ELECTIONS & VOTING RIGHTS

Elections & Voting Rights: Ballot Summary

***Elected County Mayor Political Commission, Inc. v. Shirk*,**
989 So. 2d 1267 (Fla. 2d Dist. App. 2008)

Where a self-executing county charter amendment or the amendment's ballot summary contain impossible date-specific provisions, the ballot summary is considered misleading to voters because it fails to explain that the dates cannot be met. Therefore, the amendment does not meet the statutory requirements and may properly be removed from the ballot.

FACTS AND PROCEDURAL HISTORY

Beginning April 11, 2006, Elected County Mayor Political Committee, Inc. (Sponsor) ran a six-month petition drive to collect signatures for a proposed amendment to the Hillsborough County charter that would replace the existing county administrator position with an elected county mayor (Amendment). The Amendment included a requirement that the county mayoral elections would begin in 2008. James Shirk (Shirk), a registered voter, signed the 2006 petition. The Sponsor failed to collect enough signatures by the 2006 ballot cut-off but continued collecting signatures and submitted the signatures to the supervisor of elections within the six-month time-frame required by the county charter. The supervisor certified the signatures on October 11, 2006 and placed the Amendment on the ballot for the next general election, scheduled for November 2008.

Shirk brought an action to prevent the Amendment from appearing on the 2008 ballot and to declare that the supervisor of elections erred in deferring the Amendment to the 2008 ballot. The Sponsor intervened. The parties stipulated that there were no material facts in dispute and agreed to proceed directly to a hearing on a final declaratory judgment.

On August 1, 2008, the circuit court removed the Amendment from the ballot, holding that the date-specific requirement that elections would begin in 2008 was misleading. The Sponsor appealed this finding. The Second District Court of Appeal deter-

mined the date-specific requirement in the Amendment was misleading.

ANALYSIS

Florida Statutes Section 101.161(1) requires public measures that are submitted to a vote of the people to have a ballot summary that is clear, unambiguous, and not misleading. Applying this statute, the Florida Supreme Court determined in *Advisory Opinion to the Attorney General re Florida Locally Approved Gaming*, that where a constitutional amendment was not self-executing, a specific date set out in the amendment by which the legislature would pass implementing regulations was not problematic because the intent that the legislature would act in a reasonable time was clear. 656 So. 2d 1259 (Fla. 1995). The Second District noted that a self-executing amendment is one that may accomplish its intended purpose without further legislative enactment. However, in *Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve a Public Purpose*, the Florida Supreme Court ruled that the specific date set out in that amendment was a fatal flaw because the amendment was self-executing and voters might be confused about when the actions required by the amendment would actually occur. 953 So. 2d 471 (Fla. 2007). In the present case, the Second District noted that the Amendment was self-executing because it would not require any further legislative action. The Amendment's "date-specific language prevents an election of a [c]ounty [m]ayor in the 2008 general election . . . and voters 'may be confused and misled' as to how or when the [c]ounty [m]ayor would succeed the [c]ounty [a]dministrator." *Shirk*, 989 So. 2d at 1275.

The Sponsor argued that the amendment was not clearly and conclusively defective and that the ballot summary was not misleading because the date was not critical. The Second District agreed that the Amendment could not be removed from the ballot unless it was clearly and conclusively defective. The court noted that the same standard applied to proposed constitutional amendments is applied to proposed county charter amendments and cited *Extending Existing Sales Tax* as controlling because the Amendment was self-executing. The language in the Amendment indicated that the county mayor would replace the county admin-

istrator in January of 2009, while in reality the earliest an election of a county mayor could occur would be 2010. The Second District refused to look behind the plain language in order to ascertain the intent that the election would be held at the next general election. The court also found unpersuasive the Sponsor's argument that the date was not critical, noting if the dates were not critical then they would not need to be stated in the charter, and thus the inclusion of the dates indicated their significance. Therefore, the Second District affirmed the circuit court's decision that the specific date was misleading. The court also noted that this problem could easily be remedied by omitting date-specific language from amendments.

SIGNIFICANCE

Shirk applies the *Extending Existing Sales Tax* rule regarding constitutional amendments to a county charter amendment. Thus, ballot summaries for self-executing county charter amendments that have unachievable dates in the ballot summary are considered misleading and therefore violate Florida Statutes Section 101.161(1). *Shirk* leaves unanswered whether non-self-executing amendments could be considered misleading. Instead, like the Florida Supreme Court in *Extending Existing Sales Tax*, *Shirk* encourages the omission of specific dates from amendments in order to avoid the issue entirely.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties & Municipal Corp.* § 170 (2005 & Supp. 2008).

Kristin M. Tolbert

Elections and Voting Rights: Ballot Title & Summary

***Florida Department of State v. Slough*,**
992 So. 2d 142 (Fla. 2008)

The title and summary of a proposed amendment to the Florida Constitution must be stated in such a way as to be unambiguous as to the amendment's chief purpose so that it is not misleading to the voter. Principles traditionally used in the interpretation

of statutory titles are extended to the analysis of titles and summaries of constitutional amendments.

FACTS AND PROCEDURAL HISTORY

Article XI, Section 6 of the Florida Constitution provides for the establishment of the Florida Taxation and Budget Reform Commission (Commission) every twenty years, beginning in 2007. The provision mandates that the Commission examine the state budgetary process and the sufficiency of the tax structure and then propose amendments to the Florida Constitution if necessary. Pursuant to this authority, the Commission proposed Amendment Five. The proposed title and summary were to be placed on the ballot as follows:

> ***ELIMINATING* STATE REQUIRED SCHOOL PROPERTY TAX *AND* *REPLACING WITH* EQUIVALENT STATE REVENUES TO FUND EDUCATION**
>
> Replacing State required school property taxes with state revenues generating an equivalent hold harmless amount for schools through one or more of the following options: repealing sales tax exemptions not specifically excluded; increasing sales tax rate up to one percentage point; spending reductions; other revenue options created by the legislature. Limiting subject matter of laws granting future exemptions. Limiting annual increases in assessment of non-homestead real property. Lowering property tax millage rate for schools. (emphasis added)

Florida Statutes Section 101.161 requires amendments submitted to the people for a vote to be represented in "clear and unambiguous language on the ballot." Plaintiffs filed an action in the circuit court, arguing that the ballot title and summary violated Florida Statutes Section 101.161 because they were misleading and failed to inform voters of the "chief purposes" of the amendment. The circuit court granted summary judgment to the plaintiffs, ordering Amendment Five removed from the ballot. The Florida Department of State (State) appealed to the First District Court of Appeal. In turn, the district court certified the question to the Florida Supreme Court as a question of great public importance. The Supreme Court upheld the circuit court's decision, rul-

ing that the proposed ballot title and summary would mislead voters if placed on the ballot.

ANALYSIS

In examining whether the ballot title and summary violated Section 101.161, the Court reviewed the case de novo in order to determine whether the title and summary would fairly inform the voter of the purpose of the Amendment through the use of unambiguous language; and whether the language used would mislead the public. In answering both of these questions, and in holding that the trial court was correct to order the Amendment's removal from the election ballot for noncompliance with Section 101.161, the Court adopted two arguments asserted by Plaintiffs in support of the contention that the ballot title and summary were misleading to voters.

First, the language of both the title and summary insinuated that for every year in which school property taxes were not levied, alternative sources would be used to replenish the difference. However, under the actual amendment, the "equivalent hold harmless amount" would be established for a single, fiscal year—there was no continuing obligation to supplement school district revenues. Rather, the Amendment required the Legislature to supply the equivalent of the lost revenues for only the 2010–2011 fiscal year. Therefore, the ballot title and summary were misleading because they could lead voters to believe that any revenue loss sustained as a result of the removal of school ad valorem taxes would be continually replaced by the State; when in reality, the shortfall would not be supplemented by the State after 2011.

Second, the ballot title indicated that it applied to only education-related taxes, based on the fact that it mentioned nothing else. However, along with reducing school property taxes, the Amendment also sought to abate the increase in real property assessments for taxes other than school taxes from 10% to 5%. The Court noted that the ambiguity could lead to limitations on assessment increases for non-education-related funds such as police protection and emergency services. Although the ballot summary did include a reference to non-homestead real property assessments, the title and summary must be read together when determining whether Section 101.161 is satisfied.

In rendering its decision, the Court expressly extended principles generally related to the interpretation of statutory titles to the analysis of proposed constitutional amendment titles and summaries. The Court advised that sponsors of constitutional amendments should draft ballot titles and summaries that are "straightforward, direct, accurate, and [do] not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous." *Slough*, 992 So. 2d at 149.

SIGNIFICANCE

Slough confirms that suggested ballot titles and summaries for proposed constitutional amendments must be stated in clear and unambiguous language so as not to mislead the voter. Further, *Slough* signifies that the Taxation and Budget Reform Commission must exercise caution in executing its duties under Article XI, Section 6 of the Florida Constitution. Although the Commission is effectively outside of the legislative branch—no voting member of the Commission is permitted to be a member of the legislature—*Slough* signals that the Commission's proposed amendments to the Florida Constitution are subject to principles that mirror statutory interpretation.

RESEARCH REFERENCES

- 16 Am. Jur. 2d *Constitutional Law* § 32 (2001 & Supp. 2008).
- 10 Fla. Jur. 2d *Constitutional Law* §§ 9, 19 (2009).

Crystal M. Ellis

Elections & Voting Rights: Campaigns

***Guetzloe v. State of Florida*,**
980 So. 2d 1145 (Fla. 5th Dist. App. 2008)

Any electioneering communication must prominently state that it is a "paid electioneering communication," and failure to include the mandated language is a prosecutable offense. The number of offenses subject to prosecution is based on the number of deficient mass mailings rather than the number of recipients.

FACTS AND PROCEDURAL HISTORY

During the 2006 mayoral election in Winter Park, Douglas Guetzloe (Guetzloe) mailed a packet that purportedly documented a dispute and prosecution of a candidate running for reelection for mayor. This packet went to five thousand households and was distributed without the knowledge or consent of any candidate. After the election, Guetzloe filed the disclosure form required by Florida Statutes Section 106.071 identifying him as the source of the mailed packet. The State charged Guetzloe with fourteen counts of violating Florida Statutes Section 106.1439, a first degree misdemeanor. Guetzloe entered a no contest plea and reserved the right to appeal. He then moved to certify two questions of great public importance: (1) whether Section 106.1439, Florida's Election Communication Statute, is an overbroad restriction on anonymous political speech; and (2) whether Section 106.1439 allows the State to charge separate counts for each person to whom an electioneering communication is addressed, mailed, and received. The Fifth District Court of Appeal granted certification.

ANALYSIS

Section 106.1439(1) states that "[a]ny electioneering communication shall prominently state: 'Paid electioneering communication paid for by (Name and address of person paying for the communication).'" The issues were whether the "name and address" section was severable from the "paid electioneering communication" requirement and whether the requirement was an overbroad restriction of anonymous political speech. The Fifth District Court of Appeal held that the "paid electioneering communication" requirement was severable and that Guetzloe could be prosecuted under it. The court explained that Guetzloe was "required under Section 106.1439 to disclose that the mail-out was a 'Paid electioneering communication,' and failure to do so subjected him to prosecution." *Guetzloe*, 980 So. 2d at 1147.

Guetzloe also contended that Section 106.1439 allows for only one unit of prosecution because double jeopardy prohibits multiple punishments for the same offense. When determining the number of units of prosecution, courts must look to the criminal activity the legislature intended to punish. Applying this, the court held that Section 106.1439 allows for only one unit of prosecution. Guetzloe's electioneering communication consisted of only

one mailing sent to over five thousand households. The court opined that the legislature did not likely intend to subject an offender to a year of jail for each recipient of a single communication. Thus, the additional thirteen counts were barred by double jeopardy.

SIGNIFICANCE

Guetzloe clarifies two points with regard to electioneering communications. First, in mailing, the "name and address" section is severable from the "paid electioneering communication" requirement, and failure to include the required "paid electioneering communication" language can be prosecuted separately. Second, with regard to electioneering communications, only one unit of prosecution is allowed for the original communication and not for each individual mail piece.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Elections* §§ 96, 196 (2008).

Matthew Ransdell

Elections & Voting Rights: Candidate Qualifications

***Levey v. Dijols*,**
990 So. 2d 688 (Fla. 4th Dist. App. 2008)

Eligibility requirements for circuit court judges are defined by Article V, Section 8 of the Florida Constitution, and qualifications for candidacy in non-partisan judicial elections are controlled by Section 105.031 of the Florida Statutes. Because neither of these provisions specifies what form of a person's name must be used for purposes of candidacy, a married woman running for office in Florida may use either her maiden name or her married name on the ballot and in her qualifying oath.

FACTS AND PROCEDURAL HISTORY

In 2006, Mardi Levey Cohen (Levey) lost an election campaign for Circuit Court Judge in Broward County, and she ran for the same position in 2008. However, Levey is married to Circuit Court Judge Dale Cohen. Because she wanted to run on her own

merits and did not want to involve her husband in the campaign, she ran under her maiden name, Mardi Anne Levey. Levey finished second in the primary election and was placed on the general election ballot. The third-place finisher, incumbent Judge Pedro Dijols (Dijols), knew that Levey used a different name in the 2008 election than she used in 2006, but he did not challenge her eligibility before the election.

After the 2008 election results were certified, Dijols sued Levey, arguing that she engaged in misconduct, that she was unqualified and ineligible to run for the position, and that her motive for using her maiden name in the 2008 election was that she had lost the 2006 election using her married name. Dijols sought a writ of mandamus compelling the replacement of Levey's name with Dijols' and the recertification of the election results consistent with that change. Additionally, Dijols requested a declaration that Levey violated election laws and asked the court to direct a writ of *quo warranto* to the Supervisor of Elections and the Canvassing Board, finding that Levey violated election laws and abused her husband's judicial office in her own election.

The trial court held that Levey did not engage in any intentional misconduct but held that she was not qualified to run using her maiden name. Therefore, the court ordered the Broward County Supervisor of Elections and the Canvassing Board to strike Levey from the general election ballot and to replace her with Dijols. The Fourth District Court of Appeal reversed and ordered that Levey's name appear on the ballot or, if time did not permit revision, that notice of the change be given to the electorate.

ANALYSIS

The Fourth District explained that a statute may not validly extend the eligibility requirements for candidacy beyond the standards outlined in Article V, Section 8 of the Florida Constitution. Therefore, the court examined relevant constitutional and statutory provisions to determine whether Levey was required to use a specific form of her name for purposes of her candidacy.

The court first looked to the candidate-eligibility requirements outlined in the Florida Constitution as follows: a judicial candidate must (1) be an elector of Florida; (2) reside in the territorial jurisdiction of the court; and (3) have been a member of the

Florida Bar for the preceding five years. Because the Florida Constitution does not specify what name a candidate must use on the ballot, the court held that the Florida Constitution did not preclude Levey from using her maiden name.

Next, the court considered statutory requirements for a candidate's qualification, outlined in Florida Statutes Section 105.031, which requires a candidate to file an oath including the candidate's name as he or she wishes it to appear on the ballot. The court noted that the term "name" was not defined in the statute. However, "the term 'name' connotes any legal form of name the person is entitled to use and have printed on the ballot." *Levey*, 990 So. 2d at 693. Accordingly, the court concluded that Levey did not lose the right to use her birth-given name upon marriage and held that she was permitted to use either her married name or her maiden name on the ballot and in her qualifying oath.

Dijols argued that the outcome was controlled by *Planas v. Planas*, in which the Third District Court of Appeal held that a candidate's use of the name "J.P. Planas" was an attempt to deceive voters by likening himself to a well-known incumbent who used the name "J.C. Planas." 937 So. 2d 745 (Fla. 3d Dist. App. 2006). The Fourth District opined that *Planas* was distinguishable because that candidate was attempting to use the suspect name for the first time, whereas Levey sought to use a name she was given at birth. Moreover, the challenge in *Planas* was brought before the election, whereas Dijols did not challenge Levey's eligibility until after election officials approved the candidate's name, the ballots were printed, and the election was held. The court explained that in the absence of fraud, unfairness, or disenfranchisement, the validity of an election may not be attacked after the people have voted. Because Levey was both eligible and qualified to run for public office, and because Dijols did not carry his statutory burden of providing grounds for contesting the election results, the Fourth District ordered Levey's name returned to the general election ballot.

SIGNIFICANCE

Levey emphasizes candidates' ability to select the name that they wish to appear on the ballot. The case expressly grants female candidates the freedom to use their maiden names on the

ballot. *Levey* also demonstrates the judiciary's reluctance to interfere with the results of an election after votes have been cast, when the basis of challenge concerns issues that could have been raised prior to the time the election was held.

RESEARCH REFERENCES

- Fla. Const. art. V, § 8.
- Fla. Stat. § 105.031 (2007).
- 21 Fla. Jur. 2d *Elections* § 73 (2005).

Jennifer L. Morris McPheeters

Elections & Voting Rights: Resign-to-Run Rule

***City of Tampa v. Lewis*,**
993 So. 2d 1096 (Fla. 2d Dist. App. 2008)

A police captain who qualifies to run against an incumbent mayor is deemed to have resigned his employment because a candidate-employee within the supervision of an incumbent-elected official must resign from the supervised employment.

FACTS AND PROCEDURAL HISTORY

In 2006–2007, Marion Lewis (Lewis), a captain in the Tampa Police Department (TPD), ran for mayor against the incumbent, Mayor Pam Iorio (Mayor Iorio). Lewis sought an advisory opinion from the Florida Department of State, which stated that resignation was not a precondition to Lewis' candidacy. In January of 2007, the City of Tampa (City) filed an action for declaratory judgment that Lewis was deemed to have resigned when he executed the Oath of Candidate because of the "resign-to-run" law, Section 99.012(5), Florida Statutes. Lewis counterclaimed that he was not deemed to have resigned and that he could resume his employment if he were not elected. The City moved for summary judgment and submitted affidavits saying that Mayor Iorio controlled and supervised the TPD, including the rank of captain. Lewis contended that Mayor Iorio did not supervise him; she supervised only the chief of police. The trial court denied the City's motion finding that Mayor Iorio was not Lewis' supervisor. Even though Lewis had not moved for summary judgment, the trial

court entered summary judgment for Lewis on his counterclaim. The City appealed.

ANALYSIS

Section 99.012(5) of the Florida Statutes states that

> [a] person who is a subordinate officer, deputy sheriff, or police officer must resign effective upon qualifying pursuant to this chapter if the person is seeking to qualify for a public office that is currently held by an officer who has authority to appoint, employ, promote, or otherwise supervise that person and who has qualified as a candidate for reelection to that office.

Therefore, when an employee runs for office against an incumbent that possesses the authority to appoint, employ, promote, or supervise the employee, that employee must resign upon qualifying as a candidate.

The Second District Court of Appeal held that as a matter of law, Mayor Iorio was authorized to supervise Lewis; thus, he was required to resign in order to comply with Section 99.012(5). Mayor Iorio has broad authority over the municipal government, having "direct control and supervision over all departments and divisions of the municipal government." Code Ords. Tampa (Fla.) Part A, art. IV, § 4.01 (1990). The court explained that given this broad authority over all departments, a mayor has supervision over the TPD, and that supervision is not limited to only the chief of police or any other department head. Accordingly, the court concluded that Lewis was required to resign from his position as a police captain in order to run against Mayor Iorio.

SIGNIFICANCE

City of Tampa clarifies the requirement that when an employee qualifies as a candidate against an incumbent that has supervision authority over that employee, the employee must resign his or her employment. However, the court did not address a situation where an incumbent has no statutory supervision authority, but instead has only practical authority or influence over an employee.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Elections* §§ 76–77 (2005 & Supp. 2008).

Matthew Ransdell