

## Opinion No. 44-4536

June 28, 1944

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Governor John J. Dempsey, Chairman, State Canvassing Board, Santa Fe, New Mexico

A question has arisen in connection with canvassing the returns in the recent Primary Election, pertaining to Democratic candidates for Justice of the Supreme Court, relative to the procedure to be followed by the State Canvassing Board. You request an opinion from this office concerning the applicability of the General Election Laws to a canvass of the Primary Election.

Section 56-349, subsection 6, of the N.M. 1941 Compilation, provides, in part, as follows:

"\* \* \* Whenever it appears, in any county canvass, from a comparison of such records in said county with the poll books from any precinct or election division, or in any state canvass, by a comparison of the certified index of registered electors, as filed in the office of the Secretary of State, with the poll books from any precinct or election division, that ballots have been cast by persons who are not registered and have been included by the precinct election officials in their returns, it shall be the duty of the canvassing board, state or county, as the case may be, before declaring the results of the election (provided said unregistered voters are sufficient in number to change the results), to refer the matter to the District Court of the county in which the precinct where such unregistered votes were cast is located, and the district court in the presence of the chairman of the two dominant political parties, and such counsel as they may employ, shall forthwith proceed to hear and determine whether such votes were, in fact, registered or not. \* \* \*."

This section further provides for the District Judge certifying the results of the Court's findings to the Canvassing Board, and requires the Canvassing Board thereupon to deduct unregistered votes in accordance with the Court's findings before completing its canvass.

The question involved here is whether this procedure applies to a canvass of Primary Election returns. Section 56-813 of the N.M. 1941 Compilation provides, in part, as follows:

"Such primary election shall be held, the voters shall vote therein, the method of voting shall be followed, the votes counted and canvassed, and the returns made in the same manner as by law provided for general elections except as herein otherwise provided or inconsistent with the provisions of this act; and such primary elections shall in all respects conform to the laws governing general elections, except as herein otherwise

provided. All provisions of law governing general elections in this state not in conflict herewith, are hereby made applicable to and shall govern primary elections. The powers and duties conferred or imposed by law upon boards and judges and clerks of elections, canvassing boards and other public officials in connection with general elections, are conferred and imposed upon all such officers of primary elections and shall be exercised by them in connection with primary elections, except as otherwise herein provided or in conflict herewith."

If the section contained in the General Election Law is not inconsistent with the provisions of the Primary Act, or in conflict therewith the State Canvassing Board would have to consider said section of the General Election Law in making its canvass.

Another section which may be involved in this discussion, relative to excluding unregistered votes from the returns, is Section 56-228 of the N.M. 1941 Compilation, which requires the County Clerk, not less than ten days preceding any General Election, to furnish to the Secretary of State, and to the County Chairman of each of the two dominant political parties, an alphabetical index of all registered electors of each precinct or election district. It is noted that this section does not require the County Clerk to designate the party affiliation on the alphabetical index required, and that the section itself specifically is made applicable to General Elections.

Section 56-358 of the N.M. 1941 Compilation, pertaining to the State Canvass of General Elections, provides, in part, as follows:

"The state canvassing board, in canvassing the results of any election shall consider as a part of the official returns the certified list of registrants filed in the office of the secretary of state, and shall be further governed in accordance with the procedure hereinabove provided relative to the canvassing of election returns, in section 44 (Section 56-349)."

A Primary Election, although a part of the election machinery, is merely a procedure for selecting candidates of the respective parties, and supersedes the former procedure of selection of such candidates by conventions. Affiliation with a party is one of the requirements which entitles a voter to cast his ballot in the Primary Election of either the Democratic or Republican Party. A person who is registered without party affiliation, or a person who is registered as a Republican, is prohibited from voting in the Democratic Primary Election for Democratic candidates.

Section 56-349 of the N.M. 1941 Compilation does not purport to cover illegal votes which may have been cast by persons so registered, but only relates to votes by unregistered persons. Another procedure is required to cancel other types of illegal votes. This section further provides that the District Court, in the presence of the Chairman of the two dominant political parties, and such counsel as they may employ, shall proceed to examine the ballots for unregistered votes. No provision is made for inquiring into registered votes which are illegally cast in a Primary Election, and no provision is made for the presence of the opposing party candidates in a Primary, or

their counsel, although such candidates would be primarily interested in the outcome of the Primary Election. This section, then, is not applicable to the Primary unless we read into the section matters that are not contained therein. To do so would require by implication a new section applicable to the Primary, and would constitute legislation which the Canvassing Board has no power to do.

The registration lists are a part of the returns to be considered by the Canvassing Board, whether they be sent in prior to the Primary Election, or be obtained afterwards, This does not necessarily mean that the section relative to striking unregistered votes is applicable to a Primary Election canvass. The certified registration lists may be used for other purposes such as discovering fraud in the election sufficient to warrant the Board in throwing out the returns from an entire precinct, as was done two years ago in the controversy between Representative Antonio Fernandez and Bob Valdez in their campaign for the office of Representative in Congress.

Under the Primary Law, as it was originally written, there was provided specifically the procedure for a recount before the canvass, and the action of the State Canvassing Board was declared to be final. However, in 1943, the Legislature added another specific remedy in the Primary Law by way of contest. Thus it appears that the Legislature provided three procedures for correcting returns and cancelling illegal votes in the General Election, and that they specifically only provided two procedures, namely, recount and contest proceedings, in the Primary Law. By specifically setting out two of the three procedures, the Legislature no doubt intended to exclude the third procedure from the Primary Law, and the rule of *expressio unius est exclusio alterius* would apply.

Section 56-349, subsection 6, of the N.M. 1941 Compilation makes no provision for payment of the expense in connection with the court procedure for cancelling votes cast by unregistered voters. The expense of the proceeding would no doubt have to be paid from funds derived from general taxation. That is contrary to the theory of financing the Primary Election, which is intended to be done from filing fees paid by candidates, rather than by general taxation. The result would be that members of the Republican Party and the public in general would have to pay the expense of a Democratic candidate in achieving, in part, the same objects that can be achieved completely in a contest proceedings.

From the foregoing it is my conclusion that the section in the General Election Law providing for cancelling unregistered votes is inconsistent with the procedure set up in the Primary Law for canvassing returns, and the same was not intended by the Legislature to be applicable to the canvass of Primary Election returns. In the event said General Election Law provision is considered to be applicable, I doubt whether the same would be mandatory, and believe the Canvassing Board would have discretion as to its procedure under said section. I realize that this question is one of statutory construction, and one upon which opinions may well differ, and that the Courts might disagree with my opinion.

Trusting that the foregoing answers your inquiry, I am

By C. C. McCULLOH,

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