CITY OF MIAMI

OFFICE OF THE CITY ATTORNEY

LEGAL OPINION - #15-002

TO: Honorable Mayor Tomás Regalado and Members of the City Commission

FROM: Victoria Méndez, City Attorney

DATE: November 10, 2015

RE: Counting of Votes at the November 17, 2015 Municipal Runoff Election

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You have asked for a legal opinion inquiring whether votes cast for Teresa Sarnoff, who has withdrawn as a candidate for the Office of District 2 City Commissioner, can be counted at a municipal runoff election. For the reasons expressed below, we believe that any votes for Mrs. Sarnoff should not be counted.

ANALYSIS

On November 9, 2015, this Office issued Legal Opinion #15-001 in which it found that the Charter mandates the holding of a runoff election between the two candidates for the Office of City Commissioner who received the greatest number of votes for that position. This Office additionally noted, among other things in the opinion, that "because there is no mechanism in the Charter or City Code provision, as to a candidate's withdrawal, we do not believe that the City Clerk has the power to accept a withdrawal at this stage of the electoral process." Accordingly, this Office opined that the City Clerk could not remove Mrs. Sarnoff's name from the runoff election ballot, thus necessitating the election.

Following the release of Legal Opinion #15-001, this Office reviewed a letter from Mrs. Sarnoff requesting the City Clerk, City Attorney, and City Manager to "accept this as my formal withdrawal from the contest for City of Miami Commissioner District 2" and which she signed as "Former Candidate for District 2, City of Miami Commission." We believe that Mrs. Sarnoff's letter constitutes a sufficient withdrawal pursuant to Florida Division of Elections Rule 1S-2.0001(5) which states:

> Candidate withdrawal. A candidate may withdraw his or her candidacy by submitting a document specifying the candidate's withdrawal from the particular public office he or she seeks to the qualifying office before which he or she qualifies (or has qualified) by mail, facsimile, email, photocopy, scanned copy or other type of electronic transmission that contains the signature of the candidate. The withdrawal is not effective until it is received by the qualifying office.

See also Battaglia v. Adams, Secretary of State, 164 So. 2d 195 (Fla. 1964) (recognizing that a candidate has the natural and inherent right to resign at anytime and remove his name from the ballot).

Having concluded that Mrs. Sarnoff has formally withdrawn from the runoff election, we now turn our attention to whether votes cast in her favor should be counted. McQuagge v. Conrad, 65 So. 2d 851 (Fla. 1953), provides support for not counting votes cast for Mrs. Sarnoff following her withdrawal.

In McQuagge, the Tax Assessor was placed on a ballot but he died prior to the election; a fact that was generally known by the voters. The Tax Assessor was the incumbent and the other candidates were write-in candidates. The question before the Supreme Court was whether the votes cast for him were legal votes, and what effect did they have on the outcome of the election. The Supreme Court held that the ballots cast for him were illegal, null and void, and could have no effect on the result of the election. In doing so, the Court followed the "minority rule" which provides that votes cast for a person known to be deceased or disqualified are to be treated as void and are not counted in determining the result of the election as regards the other candidates. Here, similar to McQuagge, Mrs. Sarnoff's intent to withdraw her candidacy has been disseminated to the public by letter to the Miami Herald editor, as well as multiple news reports in the Miami Herald and other media. Hence, the minority rule as followed by the Florida Supreme Court would require that the votes cast for her not be counted.[1]

We recognize that other jurisdictions follow the "majority rule" which provides that votes cast for a deceased or disqualified candidate are counted against other candidates. In such an election, if a majority is not received, the office is declared vacant, and filled according to applicable law. See, e.g., Shroyer v. Thomas, 368 Pa. 70 (Sup. Ct. 1951); McCarthy v. Reichenstein, 142 A.2d 914 (N.J. A.D. 1958). However, as explained above, the Florida Supreme Court has adopted the minority rule; thus we are bound to follow it. See also AGO 66-62 (June 10, 1966) (Florida Attorney General's opinion adhering to McQuagge and the minority rule). Although the Third District seemingly preferred the majority rule in Merrill v. Dade County Canvassing Board, 300 So. 2d 28 (Fla. 3d DCA 1974), by holding that votes cast in favor of a withdrawn candidate were not a nullity and should be counted, a district court cannot overrule Florida Supreme Court precedent. Hoffman v. Jones, 280 So. 2d 431, 440 (Fla. 1973) ("[A] District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida."). Merrill is also distinguishable because unlike in that case, the City of Miami voters are well-aware of Mrs. Sarnoff's withdrawal prior to the runoff election as this issue has received extensive local media coverage.

It is notable that the procedures adopted by the State of Florida requiring the posting of notice at polling places informing voters that a candidate has withdrawn from the election, and

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[1] Notably, Charter Section 4 was adopted after the McQuagge decision. The Legislature is presumed to know the current state of the law when adopting new measures. See, Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1 (Fla. 2005) ("It is true that courts must presume that the Legislature passes statutes with the knowledge of prior existing statutes....").

the consequences of voting for that candidate, are consistent with McQuagge and Cobb v. Thurman, 957 So. 2d 638 (Fla. 1st DCA 2006).

Regarding the counting of votes when a candidate has withdrawn, the Florida Department of State, Division of Elections has published recommended guidelines on Notice of Candidate Withdrawal or Disqualification. The purpose of the guidelines is to provide notice to the voters when a candidate has withdrawn or been disqualified and it is too late to change the format and content of the ballot. The notice is to be placed in the polling place and in each voting booth. The recommended notice advises the voter:

> A candidate in the race for the office of _____ has [withdrawn or has been disqualified, whichever is applicable] resulting in an unopposed candidate race.
>
> *A vote cast in this race will not change the outcome as the remaining candidate is deemed by law to be [insert "nominated" or "elected" as applicable] for that race.*

The guidelines further state: "These votes cast should not be reported or published .... These votes are otherwise invalid and are not part of the unofficial or official election results. Moreover, these votes should not be counted for purposes of determining whether a recount or run-off is triggered."

Based on the foregoing, we are bound by Florida Supreme Court precedent and Florida election procedures requiring that any votes for Teresa Sarnoff not be counted. Although the cost of having a runoff election is seemingly unnecessary, absent new case law from the Florida Supreme Court, this law can only be changed by act of the Florida legislature or the City Commission. We recommend that the Charter be reviewed for amendment in order to avoid this situation in the future.

PREPARED BY:

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REVIEWED BY:

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cc: Daniel J. Alfonso, City Manager
Todd B. Hannon, City Clerk

VM/JAG/FLA