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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Municipalities – Elections – Candidates –
Death – Municipal Elections – Cherokee
County

The death of the candidate who received the second most votes in the municipal election effectively withdraws his candidacy in the runoff election, and no runoff election is required.

The remaining candidate for mayor in the runoff election should be declared the winner of the election.

The candidate receiving the third most votes does not move into second place and become a candidate in the runoff election.

Dear Mr. Hawkins:

This opinion of the Attorney General is issued in response to your request on behalf of the Town of Cedar Bluff.

QUESTIONS

1. Given the Alabama Supreme Court opinion that the circuit court judgment ordering a runoff election for mayor of the Town of Cedar Bluff between Ethel Sprouse and Jimmy R. Wallace is void, does the Town of Cedar Bluff conduct a runoff election between candidate Ethel Sprouse and deceased candidate Steve Lay? If so, when should the election be held?

2 If there is no need to have a runoff election between Ethel Sprouse and the decedent Steve Lay, should the town immediately declare Ethel Sprouse as winner of the election, or does the town need to schedule a runoff election between Ethel Sprouse and candidate Jimmy R. Wallace, who received the third most votes for mayor in the August 26, 2008, election?

3. If the answer to Question 2 is that a runoff election should include Jimmy Wallace, who received the third most votes, does his position as an employee of the town preclude him from being involved in the runoff?

FACTS AND ANALYSIS

The Town of Cedar Bluff held a municipal election on August 26, 2008. On September 2, 2008, the town certified the election results with the following tallies for the office of mayor: total votes cast were 471; candidate Ethel Sprouse received 165 votes; candidate Steve Lay received 140 votes; candidate Jimmy Wallace received 124 votes; and candidate Dale Reese received 42 votes. Because no candidate received a majority of the votes cast, and there were more than two candidates, the town council ordered a runoff election to be held on October 7, 2008, between Sprouse and Lay, the two candidates receiving the most and the second most votes. Runoff elections were also ordered for Council Districts 1, 3, and 5. Because your questions do not relate to the elections of the council, the specific details about those seats will not be discussed.

On September 3, 2008, Jimmy Wallace, a candidate for mayor, and two of the candidates for town council filed an election contest pursuant to section 11-46-69 of the Code of Alabama. The main basis of the contest involved the validity of certain absentee ballots cast in the election. The circuit court invalidated the absentee ballots and issued an order in favor of the plaintiffs on October 27, 2008. The circuit court also ordered a runoff election to be held between Sprouse and Wallace. It should be noted that Steve Lay, candidate for mayor, died on October 3, 2008.

One of the candidates for council involved in the election contest filed an appeal with the Alabama Supreme Court. On May 15, 2009, the Alabama Supreme Court dismissed the appeal, holding that the circuit court lacked subject-matter jurisdiction and, thus, that the order of the circuit court was void

with respect to the candidates involved in a runoff election. *Smith v. Burkhalter*, ___ So. 3d ___, 2009 WL 1363988 (Ala. May 15, 2009).

On application for rehearing, the Supreme Court reaffirmed that the circuit court lacked subject-matter jurisdiction to hear an election contest when no candidate had been “declared elected” to a municipal office as required under section 11-46-69 of the Code of Alabama. *Smith v. Burkhalter*, ___ So. 3d ___, 2009 WL 2722737 (Ala. Aug. 28, 2009). Based upon the decision of the Supreme Court voiding the order of the circuit court with respect to the candidates involved in a runoff election, and the fact that the candidate receiving the second most votes for mayor died, the town has questions as to whether a runoff election must now be held between the two candidates receiving the most and second most votes for mayor.

Section 11-46-55 of the Code of Alabama sets forth the requirements for a municipality to order a runoff election. This section states, in pertinent part, as follows:

(d) If no candidate receives a majority of all the votes cast in such election for any one office or offices for the election to which there were more than two candidates, then the municipal governing body shall order a second or “runoff” election to be held on the sixth Tuesday next thereafter following the regular election, at which election *the two candidates having received the most and the second most votes, respectively, shall be candidates*, and the person receiving the highest number of votes for that office in the runoff election shall be declared elected. . . . *In the event one of the candidates for a particular office in the runoff election withdraws, then there need not be a second election to fill the office nor shall the name of either the party so withdrawing or the remaining candidate be printed on the ballot of any second election held under this article.* This second election shall be held by the same election officers who held the first election and at the same places the first election was held. . . .

ALA. CODE § 11-46-55(d) (2008) (emphasis added). This section provides that if no candidate receives a majority vote, the municipality must call a runoff election between the two candidates having received the most and second most votes. This action was taken by the council on September 2, 2008, when it met to certify the election results.

Section 11-46-55 also provides that if one of the candidates involved in the runoff election withdraws, there need not be a second election. The remaining candidate would be declared the winner of the election. As previously stated, the candidate who received the second most votes in the August 26, 2008, election died before the runoff election could be held. The question is whether the death of the candidate is treated as a withdrawal by the candidate.

Under the general election laws, political parties are authorized to fill vacancies because of the death of a party nominee. *See* ALA. CODE § 17-13-23 (2006). There is no similar law that provides for the replacement of a candidate in a municipal election because of the candidate's death. Nor do the municipal election laws provide specifically for the action to be taken if one of the candidates involved in the runoff election dies before the election is held.

Research reveals no Alabama case law addressing whether the death of a candidate is treated the same as the withdrawal of the candidate. The Alabama Supreme Court has stated that Alabama follows the general rule that votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards other candidates. *State ex rel. Cleveland v. Stacy*, 263 Ala. 185, 82 So. 2d 264 (1955). This Office has followed this general rule in previous opinions wherein a candidate's name appeared on the ballot and it was too late to remove the candidate's name from the ballot following the death or other disqualification of the candidate. Opinions to Honorable Don Davis, Mobile County Probate Judge, dated October 31, 2002, A.G. No. 2003-022 and to Honorable Casandra (Sandy) Horsley, Winston County Probate Judge, dated November 30, 2000, A.G. No. 2001-041. Following this rule, the votes cast for the candidate who died are not thrown out, but are counted in determining who received the second and third most votes. Thus, the person receiving the third most votes does not automatically move into second place and become a candidate in the runoff election.

In this instance, the candidate died following the certification by the municipality that a runoff election should be held, but the runoff election has not yet been held because of the filing of the election contest and the appeal to the Alabama Supreme Court. A strict following of the general rule about counting votes for deceased persons might appear to require that a runoff election be held between the deceased candidate and the candidate receiving the most votes. This would be an absurd result. The municipality in this case has not yet set a new date for the runoff election, and ballots have not been printed. The municipal election laws provide that if one of the candidates withdraws from the election, there need not be a runoff election and the remaining can-

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didate shall be certified as the winner of the election. It is the opinion of this Office that the death of a candidate, in this circumstance, has the effect of withdrawing his candidacy.

Based upon the foregoing, it is the opinion of this Office that the death of the candidate who received the second most votes in the municipal election effectively withdraws his candidacy in the runoff election, and no runoff election is required. The remaining candidate for mayor in the runoff election should be declared the winner of the election. The candidate receiving the third most votes does not move into second place and become a candidate in the runoff election. Given this answer to Questions 1 and 2, Question 3 need not be addressed.

CONCLUSION

The death of the candidate who received the second most votes in the municipal election effectively withdraws his candidacy in the runoff election, and no runoff election is required. The remaining candidate for mayor in the runoff election should be declared the winner of the election. The candidate receiving the third most votes does not move into second place and become a candidate in the runoff election.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact me.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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