

ELECTIONS: Irregularities in application for absentee ballot and failure of county clerk to post list of applicants or of voters does not affect validity of ballot.

August 9, 1950



Honorable Albert D. Nipper
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Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In this county and some others in this section, and especially where County Clerks are themselves candidates for re-election, certain questions constantly arise regarding the proper and legal manner for absentee voting.

"In some instances it is reported that the County Clerks take applications for ballots to the proposed absentee voter, solicit his vote and take his application and at the same time furnish the ballot and carry it away voted by the person interviewed.

"In some other cases the report is that the County Clerk writes to the proposed absentee and sends him the application and sometimes the ballot, too, the person addressed not having asked for such application himself as provided in RSMo #11472.

"As to listing it is stated that the lists of applicants for ballots are not posted (as required by RSMo #11472) and sometimes when a list is posted the Post Office address is omitted and oftentimes the street address is omitted or else, merely "U.S. Army" or "U.S. Navy" is listed.

"My questions are:

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"1) In your opinion is it lawful for ballots to be counted when the County Clerk has visited - or someone else has visited - the voter at his home or where he works in St. Louis or elsewhere outside the County and has in this way solicited the application, taken it then and there, and at the same time, has furnished the ballot, and upon it being voted has accepted it and has either carried it back to the original county or has himself (Clerk) taken it and mailed it back to his own office as if though the voter has done the mailing?

"2) In your opinion is it lawful for ballots to be counted when the list of applicants therefor has never been posted, as required by RSMo #11472; or,

"(a) where a list is posted, can a ballot be counted when the applicant's name has been omitted from that list; or

"(b) where the applicant's name is on the list but his Post Office Address is not given; or

"(c) where the applicant's street address is not given although his Post Office Address is given, but voter cannot be located by Post Office Address only - as for example, solely an address of "St. Louis" - "Washington, D.C." or "Chicago, Ill."?

"(d) where after the ballots are deposited in the Clerk's hands can they lawfully be counted if there is no list of them posted as required by RSMo #11475; or

"(e) where the name has been omitted from such list can the ballot then be properly counted?"

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Section 112.03, House Bill No. 2050, Sixty-fifth General Assembly, relating to absentee voting, provides in part as follows:

"Application for such ballot may be made on a blank to be furnished by the county clerk or the board of election commissioners or other officer or officers charged with the duty of furnishing ballots as aforesaid, or may be made in writing by first class mail addressed to such officer or board signed by the said applicant. Immediately upon receipt of such application within the time and in the manner provided, the county clerk of the county, or the board of election commissioners, if any, or other official charged with the duty of furnishing ballots to such applicants, shall make a list of the names of such absent voters whose applications for ballots have been received, and shall cause such list to be immediately posted in a conspicuous place accessible to the public at the entrance of the office of such officer or officers which list shall show also the postoffice address, street address, ward or precinct number given by such applicant. Such list shall be supplemented daily by the addition thereto of the names, addresses, and precinct numbers of those thereafter making application for such ballots as authorized by law: provided, that no county clerk, board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records, or otherwise ascertaining the right of such person to vote at such election shall be required to furnish any ballot or ballots to any person desiring to vote who is not lawfully entitled to vote, and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon

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receipt of the printed ballots shall send by registered mail postage prepaid, or deliver in person an official ballot or ballots if more than one are to be used and voted at said election to such applicant. * * *"

Section 112.06, House Bill No. 2050, Sixty-fifth General Assembly, provides in part as follows:

"The official or officials charged with the duty of issuing such ballots to absent voters for the district, ward or precinct in which such absent voter resides shall receive the ballot of such absent voter and safely keep and preserve the same unopened in his or their office. At least twenty-four hours before the ballot is opened and canvassed, such official or officials shall make a complete list of the names of the absent voters whose ballots have been received and shall cause the list thereof to be posted in some conspicuous place in his or their office, which list shall also show the precinct in which the absent voter claims to be a resident. Such list shall be open to public inspection. * * *"

No provision is made that an absentee ballot obtained other than in the exact manner prescribed in the above section shall be void, nor is there any provision to the effect that failure to comply with the requirements regarding the listing of the applicants for absentee ballots and the listing of the names of the persons from whom ballots have been received shall effect the validity of the ballots.

Rules for the construction of election laws were laid down by the Supreme Court in the case of Nance v. Kearbey, 251 Mo. 374, l.c. 383. The court in that case stated:

"The very taproot and reason for any election at all among a free people, is that the majority may rule; hence there are two main settled and uniform rules of interpretation, thus:

"First: Election laws must be liberally construed in aid of the right of suffrage.

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[State ex rel. v. Hough, 193 Mo. 1.c. 651; Hale v. Stimson, 198 Mo. 134.] The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. [Stackpole v. Hallahan, 16 Mont. 40.] The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

"Second: The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. [Gass v. Evans, 244 Mo. 1.c. 353; Hehl v. Guion, 155 Mo. 76.] 'Such a construction' (says this court, speaking through BARCLAY, J., in Bowers v. Smith, 111 Mo. 1.c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other. [Wells v. Stanforth (1885), 16 W.B. Div. 245.]' Again (pp. 61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. [Ledbetter v. Hall (1876), 62 Mo. 422.] In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.'"

In view of the absence of any statutory declaration that the irregularities referred to by you are fatal, we feel that under

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the rules above prescribed none of the matters referred to in your opinion request should render invalid an absentee ballot properly marked by a person legally entitled to cast such absentee ballot. If such person is legally entitled to vote, he should not be deprived of such right by reason of the fact that the county clerk has failed to comply with the laws relating to absentee voting.

The foregoing is not intended in any respect to justify or condone the county clerk's failure to comply with the law as written. He is under obligation to perform certain mandatory duties in connection with absentee ballots, and he should comply with the statutory regulations in such regard. However, his failure to do so should not penalize a voter who has done all within his power legally to cast his ballot.

CONCLUSION

Therefore, it is the opinion of this department that an absentee ballot cast by a person legally entitled to vote the same may be counted, although the county clerk might have solicited the application from the voter, taken the application from the voter at his home, and at the same time furnished the ballot, and upon its being voted has accepted it and has either returned it to the original county or has taken it and mailed the same to the clerk's office.

We are further of the opinion that the fact that no list of applicants for absentee ballots has been posted as required by Section 112.03, House Bill No. 2050, Sixty-fifth General Assembly, does not render invalid such voter's ballot, and that such ballot may be counted. We are further of the opinion that such ballot may be counted although a particular applicant's name has been omitted from the list, although his postoffice address is not given, or although his street address is not given. We are further of the opinion that after ballots are deposited in the clerk's hands, they can lawfully be counted, although no list of voters is posted as required by Section 112.06, House Bill No. 2050, Sixty-fifth General Assembly, or where the name of a particular voter has been omitted from such list.

Respectfully submitted,

APPROVED:

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