

SCHOOLS:
SCHOOL DISTRICTS:
ELECTIONS:
STATE AUDITOR:
POLITICAL
SUBDIVISIONS:



Election officials in school bond elections may be prosecuted for fraud; ballots cast in school bond elections may be recounted only in case of grand jury investigation and in trial of civil or criminal cases in which violation of election laws is under investigation or at issue; oath of officials in school bond election held on day other than day of annual meeting administered by any official authorized to administer oaths; financial statement required to be published annually in certain school districts; school district political subdivision so as to require State Auditor to make audit upon request of five per cent of voters.

May 31, 1955

Honorable G. Frank Reeves
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Reeves:

This is in response to your request for opinion dated March 10, 1955, which reads, in part, as follows:

"There has been considerable disagreement over the School Bond Issue election held at Anniston, Missouri, July 5, 1954.

"I have studied the Statutes that give authority of voters of School Bond Issue and find no reference to the general election laws nor any criminal provisions for irregularity of voting:

"Would you please send me the answers to the following questions, some of which may have already been decided:

"1. Can the election officials be prosecuted for fraud in a School Bond election?

"2. Can a recount of the ballots be permitted and published?

"3. Who is supposed to administer the oath to the election officials in said elections?

"4. Is a financial statement of the school district required to be published and posted for the information of the people of that district?

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"5. Upon demand, is it necessary to make an audit of the books of the school district and who can make such an audit?"

With regard to your first question as to whether election officials can be prosecuted for fraud in a school bond election, we direct your attention first to Sections 129.490 and 129.500, RSMo 1949, which read as follows:

Sec. 129.490. "If any judge or clerk of any election authorized by law, or any other person, shall willfully and knowingly receive and place in the ballot box, or aid, assist or assent to the placing in any ballot box, any ballot, or paper purporting to be a ballot, which is not legally voted by a qualified voter at such election, or shall illegally, willfully and fraudulently abstract, or aid in or assent to the abstraction, from any ballot box any legal ballot for the purpose of changing the lawful result of any election, or shall in any manner willfully influence or attempt to influence any person to do any of the acts aforesaid, or to omit to do any lawful act required of him in relation to any election, or shall in any manner illegally, willfully and fraudulently change or attempt to change, or induce any other person to change, the true and lawful result of any election, by any act to be done either before, at the time of or after such election, by a wrong count of the ballots, by changing the true returns or making a false return thereof, or by changing the figures of the returns after they are made up, either before or after the returns are duly made, or in any other manner except in pursuance of law or the order of a court, every person offending against any of the provisions of this section shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not less than three months, and by a fine not less than one hundred dollars, or by both such fine and imprisonment, and shall also be forever prohibited from voting at any

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election and from holding any office or position of trust or emolument under authority of this state, or any department thereof, or of any county, city or town therein, either by election or appointment, or as clerk or employee."

Sec. 129.500. "Any person who may be authorized by law to receive, canvass or count the poll books, tally lists or election returns of any election authorized by law, who shall willfully and knowingly receive, canvass and count, or assist therein, any poll books, tally lists or election returns which are fraudulent, forged, counterfeited, or shall falsely and fraudulently make an incorrect and false account of any election returns, with intent to defeat a fair expression of the popular will, and any person or persons whose duty it may be to grant certificates of election, or in any manner declare the result of any election held by authority of law, who shall grant a false certificate, or declare the result of any election based upon fraudulent, fictitious or illegal votes or returns, with intent to defeat a fair expression of the popular will, or to deprive any person duly elected of his office, shall be deemed guilty of a felony, and upon conviction, be punished as prescribed in section 129.490."

You will notice that both of the above sections apply to "any election authorized by law." School bond elections are authorized by Section 165.040, MoRS, Cum. Supp. 1953, and hence it is our opinion that the above-quoted sections are applicable to school bond elections and that officials of such elections may be prosecuted for fraud.

This position is strengthened by the fact that Section 129.900, RSMo 1949, expressly provides that Sections 129.820 to 129.890, RSMo 1949, shall not apply to school elections, the inference being that the remaining sections in that chapter were meant to apply to school elections.

With regard to your second question, we are enclosing a copy of an opinion of this office rendered to Mr. Ted A. Bollinger, Prosecuting Attorney of Shelby County, under date of April 13, 1951.

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Section 3, Article VIII, Constitution of Missouri, 1945, is the section which safeguards the secrecy of the ballot. It reads 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."

The Supreme Court considered the applicability of this section to bond elections in *State ex rel. Miller v. O'Malley*, 342 Mo. 641, 117 S.W. (2d) 319, 322, where it was said:

" * * * There can be no doubt about the fact that the section guarantees the secrecy of the ballot in bond elections, except as relaxed in the proviso.

"The relator contends the proviso appended to section 3, art. 8 in 1924 permits the opening of the ballots in grand jury investigations of fraud in bond elections. In this we think he is right. Before 1924 the proviso allowed it only in all cases of contested elections (and, of course, primary elections, which were not contemplated or protected by the Constitution). The amended proviso permits it: (1) In all cases of contested elections; (2) grand jury investigations; (3) and in the trial of all civil or criminal cases in

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which the violation of any law relating to elections, including nominating elections, is under investigation or at issue.

"The old proviso was held in many decisions to sanction the opening of the ballots only in statutory contests over the election of public officers. State ex rel. Ewing v. Francis, 88 Mo. 557, 561; State ex rel. Hollman v. McElhinney, 315 Mo. 731, 735, 286 S.W. 951, 952. But this McElhinney Case ruled the amended proviso protects primary elections also, covers contests thereover, and permits the opening of the ballots therein. See, also, State ex rel. McDonald v. Lollis, 326 Mo. 644, 648, 33 S.W. 2d 98, 99. The opening of the ballots in contests over bond elections is held to be unauthorized because the Legislature has not provided for such contests - not because they are not 'elections' or 'contests' within the meaning of the Constitution. State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655; State ex rel. Jackson County v. Waltner, 340 Mo. 137, 142, 100 S.W. 2d 272, 274."

Lest there be any misunderstanding, it might be well to point out that there is no provision for a contest of bond elections. Although Section 26(g) of Article VI, Constitution of Missouri, 1945, authorizes contests of bond elections "as provided by law," the Legislature has not implemented this constitutional provision so as to put it into effect. Such a constitutional provision is not self-enforcing. As was said in State ex rel. Miller v. O'Malley, supra, S.W. 1.c. 323:

" * * * A constitutional provision may be self-enforcing in part and not so as to another part. State ex inf. Barker v. Duncan, 265 Mo. 26, 41-43, 175 S.W. 940, 944, Ann. Cas. 1916D, 1. Undoubtedly, the part of the section permitting the opening of ballots in election contests is not self-enforcing, in the sense that further provision must be made by statute for such contests. But the part which provides for the use of the ballots as evidence in grand jury investigations is self-enforcing and no legislative default can thwart it."

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Therefore, in bond elections the only instances in which the ballots may be opened and recounted are: (1) Grand jury investigations; (2) in the trial of all civil or criminal cases in which the violation of any law relating to elections is under investigation or at issue.

There apparently is no statutory direction as to who is supposed to administer the oath to the election officials in a school bond election such as this, nor are we able to find any case in Missouri on the subject.

There are cases in other jurisdictions, however, which hold that the failure of the election officials to be sworn by the proper official, or to be sworn at all, will not invalidate the election. For instance, in *Bradford v. Grant Parish School Board*, 154 La. 242, 97 So. 430, it was held that a school bond election was not invalidated because the election officials were sworn by a deputy sheriff rather than by a clerk. The court said, i.c. 431:

"The failure of the commissioners to take an oath before the proper officer, or to take one at all, will not vitiate an election; it is a mere irregularity."

See also *Hagen v. Consol. School Dist. No. 111-74*, 156 Minn. 268, 194 N.W. 756.

Therefore, in the absence of any express statutory provision on the subject, it is our opinion that the officials in a school bond election held on a day other than the day of the annual school meeting may be sworn before any officer authorized to administer oaths.

Your fourth question is answered by Section 165.360, RSMo 1949, in the law applicable to six-director districts, which reads, in part, as follows:

" * * * it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having six directors or having high schools, to make and publish annually, on or before the fifteenth of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source

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derived, and all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all purposes for the year; which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state board of education on forms prescribed by said board.

"2. The state board of education shall not release the state aid apportioned to such a district for the next ensuing school year until a copy of the required report has been received at its office in Jefferson City and has been approved by it, and any board of education or board of directors who shall fail, refuse or neglect to order such statement to be made, and any officer of said board who shall fail, refuse or neglect to prepare such statement and publish and forward the same, as required by the foregoing provisions of this section, when ordered by such board, shall be guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars."

We believe this section to be self-explanatory, and we are enclosing copies of two previous opinions of this office for the proposition that such financial statements are required (Opinion of Attorney General to George W. Kriegesman, Nov. 3, 1933; Opinion of Attorney General to J. H. Wilson, June 6, 1934).

You will please note the changes made in Section 165.360, supra, since the 1929 revision, on which the enclosed opinions are based. We shall not discuss those changes here, however, because they are not pertinent to the question submitted.

Your last question concerns the auditing of a school district. In that connection we refer you to Section 29.230, RSMo 1949, which reads as follows:

"At least once during the term for which any county officer is chosen, the state auditor shall examine, inspect, and audit the accounts of the various county officers of the state supported in whole or in part by public moneys, and without cost to the

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county, county clerks, circuit clerks, recorders, county treasurers, county collectors, sheriffs, public administrators, probate judges, county surveyors, county highway engineers, county assessors, prosecuting attorneys, county superintendents of schools, in every county in the state which does not elect and have a county auditor. Such audit shall be made by the state auditor as near the expiration of the term of office as the auditing force of the state auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per cent of the total number of votes cast in said county for the office of governor at the last election held for governor preceding the filing of such petition shall petition the state auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury; provided, that any county having an audit by petition shall not be audited more than once in any one year. He shall audit any department, board, bureau or commission of the state which is under the control or supervision of the governor or any other elected official of the state, upon the request of the governor, and he shall further audit any political subdivision of the state whenever requested to do so by five per cent of the qualified voters of such political subdivision, determined on the basis of the votes cast for the office of governor in the last election held. Such political subdivision shall pay the actual cost thereof; provided, that no political subdivision shall be so audited by petitions more than once in any one calendar or fiscal year."

Under this section it is the duty of the State Auditor to audit the financial accounts of a political subdivision of a state when requested to do so by five per cent of the qualified voters of the political subdivision as determined by the votes cast for Governor at the last election. We are enclosing copy of an opinion of this office rendered to Haskell Holman under date of March 7, 1955, wherein it was held that a city, town or village is a political subdivision within the meaning of Section 29.230, supra. By a parity of reasoning, we are of the opinion that a school district also is a political subdivision within the meaning of this section.

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CONCLUSION

It is the opinion of this office:

1. That election officials in school bond elections may be prosecuted for fraud;

2. That the ballots cast in a school bond election may be recounted only in the case of (1) grand jury investigations and (2) in the trial of civil and criminal cases in which the violation of any law relating to elections is under investigation or at issue;

3. That the oath of election officials in a school bond election held on a day other than the day of the annual school meeting may be administered by any official authorized to administer oaths;

4. That it is the duty of boards of education in districts having six directors or having high schools to publish annually a financial statement of the district in accordance with Section 165.360, RSMo 1949;

5. That upon the request of five per cent of the qualified voters of the school district as determined by the votes cast for Governor at the last election, it is the duty of the State Auditor to make an audit of the financial accounts of the district in accordance with Section 29.230, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

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