1)(a)-(d), Florida Statutes (2008), disqualifies a canvassing board member or a substitute member of a canvassing board if the member is a candidate with opposition in the election being canvassed or is an active participant in the campaign or candidacy of any candidate who has opposition in the election being canvassed. The Election Code does not define “active participant,” nor have we found it defined in any Florida appellate case law or Attorney General Opinions. We believe the focus must be on the modifier “active” in the phrase “active participant.” If the member is a passive participant, the member would not be disqualified from being a member of a canvassing board. We do not believe that a monetary

Ms. Debra E. Eastman  
September 26, 2008  
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contribution to a candidate's campaign by itself makes a canvassing board member an "active participant" in the campaign.

Consistent with prior informal opinions provided by the Division of Elections, we interpret being an "active participant" in the campaign or candidacy of any candidate who has opposition in the election being canvassed to require something beyond giving of a campaign contribution.

SUMMARY

A contribution by a canvassing board member to a candidate in a contested race to be canvassed by the canvassing board member by itself does not disqualify that member from serving on the canvassing board. To be disqualified, the member must be an "active participant," which means something more than the mere giving of a campaign contribution.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Palmer', with a long horizontal line extending to the right.

Donald L. Palmer  
Director, Division of Elections

Prepared by:  
Gary J. Holland  
Assistant General Counsel



**FLORIDA DEPARTMENT of STATE**

**CHARLIE CRIST**  
Governor

**KURT S. BROWNING**  
Secretary of State

October 15, 2009

Honorable Sharon L. Zeller  
County Court Judge  
Broward County Courthouse  
Fort Lauderdale, Florida 33301

RE: DE 09-07  
Canvassing Board – Disqualification of Member;  
§§ 102.141(1), Florida Statutes

Dear Judge Zeller:

This letter responds to your request for an advisory opinion. You are the Administrative County Judge for Broward County and, as such, you serve as the chair of the County Canvassing Board. As a local officer having election-related duties, the Division of Elections has authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2009).

Section 102.141(1)(a)-(d), Florida Statutes (2009), disqualifies a canvassing board member or a substitute member of a canvassing board if the member is a candidate with opposition in the election being canvassed or is an “active participant” in the campaign or candidacy of any candidate who has opposition in the election being canvassed.

You ask if whether any or all of the following activities by a member of the canvassing board constitute being an “active participant” in the campaign or candidacy of any candidate who has opposition in the election being canvassed:

- Being a member of an election or re-election committee for a candidate
- Public endorsement with or without financial support of a candidate
- Holding campaign signs, wearing a campaign tee-shirt, or other public display of support for a candidate
- Signing endorsement card for a candidate
- Attending a fundraiser for a candidate
- Chairing or co-chairing an ongoing election campaign or fundraiser for the candidate

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As we stated in *Division of Elections Opinion 08-10* (September 26, 2008):

The Election Code does not define “active participant,” nor have we found it defined in any Florida appellate case law or Attorney General Opinions. We believe the focus must be on the modifier “active” in the phrase “active participant.” If the member is a passive participant, the member would not be disqualified from being a member of a canvassing board. We do not believe that a monetary contribution to a candidate’s campaign by itself makes a canvassing board member an “active participant” in the campaign.

Your questions now cause us to further define what makes one an “active participant” under section 102.141, Florida Statutes. Prior Division of Elections’ informal opinions concerning this section have interpreted being an “active participant” to include activities such as publicly endorsing a candidate, displaying a candidate’s campaign signs, or soliciting votes for a candidate. Stated more broadly, an “active participant” in a campaign is one who undertakes an action intentionally to demonstrate or generate public support of the candidate. This does not include merely making a campaign contribution. While a contribution to a candidate becomes a public record by operation of law (*see* section 106.0706, Florida Statutes (2009)), it cannot be said the donor is making the contribution for the intentional purpose of demonstrating or generating *public* support for the candidate. In fact, the donation does not become a public record until the candidate files the campaign finance reports on the required due dates, which may be months after the contribution is made. *See* § 106.07(1), Florida Statutes (2009). Therefore, one who merely makes a campaign contribution is a “passive participant” in a candidate’s campaign. *Division of Elections Opinion 08-10* (September 26, 2008).

Accordingly, to address your specific questions: Being an “active participant” would include being a member of an election or re-election committee for a candidate; public endorsement with or without financial support of a candidate; holding campaign signs, wearing a campaign tee-shirt, or other public display of support for a candidate; signing an endorsement card for a candidate; attending a candidate’s campaign fundraiser; or chairing or co-chairing an ongoing election campaign or fundraiser for a candidate. In each of these activities one is undertaking an action intentionally to demonstrate or generate public support for the candidate.

#### SUMMARY

To be disqualified as a canvassing board member, the member must be an “active participant” in the campaign or candidacy of any candidate who has opposition in the election being canvassed. An “active participant” means that a canvassing board member undertakes an effort intentionally to demonstrate or generate public support of a candidate beyond merely making a campaign contribution.

Honorable Sharon L. Zeller  
October 15, 2009  
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The following activities would make a canvassing board member an "active participant" in the candidate's campaign or candidacy: Being a member of an election or re-election committee for a candidate, public endorsement with or without financial support of a candidate; holding campaign signs, wearing a campaign tee-shirt, or other public display of support for a candidate; signing an endorsement card for a candidate; attending a candidate's campaign fundraiser; or chairing or co-chairing an ongoing election campaign or fundraiser for a candidate. However, the mere giving of a campaign contribution would not make a canvassing board member an "active participant."

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Palmer', with a long horizontal stroke extending to the right.

Donald L. Palmer  
Director, Division of Elections