Town of Melbourne Beach

PUBLIC NOTICE

AGENDA

SPECIAL TOWN COMMISSION MEETING
WEDNESDAY JULY 12, 2023 @ 6:00 pm
COMMUNITY CENTER – 509 OCEAN AVENUE

Commission Members:
Mayor Wyatt Hoover
Vice Mayor Joyce Barton
Commissioner Sherri Quarrie
Commissioner Corey Runte
Commissioner Marivi Walker

Staff Members:
Manager Elizabeth Mascaro
Town Clerk Amber Brown

PURSUANT TO SECTION 286.0105, FLORIDA STATUTES, THE TOWN HEREBY ADVISES THE PUBLIC THAT: In order to appeal any decision made at this meeting, you will need a verbatim transcript of the proceedings. It will be your responsibility to ensure such a record is made. Such person must provide a method for recording the proceedings verbatim as the Town does not do so.
In accordance with the Americans with Disability Act and Section 286.26, Florida Statutes, persons needing special accommodations for this meeting shall, at least 5 days prior to the meeting, contact the Office of the Town Clerk at (321) 724-5860 or Florida Relay System at 711.

I. Call to Order

II. Roll Call

III. Pledge of Allegiance and Moment of Silence

IV. Public Comment

After being acknowledged by the Mayor, members of the public should state their name and address for the record. The Commission encourages citizens to prepare their comments in advance. Each individual will have three (3) minutes to address the Commission on any topic(s) related to Town business, not on the Agenda. Please remember to sign the sign-in sheet provided if you will be speaking at the meeting.

V. Old Business

VI. New Business

A. Discussion and consideration of filing the vacancy for Town Commission Seat (Vice Mayor Barton)/inclusion of seat in qualifying for Special Election to be held November 7, 2023

VII. Adjournment

Town Commission Agenda Item

Section: New Business

Meeting Date: July 12, 2023

Subject: Discussion and consideration of filing vacancy for Town Commission Seat (Vice Mayor Barton)/inclusion of seat in qualifying for Special Election to be held on November 7, 2023.

Submitted By: Town Attorney Repperger

Background Information:

On June 30, 2023, Vice Mayor Barton tendered her irrevocable resignation as Town Commissioner to run for Mayor in the General Election to be held November 7, 2023. Pursuant to Fla. Stat. Sec. 99.012 (3), Vice Mayor Barton's resignation will be effective on the date of the first official meeting of the Town Commission held after certification of the results of the November 7, 2023 municipal election, for which the deadline of certification is November 17, 2023.

Sec. 99.012 (3)(d), F.S., provides that a resignation must provide that it is 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." Section 2.03 of the Town Charter provides that the terms of Town Commissioners (including the Mayor) take effect "at the beginning of the next official meeting following the municipal election at which they were elected." The new terms of Mayor and Commissioner will begin at the next official meeting following November 17, 2023.

As stated in State of Florida Division of Elections Opinion 00-09 (attached), "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 [formally] '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 opinion goes on to hold, "[a] 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 to otherwise expire."

In *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974) (attached) the Florida Supreme Court considered whether candidates for a seat on the Florida Supreme Court could qualify for election where a Justice (Honorable Richard W. Ervin) tendered a resignation (prior to election qualifying) to be effective upon a future date of his retirement. The Court examined the language of Section 3 of Article X of the 1968 Florida Constitution which provided in relevant part that a "vacancy…shall occur upon the…resignation [of a

Justice].” Based upon its interpretation of this language, the Court held that “a vacancy [had] been created [when the resignation was tendered], albeit to take effect in futuro…” and concluded that the candidates were properly qualified for election (pursuant to an earlier peremptory writ of mandamus). The opinion was also based on the Court’s interpretation of Article V of the 1968 Florida Constitution regarding an election versus an appointment of the Governor pursuant to Article V (which has now been replaced entirely by the current Gubernatorial appointment process).

The language of Section 2.04 of the Town of Melbourne Beach Charter has language virtually identical to that of the Section 3 of Article X of the 1968 Florida Constitution and states, in relevant part, that “[a] vacancy shall occur upon the…resignation…of a Commission member.”

I have previously opined that the Town Commission may vote to waive the thirty (30) day appointment period to fill a vacancy by appointment provided for in Section 2.04 of the Town of Melbourne Beach Charter and include a Commission seat that will be vacated by way of a resign-to-run resignation in qualifying for a Special Election to be held in conjunction with the General Election where the resignation has been given greater than thirty (30) days in advance of qualifying.

This year’s qualifying period is scheduled to begin at noon Monday, August 14, 2023 and end at noon on Friday, August 18, 2023. Since Vice Mayor Barton’s resignation was provided greater than thirty (30) days in advance of the qualifying period, there is sufficient time for the Town Commission to call and notice a Special Election for the vacated Commission seat and include the same in qualifying, if desired.

Attachments:

- Authority as cited.
- Section 2.04, Town of Melbourne Beach Charter

DE 00-09 - August 22, 2000

Resign-to-Run Law
§ 99.012, Fla. Stat.

TO: The Honorable Katherine Harris, Secretary of State, PL 02 The Capitol, 400 South Monroe Street, Tallahassee, Florida 32399-0250

Prepared by: Division of Elections

This is in response to your request for an opinion relating to the resign-to-run law, section 99.012, Florida Statutes. You are the Secretary of State and Chief Elections Officer of the State of Florida and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask:

1. Did Commissioner Gallagher and Treasurer Nelson cite the correct date of their respective resignations as required by section 99.012, Florida Statutes?
2. If either candidate did not cite the correct resignation date as required by section 99.012, Florida Statutes, what is the legal effect on the qualification for the office that they seek and on their ability to continue in their current office?
3. What action, if any, is required by Florida law?

SHORT ANSWER

The resignation letters submitted by Commissioner Gallagher and Treasurer Nelson cited the correct date of their respective resignations as required by section 99.012, Florida Statutes.

ISSUE

You received a letter from Ms. Karen Gievers alleging that Commissioner Gallagher erred in computing the date of his resignation when he selected the date of January 3, 2001, as the effective date of his resignation. Ms. Gievers states that the correct date is January 2, 2001, the date she alleges that the terms of cabinet offices begin. Ms. Gievers' letter requests that you "not certify him [Commissioner Gallagher] to the Supervisors of Elections in Florida's 67 counties, because of his non-compliance with section 99.012, Florida Statutes." In other words, you have been asked to remove Commissioner Gallagher's name from the November general election ballot.

BACKGROUND

Tom Gallagher is the Commissioner of Education of the State of Florida. He was elected to that office on November 3, 1998, and was sworn in on January 5, 1999. The Commissioner of Education is one of the six members of the Florida Cabinet as prescribed by the Florida Constitution. As Commissioner of Education, he serves as the agency head of the Florida Department of Education, which is the

agency responsible for the entire system of public education in the State of Florida, from kindergarten through graduate school. In addition to his role as agency head and member of the Cabinet, the Commissioner of Education serves on several advisory and policy-making boards and commissions such as the Board of Regents, State Board of Community Colleges, Education Technology Foundation, Partnership for School Readiness, SMART Schools Clearinghouse, and Enterprise Florida, Inc.

Bill Nelson is the Treasurer of the State of Florida. He was elected to this office on November 8, 1994, and subsequently re-elected on November 3, 1998, and was sworn in on January 5, 1999. The State Treasurer is a member of the Florida Cabinet as prescribed by the Florida Constitution. In addition to his duties as Treasurer, he holds the statutory posts of Insurance Commissioner and State Fire Marshal. As Insurance Commissioner, he is head of the Department of Insurance, which regulates insurance companies, insurance agencies, insurance agents, solicitors, adjusters and bail bondsmen, investigates fraud in all lines of insurance and violations of the Insurance Code. As Fire Marshal, he has the responsibility to investigate fires and suppress arson, survey state-owned property, service stations, prisons, and other buildings to determine compliance with fire safety codes, and administer a state certification and training program for firefighters, conduct workshops and seminars across the state for law enforcement and fire service professionals. Additionally, he serves as a member of the State Board of Administration and the Florida Financial Information Board. These two entities have direct responsibility to oversee and govern the Florida Financial Information System and make the financial investment and management decisions of the State of Florida. In 1996, the Legislature created the Inland Protection Financing Corporation for the purpose of financing the rehabilitation of petroleum contamination sites, payment, purchase and settlement of reimbursement obligations. Mr. Nelson serves as a member of this Corporation.

Together with the Governor, the Florida Cabinet holds the executive power in the State of Florida. The Governor and Cabinet serve as the State Board of Executive Clemency which usually meets quarterly. The Governor and three members of the Cabinet have the authority to grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

The Cabinet meets every two weeks, eleven months of each year. The meetings begin with preliminary matters such as resolutions in recognition of deserving individuals and groups and occasionally address substantive current issues such as pending legislation. There may be status reports, announcements or votes relative to appointments prior to beginning the agendas from the agencies consisting of the State Board of Administration, the Financial Management Information Board, the Administration Commission, the Board of Trustees of the Internal Improvement Trust Fund, the Florida Land and Water Adjudicatory Commission, the State Board of Education, the State Board for Career Education, the Division of Bond Finance, the Electrical Power Plant and Transmission Line Siting Board, the Department of Highway Safety and Motor Vehicles, the Florida Department of Law Enforcement, the Department of Revenue, and the Department of Veterans Affairs. These issues include the sale of bonds for capital projects, land acquisition for conservation and recreation, siting of power plants and transmission lines, appeals of development orders for developments of regional impact, areas of critical state concern, creation of community development districts, authority over sovereignty lands, approval of educational issues including appointments to

educational boards and commissions, rules of the State University System, Board of Regents, and Community Colleges, decision to accept or reject charter school applications, and hearing Sheriff's Budget Appeals as well as budget appeals from Property Appraisers.

During the months of May, June and July, 2000, one Clemency meeting and six Cabinet Meetings were held. Fifty-seven cases were heard and acted upon by the Clemency Board in June. Twenty-two resolutions were presented honoring individuals or groups and one resolution authorizing a Management Study for the Florida Parole Commission. The Governor and Cabinet also voted to approve the assignment of temporary duty to former Parole Commissioners. Other items handled include Charter School Appeals, Charter School District presentations concerning Volusia, Hillsborough and Sarasota Counties with approval for Volusia County to be a Charter School District, college reach-out funding, performance contracts for FDLE Commissioner, numerous budget issues, bond issues, optional retirement system, defined contribution plan, State Board of Administration performance report for the past year, Hurricane Catastrophe Fund, rules approved from the Department of Management Career Service Personnel, Department of Revenue, Highway Safety and Motor Vehicles, Florida Department of Law Enforcement, Education, and Board of Regents, approved several lease modifications and use of sovereign submerged lands for docks, piers, boat ramps and fiber optic cable, approved appointments to Community Colleges and the Post-secondary Education Planning Commission, approved power plant siting, approved purchase of land for prison site in Suwannee County, more than thirty purchases of land for conservation or preservation, received the National Marine Sanctuary Annual Status Report, and approved delegation for the Commissioner of Agriculture to manage aqua-cultural activities pursuant to legislation.

On March 2, 2000, the Department of State, Division of Elections published a notice of General Election as required by section 100.021, Florida Statutes. That notice of general election was published in newspapers of general circulation in each of Florida's 67 counties to give notice to the public and potential candidates of the offices to be filled at the 2000 general election. Among these offices were President of the United States, one of Florida's two United States Senate seats, all 23 of the Congressional seats from Florida, one-half of the state Senate seats, all of the seats in the Florida House of Representatives, 161 circuit judges, 133 county judge seats, and all of the county constitutional offices such as sheriff, clerk of the court, and supervisor of elections.

On May 8, 2000, Bill Nelson filed his papers to qualify for the office of United States Senator with the Department of State, Division of Elections. Along with those papers was a resignation from the office of State Treasurer with an effective date of January 3, 2001. On May 12, 2000, Tom Gallagher filed with the Department of State, Division of Elections, his papers to qualify for the office of United States Senator. Along with these qualifying papers was his resignation from the office of State Education Commissioner with an effective date of January 3, 2001.

On July 12, 2000, the Department of State, Division of Elections, published in each county in Florida an Amended Notice of General Election. The amended notice listed the offices of State Treasurer and State Commissioner of Education, which had impending vacancies due to the resignations of Treasurer Nelson and Commissioner Gallagher.

On July 17 through July 21, 2000, the Florida Department of State, Division of Elections, qualified candidates for all state offices that would be filled by the year 2000 elections. Two candidates qualified for the office of State Treasurer, Tom Gallagher and John Cosgrove.

1 Four candidates qualified for the office of State Commissioner of Education, Charlie Crist, James Bush, Vasselia Gazetas, and George Sheldon. The Division certified these qualified candidates for the offices of State Treasurer and State Commissioner of Education to the 67 county supervisors of elections on July 24, 2000.

THE RESIGN-TO-RUN LAW
SECTION 99.012, FLORIDA STATUTES

In 1970, the Florida Legislature passed, and the Governor signed into law, section 99.012, Florida Statutes, (Ch. 70-90, Laws of Florida), the "resign-to-run" law. As stated in the prefatory or "whereas" clauses:

> ... it is generally agreed that by providing for prospective resignation the people of the state of Florida would not be compelled to bear unnecessary cost of special elections occasioned by elected or appointed official who while holding one office, seek and obtain another elective office.

Section 99.012, Florida Statutes, is divided into two major subsections. Subsection (3) of section 99.012, Florida Statutes, governs state officers who seek to run for a different state office. It provides:

> No officer may qualify as a candidate for another public office, whether state, district, county, or municipal, if the terms or any part thereof run concurrently with each other, without resigning from the office he or she presently holds.

Such a resignation for an officer seeking another state office must meet several standards. It must be irrevocable, submitted at least ten days prior to the first day of qualifying for the office he or she intends to seek, and 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.

Finally, with regard to an elective office, the resignation creates a vacancy in office to be filled by election. Persons may qualify as candidates for nomination and election as if the public officer's term were otherwise scheduled to expire.

Subsection (4) of section 99.012, Florida Statutes, applies to state officers who seek to run for federal office. It states that, "[a]ny officer who qualifies for federal public office must resign from the office he or she presently holds if the terms or any part thereof run concurrently with each other." The resignation must meet several standards. It must be irrevocable, submitted no later than the day of qualifying for the office he or she intends to seek, and 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.

Section 99.012(4)(g), Florida Statutes, provides:

> The provisions of any special act to the contrary notwithstanding, with regard to an elective office, the resignation creates a vacancy in office to be filled by election, thereby permitting persons to qualify as candidates for nomination and election as if the officer's term were otherwise scheduled to expire . . . . The office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation.

In addition, subparagraph (4)(f)1. of section 99.012, Florida Statutes, provides that "failure of an officer who qualifies for federal public office to submit a resignation pursuant to this subsection constitutes an automatic irrevocable resignation, effective immediately, from the office he or she presently holds." (Similar language is absent from subsection (3).)

DISCUSSION

Question 1

> Did Commissioner Gallagher and Treasurer Nelson cite the correct date of their respective resignations as required by section 99.012, Florida Statutes?

The answer to this question is yes. It is clear that pursuant to Article XX of the United States Constitution, United States Senators and Representatives take office at noon on the third day of January. On the other hand, it is also readily apparent that the general constitutional and statutory provisions governing when a cabinet officer's successor will take office do **not** apply to the facts at hand. Section 5(a), Article IV, Florida Constitution, provides in pertinent part:

> At a state-wide general election in each calendar year the number of which is even but not a multiple of four, the electors shall choose a governor and a lieutenant governor and members of the cabinet each for a term of four years beginning on the first Tuesday after the first Monday in January of the succeeding year.

This provision is not applicable for the obvious reason that the year 2000 is an even numbered year that is a multiple of four. Section 100.041, Florida Statutes, which essentially mirrors section (5)(a), Article IV, Florida Constitution, is not applicable for the same reason. Further, the law cited clearly establishes the term of office for the regularly-scheduled election cycle and was not designed to apply in the case of a special election to fill the remainder of a term.

Section (1)(f), Article IV, Florida Constitution, provides:

> When not otherwise provided for in this constitution, the governor shall fill by appointment any vacancy in state or county office for the remainder of the term of an appointive office, and for

> the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election.

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.

Here, the remainder of the term is less than 28 months (January 2001 to January 2003). However, under *Holley v. Adams*, 238 So.2d 401, 407 (Fla.1970), if the remainder of the term is less than 28 months, the governor's power to appoint a successor to fill a vacancy created by the resign-to-run law is applicable only if no one qualifies for election to the office. In this case, two candidates qualified for the office of Treasurer/Insurance Commissioner. Further, as the remainder of the term is less than 28 months, the language "until the first Tuesday after the first Monday following the next general election" is not applicable either.

Section 100.111(1)(a), Florida Statutes, provides:

> If any vacancy occurs in any office ***which is required to be filled pursuant to s. 1(f), Art. IV of the State Constitution and the remainder of the term of such office is 28 months or longer***, then at the next general election a person shall be elected to fill the unexpired portion of such term, commencing on the first Tuesday after the first Monday following such general election.

(Emphasis added.) Again, this section is not applicable in that the "remainder of the term" is not 28 months or longer.

Because neither the constitutional nor the statutory provisions establishing the time that a cabinet officer's successor is required to take office are applicable to the facts of this case, the second contingent effective date set forth in sections 99.012(3)(d) and (4)(d), Florida Statutes, is absent. Thus, the only operative date in the case at hand is "the date the officer would take office if elected." Therefore, Treasurer Nelson's resignation letter must have an effective date on or before the date he would take office as a United States Senator, which is January 3, 2001. **As January 3, 2001, is the date cited by Treasurer Nelson, his letter complies with section 99.012(4)(d), Florida Statutes.**

With regard to Commissioner Gallagher, it is logical that a successor cannot take office until the office is vacant. Section 99.012(4)(g), Florida Statutes, provides that "[t]he office is deemed vacant upon the effective date of the resignation submitted by the official in his or her letter of resignation." Commissioner Gallagher would not be required to take office if elected to the Treasurer/Insurance Commissioner's office until the effective date set forth in Treasurer Nelson's resignation letter. Thus,

Commissioner Gallagher's resignation from the office of Education Commissioner must be effective no later than January 3, 2001. **As January 3, 2001, is the date cited by Commissioner Gallagher in his letter of resignation, his letter complies with section 99.012(3)(d), Florida Statutes.**

Question 2

> If either candidate did not cite the correct resignation date as required by section 99.012, Florida Statutes, what is the legal effect on the qualification for the office that they seek and on their ability to continue in their current office?

As the Division has answered your first question in the affirmative, it is not necessary to answer question two or three. However, the Division realizes that this situation could arise in the future. Therefore, we will answer questions two and three **hypothetically** as if the resignation dates were incorrect.

An incorrect date in the resignation letters provided by Commissioner Gallagher and Treasurer Nelson has no effect on these officers' qualifications as candidates for the office they seek nor on their ability to continue in their current office. The Florida Supreme Court has concluded that the resign-to-run law "is simply a limitation upon the right to retain the office already held when seeking another office. It is not a limitation upon the right to seek another office." *Holley*, at 408. As stated previously, the overall purpose and intent of the resign-to-run law is to avoid unnecessary special elections. In applying the resign-to-run law, one should be cognizant of its announced purpose and its intended limitations on public officeholders.

In *State ex rel. Shevin v. Stone*, 279 So.2d 17 (Fla. 1972), the Florida Supreme Court was asked to remove two elected officials seeking other offices who had failed to file letters of resignation. The court refused to remove the candidates from the ballot and permitted the late filing of resignation letters which were to be deemed, "[in accordance with the statute] '... effective not later than the date upon which he would assume office, if elected to the office to which he seeks to qualify.'"

Shevin incorporated the rule of "substantial compliance" into the construction of the resign-to-run law. Observing that the failure to timely copy the Governor and the Secretary of State with resignation letters violated the strict provisions of the law, Justice Boyd wrote, "[t]his [failure to copy] does not comply with the letter of the law but seems to satisfy the basic legislative intent. **At this date in the election campaigns, names of candidates should not be stricken from the ballot whenever there is substantial compliance with law as in these resignations."** *Shevin* at 22. (Emphasis supplied). *See also, Gonzalez v. Vogel*, 616 So.2d 473, 477 (Fla. 2d DCA 1993) (following the "substantial compliance" rule and citing to *Shevin*).

As in *Shevin*, and *Gonzalez*, the resignation letters in question substantially comply with section 99.012, Florida Statutes. The resignations were submitted in such a manner as to create vacancies in office to be filled at the next general election. Thus, there is no question that the purpose of the resign-to-run law is adequately served. Further, it is the Division's opinion that a letter submitted pursuant to the resign-to-run law is not required to contain a specific effective date. A candidate may choose to

resign earlier than the dates specified in section 99.012, Florida Statutes. However, by operation of law, a candidate's resignation date is effective no later than the earlier of those dates.

Regardless of whether the resignations in question "substantially comply" or are so flawed that they do not comply with section 99.012, Florida Statutes, Treasurer Nelson's and Commissioner Gallagher's qualifications as candidates for United States Senate and Treasurer/Insurance Commissioner are **not** in question. Section 99.012(6), Florida Statutes, provides that "[t]he name of any person who does not comply with this section may be removed from every ballot on which it appears when ordered by a circuit court upon the petition of an elector or the Department of State." This section, however, is not applicable to the facts of this case. Section 99.012(4)(f)1., Florida Statutes, provides that the failure of an officer who qualifies for federal public office to submit a resignation pursuant to this subsection constitutes an automatic irrevocable resignation, effective immediately, from the office he or she presently holds. Accordingly, if Treasurer Nelson's and Commissioner Gallagher's resignations, submitted on May 8 and 12, 2000, respectively, did not comply with this subsection, both were simultaneously removed from office by operation of law on their respective dates of qualifying for United States Senate. This would be the **exclusive** remedy with regard to both Treasurer Nelson and Commissioner Gallagher.

With regard to Treasurer Nelson, if he were removed from office by operation of law pursuant to section 99.012(4)(f)1., Florida Statutes, he would then have qualified for United States Senate as a nonofficeholder. There would be an immediate vacancy that would be filled pursuant to section (1)(f), Article IV, Florida Constitution. Thus, the governor would fill the vacancy for a term ending on the first Tuesday after the first Monday following the November 7, 2000 election.

If for the same reason, Commissioner Gallagher was removed from office by operation of law on May 12, 2000, he would then have qualified for United States Senate as a nonofficeholder. There would be an immediate vacancy that would be filled pursuant to section (1)(f), Article IV, Florida Constitution. Thus, the governor would fill the vacancy for a term ending on the first Tuesday after the first Monday following the November 7, 2000 election. Further, he would have qualified as nonofficeholder on July 18, 2000, for the office of Treasurer/Insurance Commissioner. Pursuant to section 99.012(3)(g), Florida Statutes, a nonofficeholder is not required to comply with the provision of section 99.012(3), Florida Statutes.

With regard to Commissioner Gallagher's and Treasurer Nelson's ability to continue in their current office, letters of resignation that substantially comply with the requirements of the resign-to-run law would not trigger the provision in section 99.012(4)(f), Florida Statutes, regarding automatic irrevocable resignation. If the letters were determined to be fatally flawed such that Commissioner Gallagher and Treasurer Nelson were removed from office by operation of law, the legality of all actions taken by these officers in the last several months, both in their capacity as individual officers and as members of the cabinet and various boards, could be called into question. Fortunately, this did not happen.

Question 3

What action, if any, is required by Florida law?

As in question two, we will address this question as if our answer to question one were that the effective dates in the letters in question were incorrect. With this in mind, it would be the Division's opinion that no action on behalf of your office is required. Florida law makes it very clear that a qualifying officer's responsibilities are regarded as ministerial in nature. Your duty as a qualifying officer is to examine a candidate's qualifying papers, and if in proper order accept them. *See Op. Att'y Gen.* 76-130 (June 10, 1976). As stated in Attorney General opinion 58-231, the filing officer has no duty to look beyond the four corners of the qualifying instruments to ascertain the validity of the statements.

A review of Commissioner Gallagher's qualification papers for the office of Treasurer/Insurance Commissioner indicates that all qualifying documents required by section 99.061(7), Florida Statutes, were submitted in the proper form in a timely manner. ***The resignation letter is not an item designated in this section.*** In *Shevin*, the Florida Supreme Court held:

> The resign law is not Secretary Stone's to administer by such a determination, any more than the campaign spending law. His charge under the constitution and statute does not extend to the substance or correctness or enforcement of a sworn compliance with the law-with 'matters in pais', as it were. ***Once the candidate states his compliance, under oath, the Secretary's ministerial determination of eligibility for the office is at an end. Any challenge to the correctness of the candidate's statement of compliance is for appropriate judicial determination upon any challenge properly made.***

Shevin, at 22. (Emphasis added.) Section 99.012(6), Florida Statutes, further confirms that with regard to the resign-to-run law, a filing officer's duties are ministerial. The language makes it clear that the name of a person who does not comply with the resign-to-run law may be removed **"when ordered by a circuit court."** Commissioner Gallagher properly submitted a candidate's oath indicating that he had complied with the provisions of section 99.012, Florida Statutes. Therefore, absent a court order, you do not have the authority to remove Commissioner Gallagher's name from the ballot for the November general election as requested by Ms. Gievers based upon "non-compliance" with section 99.012, Florida Statutes.

The ministerial limitations regarding the acceptance of qualifying papers is also applicable to the Department of State's duty outlined in section 99.012(4)(f)2., Florida Statutes. This section provides that upon the failure of an officer who qualifies for federal public office to submit a resignation pursuant to section 99.012, Florida Statutes, the Department of State shall send a notice of the automatic resignation to the governor. If a resignation has been submitted, the Department of State does not have the authority to determine whether the resignation is correct and its duties pursuant to this section are not invoked. As both Treasurer Nelson and Commissioner Gallagher submitted resignations, the Department of State is not required to act.

SUMMARY

In the absence of any constitutional or statutory provision establishing the time that Treasurer Nelson's successor is required to take office, the effective date of his resignation must be no later than the date he would take office if elected to the United States Senate. Commissioner Gallagher's resignation date must be effective no later than the date he would be required to take office if elected, which is the effective date of Treasurer Nelson's resignation.

Once a candidate states his compliance with the resign-to-run law, under oath, a filing officer's ministerial determination of eligibility for the office is at an end. Absent a court order, a filing officer does not have the authority to remove a candidate's name from the ballot based upon non-compliance with section 99.012, Florida Statutes.

The Department of State's duty pursuant to section 99.012(4)(f)2., Florida Statutes, is invoked only if a candidate fails to submit a resignation letter.

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1 Tom Gallagher withdrew his candidacy for United States Senator in a letter to the Division of Elections dated June 16, 2000.

Spector v. Glisson

Supreme Court of Florida

December 4, 1974

No. 45893

Reporter
305 So. 2d 777 *; 1974 Fla. LEXIS 4112 **

Sam SPECTOR, Petitioner, v. Dorothy GLISSON, Secretary of State, State of Florida, Respondent, Arthur J. England, Jr., Intervenor

LexisNexis® Headnotes

Governments > Courts > Judges

HN1[] **Courts, Judges**

Only in Fla. Const. art. X, § 3 (1968) is there a definition of when a vacancy occurs, that section providing that a vacancy in office shall occur upon inter alia resignation. Nowhere else therein is a vacancy in office defined; the other related provisions, including the specific one as to judges, state how and when it is to be filled, but not when it occurs. The current 1968 constitutional provision controls and also takes precedence over statutes such as Fla. Stat. ch. 114.01 providing that an office shall be deemed vacant in cases there enumerated, one being resignation. The provisions of Fla. Stat. ch. 100 with regard to the filling of vacancies are supplementary only to the controlling constitutional requirement. Thus, absent a specific provision in the 1968 Constitution as to judges (as there is in Fla. Const. art. V, §§ 10 and 11 regarding the manner of filling the vacancy) the general provision must apply, that a vacancy shall occur upon resignation.

Governments > State & Territorial Governments > Employees & Officials

Governments > Courts > Judges

HN2[] **State & Territorial Governments, Employees & Officials**

If the incumbent governor fills the offices by appointment they will not thereafter be vacant in the sense that they may be filled by executive appointment, but they will be vacant in the sense that under the provisions of Fla. Const. art. XVIII, § 7, they are subject to being filled by the people at the next general election.

Governments > State & Territorial Governments > Employees & Officials

HN3[] **State & Territorial Governments, Employees & Officials**

The only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business and that when an elective office is made vacant the policy of the law is to give the people a chance to fill it as soon as possible.

Governments > State & Territorial Governments > Employees & Officials

HN4[] **State & Territorial Governments, Employees & Officials**

The law may require or permit vacancies in certain public offices to be filled by election, particularly where the vacancy occurs within a certain specified time before the election.

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN5[] **Local Governments, Elections**

See Fla. Const. art. VI, § 5.

Governments > State & Territorial Governments > Elections

HN6[] State & Territorial Governments, Elections

See Fla. Const. art. VI, § 10.

Governments > State & Territorial Governments > Elections

HN7[] State & Territorial Governments, Elections

Interpretations of the constitution, absent clear provision otherwise, should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date.

Governments > State & Territorial Governments > Elections

HN8[] State & Territorial Governments, Elections

The people are the power to which is confided the right of selection by that instrument, and any construction of the Constitution which restricts by implication the right to exercise the elective franchise in the selection of this officer, and extends executive power in that direction, is inconsistent with the intent and purpose of the framers of the Constitution in creating this office. Their view plainly expressed is that its incumbent should be the choice of the people.

Governments > State & Territorial Governments > Elections

Governments > Courts > Judges

HN9[] State & Territorial Governments, Elections

Under Fla. Const. art. V, § 11(a) (1973), the governor's power to fill such vacancies has now been reduced to extend only to aa term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election, and not for the total unexpired term of the judge vacating the office, the subsequent term to be filled by the next reasonably available election.

Governments > State & Territorial Governments > Elections

HN10[] State & Territorial Governments, Elections

Interim appointments need only be made when there is no earlier, reasonably intervening elective process available.

Counsel: [1]** Fredric G. Levin and D. L. Middlebrooks of Levin, Warfield, Middlebrooks, Graff, Mabie, Rosenbloum & Magie, P.A., Pensacola, for Petitioner.

Robert L. Shevin, Atty. Gen., and Baya M. Harrison, III, and David M. Hudson, Asst. Attys. Gen., for Respondent.

Talbot D'Alemberte and Joseph P. Klock, Jr. of McCarthy, Steel, Hector & Davis, Miami, for Arthur J. England, Jr., Intervenor.

Chesterfield Smith of Holland & Knight, Lakeland, for Amicus Curiae.

James A. Urban, Orlando, and Marshall R. Cassedy, Executive Director, The Florida Bar, Tallahassee, for The Florida Bar, Amicus Curiae.

Judges: Dekle, Justice. Adkins, C.J., and Roberts, McCain, Dekle and Overton, JJ., concur. Boyd, J. and Popper, Circuit Court Judge, dissent. Overton, J., dissents.

Opinion by: DEKLE

Opinion

[*779] This cause reaches us by original petition for writ of mandamus to compel Respondent Secretary of State to accept the qualifying papers and fee of petitioner as a candidate for Justice of the Supreme Court of Florida, duly tendered during the designated statutory qualification period for candidates in the primaries and judicial nonpartisan election set for September 10, 1974. Intervenor made a similar tender **[**2]** for the same office within the same qualifying period and joins in this cause on the same basis and for the same relief sought by petitioner. We consider the two together.

The able and respected Secretary declined to accept the tendered qualification papers and fees upon the asserted ground that there was no vacancy for the office in question which was subject to an election at this time. Whether there is a vacancy to be filled by such election is the question before us, arising by virtue of the tendered resignation of a present Justice on this Court, the Honorable Richard W. Ervin, who reaches the mandatory retirement age of 70 on January 26, 1975 (not having been "grandfathered in") under the provision compelling such retirement in *Fla.Const. Art. V, § 8*.

A thorough search of the Florida Constitution reveals that ***HN1***[] ONLY in general Art. X, § 3, new in the 1968 Constitution, is there a definition of when a vacancy occurs, that section providing that a vacancy in office "shall occur" upon *inter alia* "resignation." Nowhere else therein is a vacancy in office defined; the other related provisions, including the specific one as to judges, state how and when it is to be filled, **[**3]** but not when it OCCURS. The 1885 Constitution in Art. IV, § 7, authorized the Governor to fill a vacancy "When any office, from any cause, shall become vacant . . . ." Now, however, the current 1968 constitutional provision controls and also takes precedence over statutes such as *Fla.Stat. § 114.01* providing that an office shall be "deemed vacant" in cases there enumerated, one being "resignation." The provisions of Ch. 100 with regard to the filling of vacancies are supplementary only to the controlling constitutional requirement. Thus, absent a specific provision in the 1968 Constitution as to judges (as there is in Art. V, §§ 10 and 11 regarding the *manner* of filling the vacancy) the general provision must apply, that a vacancy "shall occur" upon "resignation".

The Attorney General's opinion [1] relied upon by respondent in rejecting applications for the vacancy in question, hinged in large measure upon an assertion that a resigning judge cannot make his resignation effective at a future date, so that there is no "vacancy" until the effective date of the resignation, citing *In re Advisory Opinion, 117 Fla. 773, 158 So. 441 (1934)*, and like cases. This opinion, like the **[**4]** others cited with it, was long before new Art. V making specific provision for filling vacancies, as above discussed, but interestingly enough the decision went on to hold that the then power of appointment under different language (*Art. IV, § 7, Fla.Const. of 1885)* did become operative *at the time of the resignation*, "to become effective **[*780]** the day the resignation takes effect." Thus the petitioner's cited precedent is really support for the present holding that an effective resignation does create a present vacancy to be filled, but now by election by virtue of the new Art. V which applies.

The fact that a vacancy has been created, albeit to take effect *in futuro*, is supported by and is the only conclusion which is consistent with the prior holdings of this *Court in In re Advisory Opinion, supra*, and *Tappy v. State, 82 So. 2d 161 (Fla.1955)*, which followed the general rule that "the appointment [is] to take effect when the resignation becomes operative." **[**5]** [2]

In *Gray v. Bryant, 125 So. 2d 846, 860 (Fla.1960)*, this Court was concerned with the Governor's power of appointment with respect to newly created circuit court judgeships. We said there:

> ". . . ***HN2***[] if the incumbent governor fills the offices by appointment they will not thereafter be vacant in the sense that they may be filled by executive appointment, but they will be vacant in the sense that under the provisions of Section 7, Article XVIII, they are subject to being filled by the people at the next general election."

It is also argued that a tender of resignation *in futuro* could easily be withdrawn. There is a division of authority on this subject, dependent upon the actual or particular facts involved. See 63 Am.Jur.2d Public Officers & Employees, § 166 (p. 730). *Sub judice*, however, Justice Ervin's resignation of Feb. 1974 was explicitly made *unconditional* by him and left no way for

[1] AGO 074-175 - June 20, 1974.

[2] Mechem, Public Offices and Officers, § 133 (pp. 66, 67).

withdrawal thereof; thus, **[**6]** it became as fixed as if it were a present and definite date to leave office, very similar to the situation existing under our resign-to-run law, in which there is a known termination date of the office and an intervening election for selection of a successor. [3] Incidentally, the earlier question in the present controversy as to the Governor's "acceptance" of such a resignation was rendered moot by the fact, now conceded, that the Governor subsequently decided to and did accept the resignation, which may not have been controlling in any event.

Respondent's concern that this resignation might be withdrawn prior to its effective date and thus frustrate the constitutional process for a replacement seems more imagined than real. It would be hard to believe that a resignation of such great import by a Justice of the Florida Supreme Court would have been capriciously submitted and so tenuous in its finality that it would be subject to withdrawal; in any event, **[**7]** the resigning Justice by his letter left no doubt whatever as to finality and left no way out for any withdrawal of the tendered resignation, stating explicitly that his resignation was unconditional (a clear estoppel) as of midnight, January 6, 1975, so that his vacancy occurring on January 7, 1975, could be "filled by the person who will be elected in the 1974 judicial election." Furthermore, this particular resignation is also made in the context of a mandatory retirement in which such Justice is *compelled* by constitutional provision to retire in any event a few days beyond the date named as his mandatory termination of office, to-wit, January 26, 1975. Relinquishment of 20 days of the Justice's tenure to accommodate the electorate with the privilege of electing his successor by making the resignation effective on January 6, 1975, at midnight (the time immediately before a successor normally assumes office on the following first Tuesday after the first Monday of that year pursuant to election) shows a clear and fixed intent as to the resignation date and can hardly be considered uncertain and conditional. The significance of such magnanimous action and its adaptation to the **[**8]** preferred elective process should be gratefully acknowledged and not cavalierly discounted as merely conditional.

> **[*781]** "It has been said that *HN3*[] the *only excuse for the appointment of any officer made elective* under the law *is founded on the emergency* of the public business and that when an elective office is made vacant the *policy of the law is to give the people a chance to fill it as soon as possible.*" 63 Am.Jur.2d, Public Officers & Employees, § 128, p. 708, citing *Patterson v. Burns (DC Hawaii), 327 F. Supp. 745*; *Todd v. Johnson, 99 Ky. 548, 36 S.W. 987*; State ex rel. Laurer [Lanier] v. *Hall, 74 N.D. 426, 23 N.W.2d 44*.

> "*HN4*[] The law may require or permit vacancies in certain public offices to be filled by election, *particularly where the vacancy occurs within a certain specified time before the election.*" 63 Am.Jur.2d, Public Officers & Employees, § 128, p. 708, citing *State ex rel. Crow v. Hostella, 137 Mo. 639, 39 S.W. 270* and Riter [Reiter] v. *State, 51 Ohio St. 74, 36 N.E. 943*.

By his letter of February 19, 1974, Justice Ervin chose to make his resignation effective coincident with the date for taking office by all elected officials **[**9]** on the first Tuesday after the first Monday in January, 1975, thereby undertaking to accommodate the election of a successor by the traditional method of an election which would intervene in September, 1974.

Respondent cites the Governor's power of appointment to judicial office in § 11 of Art. V, the judicial article adopted effective Jan. 1, 1973, as solely controlling, and so, rendering inapplicable to the filling of a judicial vacancy, our constitution's general article with respect to elections in § 5 of Art. VI which provides as follows:

> "*HN5*[] *Section 5. General and special elections.* - A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term. Special elections and referenda shall be held as provided by law."

Even were this position correct, it overlooks the similar, specific elective provision of Art. V itself in the preceding § 10, providing initially for **[**10]** election of all justices and judges in saying:

> "*HN6*[] *Section* 10. Election was Terms. -
>
> > "(a) *Election.* - All justices and judges shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts."

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[3] *In re Advisory Opinion, 239 So. 2d 247 (Fla.1970)*.

This then - the provision for election of judges - is the prime and basic provision and precept of Art. V, just as is Art. VI regarding elections generally. The subsequent provision for filling vacancies is subordinate and supplementary thereto. This view is consistent with the traditional treatment accorded to the elective process in this free nation of, by and for the people.

We have historically since the earliest days of our statehood resolved as the public policy of this State that *HN7*[] interpretations of the constitution, absent clear provision otherwise, should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date. [4]

[11]** Noteworthy is the language of the early *Weeks v. Gamble, 13 Fla. 9 (1870)*, opinion on this point, in holding that the Lt. Governor there involved was to be elected by the people:

> "*HN8*[] They are the power to which is confided the right of selection by that instrument, **[*782]** and any construction of the Constitution which restricts by implication the right to exercise the elective franchise in the selection of this officer, and extends executive power in that direction, is inconsistent with the intent and purpose of the framers of the Constitution in creating this office. Their view plainly expressed is that its incumbent should be the choice of the people. . . ."

This same rule was recognized in *Klein v. Schulz, 87 So. 2d 406 (Fla.1956)*, although the result there was controlled by the express provision of the statute that the incumbent should complete his term.

We feel that it necessarily follows from this consistent view and steadfast public policy of this State as expressed above, that if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people **[**12]** at the earliest possible date. Thus the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people, either directly or through their elected representatives in their Legislature, which are not delegated, and also consistent with the priority of the elective process over appointive powers except where explicitly otherwise provided. We thereby continue the basic premise of our democratic form of government, that it is a "government of the people, by the people and for the people."

In thoroughly examining respondent's assertion of the exclusiveness of appointive authority in new § 11, Art. V, we go back and examine the Art. V provisions which it succeeded, §§ 14 and 15 of old Art. V adopted in 1956 and applicable until the 1973 new Art. V. There the provision for the filling of vacancies by appointment extended to the entire remainder of an unexpired term of the vacancy occurring, for instance, one created by a retiring judge. *HN9*[] Under § 11(a) of the 1973 Art. V, the Governor's power to fill such vacancies has now been reduced to extend only to "a term ending on the first Tuesday after the first Monday **[**13]** in January of the year following the next primary and general election," and not for the total unexpired term of the judge vacating the office, the subsequent term to be filled by the next reasonably available election. Thus we see that the appointive power has been reduced or limited from what it was, rather than being made greater or paramount, as respondent argues. Such provision is consistent with the paramount position historically given to the elective process, as discussed above. This new, more restrictive language of new Art. V points up the subsidiary position of the appointive power to that of election by the people by restricting the appointment to the earliest possible time that the people might speak. *Sub judice* an opportunity is immediately available for the voice of the people to be heard in the intervening elections which can now be employed to exercise the elective process without a forced intervening appointment until another election occurs 2 years hence for the subsequent, remaining 2 years of the term of Justice Ervin from which he retires, which latter course would be an illogical one to follow in light of all of the opinions and expressions of this Court **[**14]** over the years on the priority of the elective process.

It is appropriate to note also that as recently as the last legislative session of 1974, the Legislature was strongly urged by The Florida Bar and others to adopt a merit selection of judges of some sort different from that of popular election, and such proposal which would have changed the present elective process was clearly rejected by that Legislature.

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[4] See *Weeks v. Gamble, 13 Fla. 9 (1870)*; *Klein v. Schulz, 87 So. 2d 406 (Fla.1956)*; *State ex rel. Ayres v. Gray, 69 So. 2d 187 (Fla.1953)*; *State ex rel. West v. Gray, 70 So. 2d 471 (Fla.1954)*; *Ervin v. Collins, 85 So. 2d 852 (Fla.1956)*.

The appointive power has its restrictions, as in the instance of our "resign to run" law [5] which makes express provision **[*783]** for an interim choice of a successor by election to be effective on the first Tuesday after the first Monday in January of the year following such election. The same application of the elective process is routinely applied in respect to incumbent judges who choose not to stand for reelection (and is being exercised in choices of successor judges in this same September election without being questioned). Their successors are perennially selected at the election preceding the end of that term. We have a situation not too different in the present instance where the time that Justice Ervin will serve will be ending by virtue of his unconditional **[**15]** resignation as of the appropriate first Tuesday in January of 1975 and it is perfectly logical and proper that his successor be elected in the intervening election, as Justice Ervin arranged his affairs to permit. Such intervening election should be utilized to choose the incumbent's successor in situations as here where the vacancy must mandatorily occur and it is shown reasonably in advance of an intervening primary or general election, that the provision for compulsory retirement in our constitution will require a judge to retire by virtue of attaining age 70 (where he is not grandfathered in). Such result is demanded by the terms of the constitution; it affords the people a chance to speak, as their constitution has dictated.

Use of an available election also serves the worthy purpose of combining and restricting the holding of so many elections which can discourage voters to exercise their most precious right of franchise. We should **[**16]** not adopt a view that would delay the people's choice, merely to allow a gubernatorial appointment for a short term and then another election.

It is clear that § 11(a) of new Art. V was provided in order to fill by prompt appointment those vacancies which occur at times and in situations where there is a need for someone to fill an interim judgeship so that the business of the courts can continue and will not suffer by lack of an incumbent judge, but only in those instances where the elective process is not available. Section 11(a) does not contemplate a strained application which would give priority to the appointive power over the paramount elective process when there is a known vacancy to occur in conjunction with and reasonably before a judicial election; the elective machinery should be allowed to function to provide the successor.

The nominating commission process in § 11 of Art. V is really a restraint upon the Governor - not a new process for removing from the people their traditional right to elect their judges as provided in the basic, preceding § 10 of Art. V. One of the principal purposes behind the provision for a nominating commission in the appointive process **[**17]** was - not to replace the elective process - but to place the restraint upon the "pork barrel" procedure of purely political appointments without an overriding consideration of qualification and ability. It was sometimes facetiously said in former years that the best qualification to become a judge was to be a friend of the Governor! The purpose of such nominating commission, then, was to eliminate that kind of selection which some people referred to as "picking a judge merely because he was a friend or political supporter of the Governor" thereby providing this desirable restraint upon such appointment and assuring a "merit selection" of judicial officers.

We must bear in mind that in all events the Governor's judicial appointments are only interim appointments, in effect "stop gap" measures until an election can be held. It is not, therefore, a measure to be applied in those instances where the electorate has a reasonable, available opportunity to express its choice. We do not in any way disparage, nor seek to diminish, the full application and use of the merit system of selection of judges which should still apply whenever there is no intervening election and when such circumstances **[**18]** as **[*784]** are present here are known in advance, and where the resignation is made unconditional in all good faith, as is clear in this instance.

In the circumstances *sub judice* where the resignation is clearly unconditional and fixed, with an intervening election making the elective process reasonably available, a vacancy in the office in question was made clear and certain to occur on January 6, 1975, which should be filled by the intervening available elective machinery. To hold otherwise would frustrate the plain requirements of our constitution and the public policy of this State for over 100 years. Here the judicial election in September is available subsequent to the resignation letter of February 1974, and there is no emergency or public business requiring an appointment, since the present justice's tenure would continue until that effective date of January 6, 1975, under his

[5] F.S. § 99.012; In re Advisory Opinion, 239 So. 2d 247 (Fla.1970).

unconditional resignation. As to the argument that no vacancy could exist until the actual, physical departure from the bench on January 6, it would seem that to take this strained view as to a known vacancy in order to provide for Executive appointment would almost be creating an artificial **[**19]** appointment in violation of the constitutionally required elective process. This is of course not compatible with the policy of the law and the public policy of this State which gives to the people the right to elect their public officials including judges at the earliest opportunity.

HN10[] Interim appointments need only be made when there is no earlier, reasonably intervening elective process available. As between the appointive power on the one hand and the power of the people to elect on the other, the policy of the law is to afford the people priority, if reasonably possible, and of course here it was very logically available. If such policy is to be modified, let the people speak.

Peremptory writ of mandamus is proper as earlier held in the Court's judgment on Friday, August 2, 1974, and the terms thereof have been fulfilled in compliance with the writ.

The intervenor has raised the question of the length of the term of the vacancy. Such question was neither presented, briefed nor argued and the reference thereto in the pre-opinion judgment was *obiter dicta* only. Accordingly, such reference is deleted and decision thereon is deferred until such question shall be properly **[**20]** presented to a court of appropriate jurisdiction in a separate proceeding, then properly briefed with oral argument. By way of caveat, we feel impelled to say that any commission issued in pursuance of such election is subject to any adjustment as to tenure as such final decision thereon may dictate.

It is so ordered.

ADKINS, C.J., ROBERTS, McCAIN and DEKLE, JJ., concur.

BOYD, J., dissents with opinion.

POPPER, Circuit Court Judge, concurs in part and dissents in part with opinion.

Concur by: POPPER (In Part)

Dissent by: BOYD; POPPER (In Part)

Dissent

OVERTON, J., dissents.

BOYD, J. (dissenting).

I respectfully dissent.

In this case, the Court should follow the expressed will of the people. I have searched in vain for a constitutional provision which would permit the vacancy created by Mr. Justice Richard Ervin's resignation to be filled by popular vote. There is simply no such language in the Florida Constitution.

The people spoke on this issue in 1972. They adopted *Section 11 of Article V of the Florida Constitution* which provides as follows:

> "*Section* 11. Vacancies. -
>
> "(a) The governor shall fill each vacancy in judicial office by appointing for a **[*785] [**21]** term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election, one of not fewer than three persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term. The nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor must make the appointment within sixty days after the nominations have been certified to him.
>
> "(b) There shall be a separate judicial nominating commission as provided by general law for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within the circuit."

The record shows the letter of resignation will make Justice Ervin's resignation effective on January 6, 1975. Clearly, there will be no vacancy until that time. The above constitutional provision will require the Governor to appoint a successor to Justice Ervin who would serve until the 1976 Judicial election.

If the people should find Section **[**22]** 11 of Article V mentioned above unacceptable, the Constitution should be changed by the people and not by this Court.

I regret that I must respectfully dissent to the majority opinion.

POPPER, Circuit Court Judge (concurring in part and dissenting in part):

I concur in that part of the opinion calling for an election to fill the vacancy, sub judice, but dissent from that part of the opinion which defers the question of tenure, it being my opinion that the question of tenure can and should be disposed of in this proceeding.

ORDER DENYING REHEARING

The opinion having been revised, the petition for rehearing is visited to the revised opinion. The election has been held and the successful candidate has taken office. As stated in our formal opinion, the issue of the length of the term of office was not initially argued, briefed, or properly before the Court for determination. This is no longer an adversary proceeding, and it is not now a proper subject for determination on the status of this record.

Petition for rehearing is denied.

ADKINS, C.J., and ROBERTS, McCAIN, DEKLE and OVERTON, JJ., concur.

BOYD, J. and POPPER, Circuit Court Judge, dissent.

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Sec. 2.04. VACANCIES ON THE COMMISSION.

A vacancy shall occur upon the death, resignation, removal from office (other than by recall) as authorized by law, or forfeiture of office of a Commission member. When such a vacancy occurs, other than that of Mayor, the remaining Commission members may select, by the affirmative vote of not less than a majority of the remaining membership, a person to fill the vacancy. Such an appointed person shall be a qualified elector in the Town, as specified in this Charter, and shall serve until the next general municipal election, at which time a candidate will be elected to serve a term equal in time to what would have otherwise been the time remaining in the term of the Commissioner-at-Large whose office has become vacant.

In the event the office of Mayor is vacated, the Vice-Mayor assumes the position until the next general municipal election, at which time a candidate will be elected to serve for the remainder of the Mayor's unexpired term, and a person is appointed or elected to fill the office of Commissioner-at-Large held by the Vice-Mayor, all in accordance with the criteria and procedures herein provided. Said individual succeeding to the position of Commissioner-at-Large, formerly held by the Vice-Mayor, shall hold office only until the next general municipal election.

If the Commission shall fail to fill a vacancy on the Commission within thirty (30) days after it occurs, or whenever two (2) or more vacancies shall occur at the same time, the Mayor shall immediately call a special election to fill the vacancy or vacancies. Those elected at the special election will serve a term equal in time to what would have otherwise been the time remaining in the term of the Commissioner-at-Large whose office has become vacant. Among the successful candidates those receiving the largest number of votes shall be declared elected for the longest terms.

In no event shall the Commission consist of more than two (2) commissioners serving on an appointive basis.

(Adopted by electorate 11-6-73; Amendment adopted by electorate 11-4-86; Amendment adopted by electorate 11-7-89)