



2004 - 2006

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

August 23, 2004

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Honorable Albert O. Howard
Probate Judge, Probate Court of
Russell County
Post Office Box 700
Phenix City, Alabama 36868-0700

Political Parties – Candidates – Elections –
Fair Campaign Practices Act

If a candidate in a primary election failed to file a statement or report required by the Fair Campaign Practices Act before the primary election, that candidate is disqualified, and a certificate of nomination should not be issued to that candidate. If a certificate was issued, it should be revoked, and a vacancy in nomination is created. The probate judge may decline to place the name of that party-certified nominee on the ballot for the general election. The party may fill the vacancy in nomination with another qualified candidate.

Under the facts set forth herein, no violation of due process rights occurred for the Russell County Democratic Executive Committee and/or the party-certified nominee.

Dear Judge Howard:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) Is judicial notice that a local candidate filed a required preelection report on the date of the

primary election sufficient to obviate the need for the probate judge to make any further inquiry before refusing to place the name of that party-certified nominee on the ballot for the general election?

(2) Is a letter to the Russell County Democratic Executive Committee that the name of a party-certified forfeited nominee will not be on the ballot for the general election, stating the reasons therefor, sufficient due process for the Russell County Democratic Executive Committee and for the party-certified nominee?

FACTS AND ANALYSIS

Your request states that following the primary election on June 1, 2004, the Russell County Democratic Executive Committee was informed by Probate Judge Albert O. Howard that the winning candidate in one county commission district race had filed her required 10-5 day Fair Campaign Practices Act ("FCPA") report on election day, June 1, 2004. The report was due by May 27, 2004. The 10-5 day report was unverified but showed expenditures in excess of \$3000, well above the \$1000 threshold for reporting by local candidates.

The Russell County Democratic Executive Committee was informed, by a letter from the Probate Judge, that the failure to file the report before the election placed the candidate in violation of section 17-22A-21 of the Code of Alabama. Further, the Russell County Democratic Committee was informed that to certify the nomination of the candidate would place the Russell County Democratic Executive Committee in violation of the FCPA and that the prescribed penalty for such a violation, as stated in section 17-22A-22(a) of the Code of Alabama, was a Class A misdemeanor.

Nevertheless, the Russell County Democratic Executive Committee certified the candidate as the Democratic nominee for that county commission district. Following the certification, a letter was provided by the Probate Judge to the Chairman of the Russell County Democratic Executive Committee stating that an illegal act would not be recognized, and the illegal certification would not suffice to place the nominee on the general election ballot. The letter acknowledged that the Russell County Democratic Executive Committee had a right to name another candidate for that office.

Political parties have the authority to determine who shall be entitled and qualified to be candidates or otherwise participate in primary elections so long

as the political committees do not violate some statutory or constitutional provision. *Knight v. Gray*, 420 So. 2d 247 (Ala. 1982); *Perloff v. Edington*, 302 So. 2d 92 (Ala. 1974). The state and county executive committees certify the names of all candidates who have been put in nomination by primary election to the Secretary of State and the probate judge, respectively. ALA. CODE § 17-7-1 (Supp. 2003). Those persons certified by the parties are entitled to have their names placed on the general election ballot "provided they are otherwise qualified for the office they seek." ALA. CODE § 17-7-1(a) (Supp. 2003).

Section 17-22A-21 of the FCPA states as follows:

A certificate of election or nomination shall not be issued to any person who shall fail to file any statement or report required by this chapter. A certificate of election or nomination already issued to any person elected or nominated to state or county office who fails to file any statement or report required by this chapter shall be revoked.

ALA. CODE § 17-22A-21 (1995).

The Alabama Supreme Court addressed the consequences of noncompliance with the reporting requirements of the FCPA in *Davis v. Reynolds*, 592 So. 2d 546 (Ala. 1991). In *Davis*, the Court discussed the consequences of filing "a statement designating [a candidate's] principal campaign committee" after the period specified by section 17-22A-4, but *before* the day of the election. *Id.* at 547. The Court commented that the "primary laudable purpose" of the FCPA was to "inform the voting public of the source of a candidate's financial support" and, thereby, to "aid the voting public in choosing its [government] officials." *Id.* at 555-56. The Court reasoned that this purpose could be accomplished only as long as candidates comply with the requirements of the FCPA to "disclose campaign contributions and expenditures *prior* to elections." *Id.* at 555 (emphasis added). Thus, a winning candidate who waits until *after* the election to disclose the required information "forfeit[s] the election." *Id.*

The Court carefully distinguished the consequences of a *post*-election disclosure from those of an untimely *pre*-election disclosure. In the latter event, as was the case in *Davis*, the candidate was subject only to the misdemeanor penalties imposed by section 17-22A-22, rather than to the harsher, election-forfeiture penalty imposed by section 17-22A-21. *Id.*

The reasoning in *Davis* was followed by the Court in *Ex parte Krages*, 689 So. 2d 799 (Ala. 1997), in which the Court stated as follows:

[T]he disclosure obligations are so fundamental to the purposes and objectives of the FCPA that a disclosure offered to the voting public only *after* the election constitutes an *incurable* default. This is so, of course, because a post-election disclosure simply cannot provide the benefits the legislature sought to bestow upon the voting public by passage of the FCPA.

Id. at 807. In *Krages*, the candidate filed his 10-5 day report on the day after the election. Accordingly, the Court held that he had “failed to file” within the meaning of section 17-22A-21 and, consequently, he could not be certified as the winner of the election. *Id.*

In this case, the candidate was required to file her 10-5 day report for the June 1, 2004, primary election by May 27, 2004, with the probate judge. ALA. CODE § 17-22A-8 (1995). According to the facts presented, the candidate filed the report on June 1, 2004, the day of the election. Accordingly, the candidate failed to file the report before the election. Filing on the day of the election is not before the election. Thus, the probate judge had actual knowledge that the report was not filed before the election.

If a candidate in a primary election fails to file a statement or report required by the FCPA before the primary election, that candidate is disqualified, and a certificate of nomination shall not be issued to that candidate. If a certificate is issued, it shall be revoked, and a vacancy in nomination is created. The Supreme Court of Alabama has held that the probate judge, even as a ministerial officer, has the right to decline to place names on the ballot when a nomination was contrary to the statutes. *Kinney v. House*, 243 Ala. 393, 10 So. 2d 167 (1942). The party may fill the vacancy in nomination with another qualified candidate. ALA. CODE § 17-16-41 (1995). Furthermore, this Office has previously stated that a political party may not fill a vacancy in nomination with a candidate who has been disqualified under section 17-22A-21 of the Code for failure to file a statement or disclosure report required by the FCPA. Opinion to Honorable Jim Bennett, Secretary of State, dated October 3, 2000, A.G. No. 2001-001.

The Russell County Democratic Executive Committee was informed by letter from the Probate Judge that the name of the party-certified nominee would not appear on the ballot for the general election and the reasons therefor. Based on the information presented, the Executive Committee did not file a substantive response to that notice, nor did the Committee request a hearing. Accordingly, it is the opinion of this Office that, under the facts set forth herein, no violation

of due process rights occurred for the Russell County Democratic Executive Committee and/or the party-certified nominee. *See Ala. Republican Party v. McGinley*, 2004 WL 1099995 (Ala. May 18, 2004) (procedural due process requires notice and an opportunity to be heard).

CONCLUSION

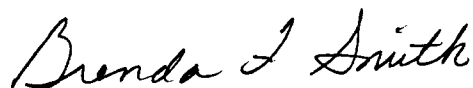
If a candidate in a primary election failed to file a statement or report required by the FCPA before the primary election, that candidate is disqualified, and a certificate of nomination should not be issued to that candidate. If a certificate was issued, it should be revoked, and a vacancy in nomination is created. The probate judge may decline to place the name of that party-certified nominee on the ballot for the general election. The party may fill the vacancy in nomination with another qualified candidate.

It is the opinion of this Office that, under the facts set forth herein, no violation of due process rights occurred for the Russell County Democratic Executive Committee and/or the party-certified nominee.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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