

## Opinion No. 56-6427

April 24, 1956

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mrs. Natalie Smith Buck, Secretary of State, Santa Fe, New Mexico

You have asked the opinion of this office relative to what would be the consequences if all of the election officials of one party or the other fail to appear at their polling place when voting is due to start on election day and if no other members of the same party are present to choose substitutes.

You are making reference to § 3-3-19, N.M.S.A., 1953 Compilation, which provides the manner of selecting election officials in the event that those duly appointed fail to appear. Said section reads as follows:

"If, for any cause, any election judge so appointed shall fail to attend at the precinct or election district, for which he was appointed, on the day of election, an alternate appointed from the same political party shall qualify and act as such judge. If there should be a vacancy not filled by such alternate, it shall be lawful for a majority of the qualified voters in such precinct or election district present at the opening of the polls where such vacancy occurs who belong to the same political party as the judge whose failure to attend caused such vacancy, to appoint a judge to fill such vacancy, who shall be sworn and who shall act in the same manner and with the same effect as if he had been appointed by the board of county commissioners; Provided, however, that not more than two (2) of the election judges shall be of the same political party.

If for any cause any counting judge so appointed, shall fail to attend at the precinct or election district, for which he was appointed, on the day of election, an alternate appointed from the same political party shall qualify and act as such counting judge. If there shall be a vacancy not filled by such alternate, it shall be lawful for the judge or judges of election in such precinct or election district where such vacancy occurs belonging to the same political party as the counting judge whose failure to attend caused such vacancy, to appoint a counting judge of election to fill such vacancy, who shall be sworn and who shall act in the same manner and with the same effect as if he had been appointed by the board of county commissioners; Provided, however, that not more than two (2) of the counting judges shall be of the same political party."

You ask what the consequences would be should there be no persons present of a particular political party to select the judges to fill the vacancies. In other words, what you suggest is, what would be the effect of a boycott of the election by members of one political party together with the judges thereof.

This is a highly improbable situation, but should it occur certainly these facts could not be constituted to deprive those people who vote of their franchise, assuming that there

is no fraud in the actual conduct of the election. We are guided in this result by the case of Carabajal v. Lucero, 22 N.M. 30, wherein our Supreme Court stated as follows:

"In many precincts in the state all the voters are affiliated with the one party or the other, and it is impossible to select judges and election officers of different political faith. Suppose, for example, that in a given precinct no voters of a given political party should be in attendance at the opening of the polls, and the judge appointed to represent such party should not be present, could it be contended that an election could not legally be held in such precinct because it would be impossible to select an election official to represent such party? The very statement of the proposition refutes it."

It should be further pointed out that § 3-8-12 provides a criminal penalty for those election officials who willfully fail and refuse to perform their duties. Said section reads as follows, and any willful boycott, organized or otherwise, by election officials will subject them to prosecution thereunder.

"Any member of a board of registration, or any judge or clerk of election or counting judge or counting clerk or poll clerk who shall wilfully fail or refuse to perform any of the duties herein prescribed, when no other punishment is herein provided, shall be guilty of a misdemeanor and punished by a fine of not less than twenty-five dollars (\$ 25.00) nor more than one hundred dollars (\$ 100)."

By J. A. Smith

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