


CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - #09-002

TO: Honorable Mayor and Members of the City Commission
FROM: Julie O. Bru, City Attorney 
DATE: April 28, 2009
RE: Interpretation of Florida Resign-to-Run Law and Method of Filling
Vacancy in Office pursuant to the City of Miami Charter.

The City Attorney has been advised that an incumbent Commissioner whose term is not expiring this year plans to run for the Office of Mayor during the General Municipal Election to be held on November 3, 2009. The City Attorney has received several inquiries relating to the Florida Resign-to-Run Law and the City of Miami Charter ("Miami Charter"). Specifically:

1. HOW AND WHEN IS THE INCUMBENT COMMISSIONER REQUIRED TO RESIGN IN ORDER TO RUN FOR THE OFFICE OF MAYOR DURING THE GENERAL MUNICIPAL ELECTION TO BE HELD IN 2009?
2. HOW AND WHEN IS THE VACANCY CAUSED BY THE INCUMBENT COMMISSIONER'S RESIGNATION FILLED?
3. CAN THE VACANCY BE FILLED BY HOLDING A "SPECIAL ELECTION" CONCURRENTLY WITH THE GENERAL MUNICIPAL ELECTION SCHEDULED FOR NOVEMBER 3, 2009 TO ELECT CITY COMMISSIONERS FROM DISTRICTS 3 AND 5 AND THE MAYOR?

ANALYSIS

Question 1

HOW AND WHEN IS THE INCUMBENT COMMISSIONER REQUIRED TO RESIGN IN ORDER TO RUN FOR THE OFFICE OF MAYOR DURING THE GENERAL MUNICIPAL ELECTION TO BE HELD IN 2009?

The Florida Resign-to-Run Law, set forth at Section 99.012, Florida Statutes (2009), requires elected or appointed officials to resign before running for another public office. In particular, Section 99.012(3)(a) states: "No officer may qualify as a candidate for another state, district, county, or municipal public office if the terms or any part thereof run concurrently with each other without resigning from the office he or she presently holds."

The purpose of the Resign-to-Run Law is twofold. The legislative intent for the Statute is (1) to prevent an elected official or appointed official holding office to use the prestige and power of that office in seeking election to a higher or different office; and (2) to avoid the unnecessary cost of special

elections occasioned by elected or appointed officials who, while holding one office, seek and obtain another elected office. See *Holley v. Adams*, 238 So.2d 401, 407 (Fla. 1970).

Pursuant to the Resign-to-Run Law, the term of the incumbent Commissioner whose term does not expire in 2009 would run concurrently, or overlap, with the term of the newly elected Mayor. Consequently, in order to run for the Office of Mayor during the General Municipal Election in November 2009, the incumbent Commissioner must resign in accordance with the Resign-to-Run Law.

The resignation required by the Resign-to-Run Law is irrevocable. See § 99.012(3)(b), Fla. Stat. Further, the resignation must be submitted in writing at least ten days before the first day of qualifying for the office sought. See § 99.012(3)(c), Fla. Stat. Under Section 7 of the Miami Charter, “An affidavit of candidacy shall be filed not earlier than sixty (60) days and not later than forty-five (45) days prior to the date of the general municipal election[.]”

In Section 99.012(d), the Resign-to-Run Law mandates that the resignation must be effective **no later than the earlier** of the following dates:

1. The date the officer would take office, if elected; or
2. The date the officer’s successor is required to take office.

Thus, the effective date of resignation can be no later than *the earlier of* either the date the incumbent Commissioner would take office if elected to the Office of Mayor, or the date the incumbent Commissioner’s successor would take office.¹

Question 2

HOW AND WHEN IS THE VACANCY CAUSED BY THE INCUMBENT COMMISSIONER’S RESIGNATION FILLED?

The Resign-to-Run Law addresses the method to fill the vacancy for the unexpired term of the resigning officer. Section 99.012(f)2 provides, in pertinent part:

With regard to an elective charter county office or elective municipal office, the vacancy created by the officer’s resignation may be filled for that portion of the officer’s unexpired term in a manner provided by the respective charter. The office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation.

(Emphasis added.)

Based upon Section 99.012(f)2, the resulting vacancy in an elective municipal office may be filled for the unexpired term “in a manner provided by the respective charter.” Although the Florida Statute appears permissive as to the application of the Miami Charter, the Miami Charter itself is mandatory regarding the method of filling vacancies. Cf. Florida Division of Elections Opinion 80-16 (June 19, 1980) (requiring special election because “it is unavoidable here; it is the manner provided under the municipal charter for filling a vacancy in the Mayor’s office.”); Florida Division of Elections Opinion 82-20 (July 23, 1982) (same). Thus, the remaining Commissioners must fill the vacancy in accordance with the method provided in the Miami Charter.

¹ Under Chapter 1, General Provisions, Section 1-2 of the City of Miami Code, “In computing any period of time prescribed or allowed by this Code, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday nor legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.”

Section 12(a) of the Miami Charter states, in pertinent part:

A vacancy on the city commission or in the office of the mayor caused by death, resignation, forfeiture or other action or causes shall be filled within ten (10) days after such vacancy occurs by a majority of the remaining city commissioners.²

Furthermore, Section 99.012(f)2 provides that the office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation. The operation of the term "vacancy" used in the Resign-to-Run Law has been discussed by the Florida Division of Elections. In Florida Division of Elections Opinion 00-09 (August 22, 2000), the Division opined:

Although a vacancy is created or becomes operative at the time an irrevocable resignation is submitted, *Spector v. Glisson*, 305 So.2d 777 (Fla. 1974), **the office is not "vacant" until the date a resignation becomes effective.** See *Tappy v. State ex rel. Byington*, 82 So.2d 161 (Fla. 1955) and *State ex rel. Landis v. Baxter*, 122 Fla. 312, 165 So. 271 (Fla. 1936). The public officer's tender of a resignation before qualifying creates a vacancy in office effective at a future date, which permits persons to qualify as candidates for nomination and election to that office as if the public officer's term were otherwise scheduled to expire. **However, there is no vacancy in the office until the effective date of the resignation.** When a resignation is submitted with a future effective date, the "remainder of the term" is the term of office remaining after the effective date of the resignation.

(Emphasis added.)

Under Section 12(a) of the Miami Charter, the remaining Commissioners are required to make an appointment to fill the vacancy within ten days "**after such vacancy occurs by a majority of the remaining city commissioners.**" (Emphasis added.) This highlighted language itself indicates that the appointment will happen after the "actual" vacancy occurs; otherwise the appointment would not be made by the "remaining" commissioners. This conclusion is supported by the reasoning of the Division of Elections in the above cited opinions. Hence, the ten-day period within which to make an appointment under Section 12 of the Miami Charter is triggered by the date the incumbent Commissioner's office actually becomes vacant.

Question 3

CAN THE VACANCY BE FILLED BY HOLDING A "SPECIAL ELECTION" CONCURRENTLY WITH THE GENERAL MUNICIPAL ELECTION SCHEDULED FOR NOVEMBER 3, 2009 TO ELECT CITY COMMISSIONERS FROM DISTRICTS 3 AND 5 AND THE MAYOR?

Whether a Special Election can be held concurrently with the General Municipal Election on November 3, 2009, depends on the timing of the effective date of the incumbent's resignation and the actions taken by the remaining Commissioners to fill the vacancy.

² As discussed further herein, under Section 12 of the Miami Charter, if the remaining Commissioners fail to appoint a person to fill the vacancy within ten days, the City must call a Special Election to fill a vacancy.

Pursuant to Section 12(b) of the Miami Charter, if the Commissioners fail to appoint a replacement to fill the vacancy within ten days, a "Special Election" must be called. The Special Election must be held at a date not less than 38 and not more than 45 days after the expiration of the ten-day period and the five-day qualifying period. The qualifying period for the Special Election is for the five days, not including Saturday, Sunday, or legal holidays, before the 38th day before the date of the Special Election.³

On April 2, 2009, the City Commission adopted Resolution No. 09-00276 calling for a General Municipal Election to be held on November 3, 2009 to fill the Office of Commissioners for Districts 3 and 5 and the Office of Mayor. Provided that the effective date of the resignation falls within the time requirements of Section 12 of the Miami Charter, the remaining Commissioners can call for a Special Election to be held on November 3, 2009.

CONCLUSION

Under the Florida Resign-to-Run Law, an incumbent Commissioner whose term is not expiring in 2009, intending to run for the Office of Mayor in 2009, is required to resign from the Office of Commissioner. The written resignation is irrevocable and must be submitted at least ten days prior to the first day of qualifying. Under the Resign-to-Run Law, the effective date of resignation can be no later than the earlier of either the date the incumbent commissioner would take office if elected to the Office of Mayor, or the date the incumbent Commissioner's successor would take office.

The vacancy created by the resignation must be filled by the procedure set forth in the Miami Charter. Under Section 12 of the Miami Charter, the remaining City Commissioners must appoint a person to the vacant office within ten days after the office becomes vacant. If the remaining Commissioners fail to fill the vacancy in office by appointment, a "Special Election" must be called. The Special Election must be held at a date not less than 38 and not more than 45 days after the expiration of the ten-day period and the five-day qualifying period. The qualifying period for the Special Election is the five days, not including Saturday, Sunday, or legal holidays, before the 38th day before the date of the Special Election.

Whether a Special Election can be held concurrently with the General Municipal Election that will be held on November 3, 2009, depends on the timing of the effective date of the incumbent's resignation and the actions taken by the remaining Commissioners to fill the vacancy.

cc: Pedro G. Hernandez, City Manager
Priscilla Thompson, City Clerk

³ Pursuant to Section 12 of the Miami Charter, the person who receives the greatest number of votes for the Office in said Special Election is elected to fill the vacancy until whichever of the following occurs first: (1) the odd-year general municipal election for Mayor and City Commissioners, or (2) the even-year State of Florida general election, at which election national, state, and county offices are filled. There is no provision for a runoff.