Opinion No. 52-5620

December 15, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Charles B. Barker Assistant District Attorney Santa Fe, New Mexico

*{*332}* This is in reply to your letter of November 26, 1952, in which you requested an opinion concerning payment of election officials called in for ballot recounts.

Your question specifically was whether those election officials were entitled to pay and mileage when the recounts revealed minor errors or discrepancies obviously unintentional clerical mistakes.

Section 56-619, N.M.S.A., 1941 Comp., reads as follows:

"Any applicant for such recount upon applying therefor shall deposit with the clerk of the district court fifty dollars ($ 50.00) in cash or a sufficient surety bond in an amount equal to fifty dollars ($ 50.00) for each precinct or election district for which a recount is applied for as security for the payment of the costs and expenses of such recount, in case the original count be confirmed or the result of such recount is not sufficient to change the result of such original count. **If it shall appear that error or fraud sufficient to change the result has been committed, then the costs and expenses of such recount shall be paid by the county** upon warrant of the county clerk directed to the county treasurer and from the general fund of said county; **but if no error or fraud shall appear sufficient to change such result, then the costs and expenses of such recount shall be paid by the applicant. Said costs shall consist of** docket fee for filing application, mileage of the sheriff in serving summons and **fees and mileage of election officers at the same *{*333}* rates allowed witnesses in civil actions,** but **if the recount shows that error or fraud has been committed by the election officers** of any precinct or election district **they shall not be entitled to such fees or mileage."**

I have underlined the particularly pertinent provisions of the statute.

Section 56-615, applicable to recounts for statewide offices, has almost identical language to that contained in the statute quoted. This opinion is applicable to both statutes.

In my opinion, when the legislature enacted the two provisions, it was their intention throughout to require the applicant for recount to bear the cost of the recount whenever the recount proved fruitless insofar as changing the outcome of the election.

The language of the last phrase of the two sections, which states: " . . . if the recount shows that error or fraud has been committed by the election officers of any precinct or

election district, they shall not be entitled to such fees and mileage," must be taken to carry with it the same requirement as to degree or extent for that "error or fraud" as set forth where that language is used previously in the same paragraph. "If it shall appear that error or fraud **sufficient to change the result** has been committed . . ." (underlining supplied) and ". . . if no error or fraud shall appear **sufficient to change such result,** then the costs and expenses shall be paid by the applicant." (underlining supplied.)

The words "sufficient to change the result" must, by necessary implication, be added to the words of that last phrase also.

Our State Supreme Court has ruled on what our legislature meant in our election laws when they used the words "sufficient to change the result." In the case of Reese v. Dempsey et al, 48 N.M. 485, 153 P. 2d 127, the Court held that "change the result" meant change the final outcome of the election so that the applicant on the final canvass after the recount received the most votes. The language of the Court was:

"The result contemplated by the statute, as the majority view it, is not a determination of who got exactly how many votes . . . , but is controlled by answer to the query: 'Who has the plurality of votes and is entitled to the certificate?'"

It is my opinion, in the case of a completed recount in which the returns have again been canvassed and in which the "result" has not been affected, the applicant for that recount must pay the costs as set forth in the statute. These being: " . . . docket fee for filing application, mileage of the sheriff in serving summons and fees and mileage of election officers at the same rate allowed witnesses in civil actions . . ."

Witnesses are allowed the sum of one dollar ($ 1.00) per day and five (5 [cents]) per mile for each mile travelled according to Section 20-104, N.M.S.A., 1941 Comp.

Payment of these fees may be enforced by actions in the name of those persons entitled to be paid, either against the applicant or his sureties. State v. Barker, 51 N.M. 51, 178 P. 2d 401.