

Opinion No. 42-4152

September 8, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mrs. Jessie M. Gonzales Secretary of State Santa Fe, New Mexico

{*245} You have submitted the following questions to this office and requested that we give you an opinion:

"Can relatives of candidates serve as poll clerks, judges of election or counting judges? Also, what are {*246} the penalties for violation of the above?"

"Can an armed under-sheriff residing in one precinct serve as poll clerk, judge of election or counting judge in a precinct other than his own? Is he qualified to serve as an official in any precinct? Penalties for violation.

"Can a poll clerk mark a ballot without proper affidavit? Please outline procedure.

"Can a non-resident of a precinct be an election official?"

In answer to the first question, I call your attention to Section 316 of the Election Code of the State of New Mexico: (Section 32, Chapter 142, Laws of 1935, as amended by Chapter 113, Laws of 1941)

"No person shall be appointed as a judge of election or counting judge, clerk of election, or counting clerk, who is related by blood or marriage within the first degree to any candidate to be voted for at such election."

No specific penalty is provided by our statute in case such provision is violated. However, Section 728 of the Election Code of the State of New Mexico provides:

"Any person or persons who shall knowingly combine, unite or agree with any other person or persons for the purpose of omitting any duty or committing any act, the omission of which duty or commission of which act, would act, would by the provisions of the election code constitute a penal offense, shall on conviction thereof be fined not less than twenty-five dollars nor more than five thousand dollars, or imprisonment in the state prison for not exceeding five years, or both in the discretion of the Court."

It is very probable that if Section 316 is violated, Section 728 would apply.

In answer to your second question, Section 316, New Mexico Election Code, further provides:

"No member of any board of education, school superintendent, teacher, or other employee of any school district, or sheriff, deputy sheriff, constable, policeman, marshal, deputy marshal, state policeman, or state motor patrolman, shall serve upon any board of registration, or as election judge, or clerk, or counting judge or clerk, or counting judge or clerk, or as a challenger in any election.

"All election officials, including challengers and watchers, shall be legal residents of the precinct wherein the election at which they serve is held."

This section answers both questions pertaining to an under-sheriff.

No specific penalty is provided for violating the above cited section. However, Section 727 would undoubtedly apply:

"No Sheriff, Deputy Sheriff, Constable, Marshal, Deputy Marshal, Policeman, tSate Policeman, Motor Patrolman, or peace officer shall during the conduct of any election, enter any election booth nor shall any such official in any polling place give or offer to give any advice, counsel, aid or assistance of any kind to any official or voter therein, except to assist in preserving the peace when requested so to do by any election official {*247} and where occasion for such assistance is apparent. Any person or officer who shall violate the provisions of this Section, shall, upon conviction, be punished by a fine of not exceeding three hundred dollars or imprisonment not exceeding six months. In addition to the penalty herein provided, the willful violation of the provisions of this Section shall be sufficient cause for the removal of any Sheriff, Deputy Sheriff or other peace officer in an appropriate proceeding under the provisions of the Law relative to the removal of officers by District Courts. Any officer so removed shall thereafter have no right to vote or to hold any public office or have any public employment."

In answer to your question concerning whether a poll clerk may mark a ballot without proper affidavit, I call your attention to Section 319, Subsection 16, New Mexico Election Code:

"Where any voter requests assistance, and is entitled to assistance under the provisions of Section 37 of this Act, the judges shall require him to take the oath on the form headed 'Affidavit for Assistance' included with the election supplies. Either judge may swear the voter. The voter must sign or mark such affidavit. All blanks must be filled in by the election officials, and the affidavit, after being completed, must be deposited in the ballot box. Such voter shall then be assisted by two poll clerks who shall accompany the voter into the booth and in the presence of each other assist said voter in marking his ballot. No judge, clerk, challenger, party worker, sheriff, deputy sheriff, or other person shall go into any booth while occupied by an elector marking his ballot, or mark any voter's ballot, except the two poll clerks as herein provided. Provided that if any voter so assisted shall so request he may show his marked ballot to his party challenger to ascertain whether it has been marked as the voter instructed."

In view of this section, a proper affidavit is necessary. The procedure set out in such section must be complied with.

As previously stated, a non-resident of a precinct can not be an election official unless his regular or legal residence is in such precinct.