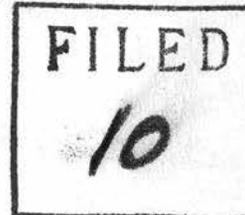


ELECTION CONTESTS

) Ballot boxes or packages, may be opened, for  
) recount or correction only in cases of  
) contested elections or other judicial pro-  
) ceedings specifically named in the  
) Constitution.

April 13, 1951

4-13-51



Mr. Ted A. Bollinger  
Prosecuting Attorney  
Shelby County  
Shelbyville, Missouri

Dear Mr. Bollinger:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"An opinion of your office is requested on the following statement of fact:

"At the election for County Superintendent of Schools the Clerks and Judges in several School Districts failed to enter the candidates names and vote in the poll books. The only thing appearing in said poll books is the register of voters, not even the tally sheets were used. The issue, therefore, is whether the envelopes containing the ballots may be opened for a recount, and if so, who the proper persons would be to do said opening and counting. If the result is that the districts failing to properly report in the poll book are to be considered as no vote for either candidate there may be an entirely different outcome."

The election of county superintendent of public schools is governed by Section 167.020, RSMo 1949, the second paragraph of which is as follows:

"2. The clerk of the county court shall cause to be delivered to the president or clerk of the board of school directors of the various districts of the county a sufficient number of ballots for the voters of

Mr. Ted A. Bollinger

the district and a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall so far as practical conform to the form of poll book set out in section 111.510, RSMo 1949, relating to general elections; and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated. It shall be the duty of the county clerk, within five days after the annual school meeting, to call to his assistance two magistrates or two qualified voters of the county, and cast up the vote and issue a commission to the person receiving the highest number of votes, for which commission he shall receive a fee of one dollar to be paid by the person commissioned. A tie vote shall cause a vacancy in the office of county superintendent, which shall be filled by appointment by the governor, and the person so appointed shall hold such office till the next annual school meeting and until his successor is elected and qualified. In case a school district is divided by a county line, the county clerk

Mr. Ted A. Bollinger

shall transmit to the president or clerk of the board of directors of such districts two sets of tally sheets and the voters residing on each side of the line shall vote separately and returns shall be made to each county as herein provided. For transmitting the returns of such election, the chairman of the annual meeting shall receive the sum of one dollar to be paid out of the incidental fund of the district."

In the case now under consideration it appears that the local officers in some of the school districts failed to record the votes for county superintendent on the tally sheets and return them to the county clerk as required by law. The votes from these districts cannot be counted unless the sealed packages containing the ballots be opened according to law. The county officials are not authorized to open the ballots for recount or correction.

The Constitution of Missouri undertakes to protect the secrecy of the ballot in Section 3, Article VIII, which is as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

This section was construed by the Supreme Court of Missouri in *State ex rel. Goldman et al.*, 278 S.W. 708. This was a case in prohibition against the Board of Election Commissioners

Mr. Ted A. Bollinger

of Kansas City, Missouri, who had asserted the right under an act of the Legislature to open the ballot boxes in certain precincts of that city, containing the ballots cast in a general city election. The court, referring to this section of the Constitution, said:

"The first portion is the time-worn provision covering the secrecy of the ballot. The proviso, however, is the thing of interest in this case. This proviso limits the broad provisions for secrecy of the ballot, by allowing two things: (1) Allowing the election officers to raise the veil of secrecy and testify in certain named instances; and (2) to further raise the veil of secrecy and permit the ballots to 'be opened, examined, counted, compared with the list of voters, and received as evidence.' Note the word 'counted.' Now when can these officers testify, or these ballot boxes be opened, and the ballots be counted? The new Constitution answers the question. It says:

"(1) In cases of contested elections, (2) grand jury investigations, and (3) in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue."

"Thus the Constitution names the instances where the secrecy of the ballot may be exposed, and the ballots recounted, but a count by an election board is not one of such instances. The makers of the organic law having specifically named the instances and the places at which the boxes may be opened and the ballots counted, all other matters are excluded, this under the familiar rule *Inclusio unius est exclusio alterius*. The law of 1921, relied upon by respondents, conflicts with the new constitutional provision, and therefore falls as an invalid act. There can be no count of ballots by the respondents, and their sole power left is to cast up the returns of the judges and clerks

Mr. Ted A. Bollinger

(absent mistakes upon the face of them)  
and certify the results.

"Absent the power granted by the act of 1921, the existing law (section 4874, R. S. 1919) provides that, after the ballots have been counted by the election judges, they shall be sealed up in boxes or packages and returned to respondents, who shall deposit them in their offices, there to remain for twelve months, so sealed up, unless called for in the cases specifically named in the constitutional provision adopted in 1924. Laws 1925, p. 410."

It is clear that ballot boxes or packages may be opened for recount or correction only in cases of contested elections or other judicial proceedings specifically named in the Constitution. Any candidate not satisfied with the result may institute an election contest in circuit court, as provided in Chapter 124, RSMo 1949. Notice of such contest, however, must be given to the opposite party within twenty days after the votes have been officially counted. (Section 124.250)

#### CONCLUSION

It is the opinion of this office that the county clerk of Shelby County, in the case now under consideration, is under duty to issue a certificate of election to the person receiving the highest number of votes for county superintendent, without counting the ballots from those districts in which no returns were shown on the tally sheets. An election contest then may be brought according to law.

Respectfully submitted,

APPROVED:

B. A. TAYLOR  
Assistant Attorney General

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J. E. TAYLOR  
Attorney General

BAT/feh