

Opinion No. 44-4603

October 24, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. C. R. Sebastian, State Comptroller, Santa Fe, New Mexico

We have your letter of October 24, 1944, wherein you ask various questions concerning the procedure to be followed in connection with the Absentee Vote Statute, which have been submitted to you by a County Clerk. You ask:

"1. Are the absentee ballots to be delivered to the precincts and if so, on what date is this to be done?"

In answer to this question, I refer you to Section 17 of the act passed by the Special Session of the Sixteenth Legislature, and in addition to the general terms of this section, I quote a portion of subsection (e) which provides:

"Between the time of 9:30 a. m. and 10:00 a. m. of election day, the County Clerk shall deliver the ballots received by him prior to 12 o'clock noon on the day preceding said election to the Deputy County Clerks for delivery to the precinct Election Officials. * * *"

The law further provides that the ballots must be delivered before the polls are closed.

You further ask whether the law provides for the cost of transportation.

Section 25 of the Absentee Vote Law made an appropriation to be used, among other things, to defray the cost of mileage of the County Clerks and their deputies, at the rate of 8c per mile for delivering the ballots to the various precincts, and compensation to be paid Special Deputy County Clerks appointed pursuant to the provisions of this act, in the delivery of ballots at the rate of \$ 3.00 for each Deputy County Clerk.

You further ask whether, in counties where distances are great, it will be possible to comply with the law in having the ballots delivered on the day of election.

Section 17 (b) of the Absentee Vote Law provides:

"The several County Clerks shall, at least 30 days preceding any election, establish routes within their counties for the delivery of such ballots to the end that such ballots may be promptly and economically delivered to the precinct election officials."

Subsection (c) further provides:

"Each County Clerk is hereby empowered to appoint special Deputy County Clerks in the same number as routes established by him for delivery of said ballots * * *."

There is further provision for the Deputy County Clerks taking an oath.

In view of the foregoing, it is made the duty of the County Clerk to establish routes, regardless of the size of the counties, that will make it possible to have the ballots delivered during the time that the polls are open. Adequate compensation is provided to have such ballots delivered.

A further question concerns whether soldiers of Indian extraction are permitted to cast a ballot for the Presidential and Congressional election.

In answer to this question, we can merely state that under the provisions of Section 1 of Article 7, an Indian cannot vote unless taxed, and the fact that an Indian is in the armed forces does not change his status concerning whether or not he is a qualified elector in New Mexico, under the Constitution. Such ballots can be challenged the same as any other ballot where there is a question concerning the qualifications of the person offering to vote, and the challenge shall be treated in the same manner as all other challenges for similar reasons are treated.

You also ask the status of the case where an Indian soldier is casting an absentee ballot, in view of the fact that he is not registered under our State Laws.

In answer to this question, I quote Section 2 of the act which provides:

"The making of an application for or the mailing of an absentee ballot by a person in the armed forces, whether in foreign or domestic service, who is not registered but is a qualified elector of the State of New Mexico, **shall be equivalent to and shall constitute registration** for the election at which such ballot is cast notwithstanding any law of this State relating to the registration of qualified electors or voters." (Emphasis ours).

It is noted that registration is absolutely immaterial, and that the making of the application for the absentee ballot is equivalent to registration. It is very important that the County Clerks and Election Officials have called to their attention that upon receipt of a ballot that they must presume that the person is registered insofar as absentee voting is concerned, and must treat the person as being registered.

Your letter further states:

"Also, what is the status of a soldier casting a ballot who is now twenty one years of age, but was under twenty one at the time of his induction? He will not be shown on the registration list and, under these conditions, what is the stand to be taken by the election judges?"

The answer to the foregoing question should answer the first portion of this question wherein it is set forth that under the specific terms of the statute, registration is waived,

and the making of an application for, **or the mailing of an absentee ballot is equivalent to registration.**

The judges should count the ballot if the oath on the inner envelope is filled out, showing that the person is twenty-one years of age, in the armed services, and therefore entitled to vote under our act. The regular registration list need not be considered.

In view of the fact that the time before election is short, and there seems to be so many questions that the various County Clerks are in doubt concerning, I am having mimeographed, and am attaching to this opinion, the various provisions of our statute in full which the County Clerks in each county should familiarize themselves with and comply with in order to avoid the heavy penalties set forth in Section 26 of this act.

Hoping that the foregoing will be of some benefit to you, I am

By HARRY L. BIGBEE,

Asst. Atty. General