

## Opinion No. 67-126

October 30, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mrs. Ernestine D. Evans Secretary of State State of New Mexico Santa Fe, New Mexico

### QUESTION

#### QUESTIONS

1. Section 2 of the New Mexico Absent Voter's Act (Laws 1967, Chapter 283) limits the applicability of the Act to those registered qualified electors of New New Mexico who are "not covered under the provisions of the Federal Voting Assistance Act of 1955." The Act referred to is a Federal statute (5 U.S.C. 2171) which, by its own terms, is merely a recommendation of Congress and does not affect or "cover" any elector of this state. Should the reference be interpreted to refer to Sections 3-14-11 through 3-14-32, N.M.S.A., 1953 Compilation, which are intended to implement the Federal Voting Assistance Act of 1955?

2. Under Section 3 of the 1967 New Mexico Absent Voter's Act, a qualified voter must apply for an absent voter's ballot not less than seven days before the election. The application may be made (1) in person or (2) by mail, and if the application is proper, the county clerk is required to (1) deliver or (2) mail an official absent voter's ballot to the applicant. What are the earliest dates that a qualified voter may apply (1) in person and (2) by mail, and demand (1) delivery or (2) mailing of the ballot?

3. Section 7 of the 1967 New Mexico Absent Voter's Act requires delivery of all executed voters' ballots to the special absentee ballot judges (provided for in 3-3-15B, as amended by Laws 1967, Chapter 296). The same section prescribes duties for the county clerk after "the results have been certified by competent authority." Who is the "competent authority" for certification with respect to absent ballots?

4. Should the certification authority certify the result of the absent voting for inclusion in the results of the voting divisions wherein the absent voters reside, or should the results of the absent voting be added to the county canvass as if all of the absent voters voted in one separate voting division?

5. Is the 1967 New Mexico Absent Voter's Act constitutional?

#### CONCLUSIONS

1. Yes, Section 3-14-11, et seq., N.M.S.A., 1953 Compilation.

2. As soon as the candidates to be voted on by absentee ballot have been determined.
3. Special absentee ballot judges.
4. Certification in voting division where absent voter resides.
5. Yes.

## OPINION

### {\*193} ANALYSIS

In answer to your first question, the reference to electors who are "not covered under the provisions of the Federal Voting Assistance Act of 1955" necessarily refers to Sections 3-14-11 through 3-14-32, N.M.S.A., 1953 Compilation since these are the New Mexico Statutes which **implemented** the Federal Voting Assistance Act of 1955.

Thus we see that the 1967 Absent Voter's Act is separate and distinct from Section 3-14-11 et seq., supra, and permits absentee voting for **presidential electors, United States Congressmen, and United States Senators** by certain categories of persons, i.e., those who on election day are unavoidably absent from their county or the state and those whose illness, injury or disability will prevent them from being present at the polling places. It is extremely important to note that this 1967 Act makes no attempt to authorize absentee voting for other than Federal offices. To do that would require a constitutional amendment. **Thompson v. Scheier**, 40 N.M. 199, 57 P.2d 293; **Baca v. Ortiz**, 40 N.M. 435, 61 P.2d 320; **Chase v. Lujan**, {\*194} 48 N.M. 26, 149 P.2d 1003; **State v. Thomas**, 62 N.M. 103, 305 P.2d 376.

Your second question involves the matter of making application for an absent voter's ballot. Laws 1967, Chapter 283, Section 3 provides that the application is to be made in person or by mail to the office of the county clerk of the county in which the applicant is registered, not **less than** seven days before the election. You inquire as to the earliest date that a registered qualified elector may demand a ballot. Upon proper application, the ballot is to be mailed to the absent voter applicant as soon as the candidates for the offices to be voted upon by absentee ballot have been determined. See Section 3-14-17, N.M.S.A., 1953 Compilation, as amended by Laws 1967, Chapter 294, Section 1.

Laws 1967, Chapter 283, Section 7, a portion of the Absent Voter's Act, prescribes that the county clerk is to perform certain duties after "the results have been certified by competent authority." Your third question asks "who is the 'competent authority' to certify these results?" The competent authority is the special absentee ballot judges to whom the ballots have been delivered. See Laws 1967, Chapter 283, Section 2 and Laws 1967, Chapter 294, Section 6.

These special absentee ballot judges are to be selected as provided in Laws 1967, Chapter 296, Section 2. Until amended by Laws 1967, Chapter 294, Section 3-14-28.1,

N.M.S.A., 1953 Compilation provided that the members of the board of county commissioners were to serve as special absentee ballot judges under the laws relating to the **other** absentee voters (those listed in Section 3-14-12, supra, one of the statutes implementing the provisions of the Federal Voting Assistance Act of 1955). The reason for changing this provision was because it could operate in an unconstitutional manner on occasion. Article 7, Section 1, New Mexico Constitution, provides that ". . . not more than two judges of election shall belong to the same political party at the time of their appointment." Frequently all three members of a board of county commissioners belong to the same political party.

You also ask whether the certifying authority should certify the results of the absent vote for inclusion in the voting divisions where the absent voters reside, or whether the results of the absent voting should be added to the county canvass as if all of the absent voters voted in one separate voting division.

The certifying authority should certify the results of the absentee balloting for inclusion in the tabulation of the voting division where the absent voter has sworn that he resides. Laws 1967, Chapter 283, Section 5 provides that the county clerk shall keep, as part of his election records, a special book in which he shall enter the name and county address of all applicants, the date of receipts of the application, the method and date of the delivery of the absentee ballot, the voting division of the applicant and the address to which the absentee ballot was delivered or mailed. In addition, the county clerk is to deliver a list of all applicants to whom absent voter's ballots have been delivered or mailed, together with all information shown in the absentee ballot book to the following: (1) the chairman of each of the dominant political parties in the county, and (2) the election officials of any voting division in the county in which the person receiving an absentee ballot would have voted. Laws 1967, Chapter 283, Section 7(c) provides as follows:

"After the election is over and the results have been certified by competent authority, the county clerk shall place a notation 'AB' on the original affidavit of registration in the special binder of each voter, whose name appears in the absent voter's poll book as having voted by absent ballot."

{\*195} These various provisions certainly indicate that the absent voter's ballot should be included in the voting division wherein the voter resides. Further, the other absentee ballot law enacted to effect the recommendations of the United States Congress contained in the Federal Voting Assistance Act of 1955 (Sections 3-14-11 through 3-14-32, supra) provides that "The form for the special tally sheet shall have a space provided for the entering of the votes **chargeable to each precinct and voting division**, and votes shall be counted and tallied according to precinct and voting division as shown by the inner envelope." (Emphasis added)

It would not make sense to tally some absentee ballots according to precinct and voting division and to tally other absentee ballots as though they had all been cast in one separate "absentee voting division."

Since our courts have never held that personal presence at the polls is a **qualification** for being an elector of the New Mexico legislature, Chapter 283 of the Laws of 1967 is constitutional under the United States Constitution. Article 1, Section 2, Constitution of the United States, Amendment No. 17 to the United States Constitution, and Article 2, Section 1, Constitution of the United States. Again it must be borne in mind the 1967 Absent Voter's Act applies **only** to Federal offices.

The rationale for our answer to this question is spelled out in considerable detail in Opinion No. 57-223 and we specifically refer you to that Opinion.

By: Oliver E. Payne

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