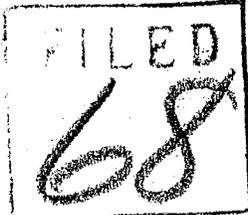


ELECTIONS:
COUNTY CLERK:

The county clerk in canvassing returns of an election cannot go behind the return unless, upon a comparison of the poll books and tally sheets, there is found a discrepancy, then he shall issue a certificate of election to the candidate receiving the highest number of votes as shown by the tally sheets.



November 28, 1956

Honorable Max Oliver
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Oliver:

This will acknowledge receipt of your request for an opinion which reads:

"Last Friday I requested your opinion concerning the proper procedure in case the canvassers ascertained from a comparison of the poll book with the tally sheets that the candidates for a particular office received more votes between them than the poll books showed said precinct to have voters casting their votes at said election.

"Would you give your opinion in writing on this question."

It is our understanding that you are only interested in knowing what is the proper action for the county clerk to take in this instance.

Section 111.710, Mo.RS 1949, provides that the county clerk and two others selected by said clerk, one from each political party, shall examine and cast up votes given each candidate and then give those having the highest number of votes certificates of election.

Section 111.720, RSMo 1949, provides that when judges of election in casting up the total votes cast shall make an error in giving to any county candidate for nomination or election a greater or less number of votes than he actually received as shown by the tally sheets of such precinct, the county clerk shall, in certifying to the nomination or election, be governed by the votes cast as shown

Honorable Max Oliver

by the tally sheets.

Section 111.620, MoRS 1949, provides how number or numbers on each ballot shall be covered by a sticker before being placed in the ballot box so as to conceal the number or numbers on said ballot. That no such sticker shall be removed except in case of contested elections, grand jury investigations or trial of civil or criminal cases in which violation of laws relating to elections may be in issue.

Section 111.630, MoRS 1949, further provides that said number must be covered in the manner hereinabove provided, and further provides the ballot shall be sealed in a package and delivered to the county clerk who shall deposit them in his office and safely preserve them for twelve months. That he shall not allow them to be inspected unless in case of a contested election or it becomes necessary to use them in the evidence in certain specified instances.

Volume 29, C.J.S., Sec. 237, pages 340 and 344, lays down the established and general rule as to powers of canvassers and reads:

"It is a common error for a canvassing board to overestimate its powers, but, since such a board is ordinarily a creation of constitution or statute, it may be stated generally that it has such powers and duties, and only such, as are conferred by the constitution or statute creating it, notwithstanding their exercise of certain judicial or discretionary powers, the powers and duties of the members of a board of canvassers are primarily ministerial in nature, being limited generally to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained. Unless authorized by constitutional or statutory provisions, they have no power to go behind the returns and ascertain the qualifications of the voters or otherwise inquire into the regularity of the election.

* * * *

"It is settled beyond controversy that canvassers cannot go behind the returns. The returns provided for by law are the sole and exclusive evidence from which a canvassing board or official can ascertain and declare the result. The canvassers are not authorized to examine or consider papers or documents which are transmitted to them with the

Honorable Max Oliver

returns, or as returns, but which under the statutes do not constitute part of the returns; neither are they at liberty to receive and consider extrinsic evidence, except perhaps where the returns have been destroyed or are otherwise unavailable, or where the testimony of the election officers is necessary to correct or complete conflicting and incomplete returns. Where there has been an alteration of the returns after they have been sent in, it is the duty of the canvassers to disregard the alteration and make the count according to the true returns."

In State ex rel. Ford vs. Trigg, 72 Mo. 365, an application for mandamus was filed to compel a county clerk to certify to the Secretary of State the vote cast for representatives of Congress in two precincts as same was certified by the judges and clerks of said election precincts. The county clerk contended that by comparison of the poll books and tally sheets filed it was apparent a mistake had been made in adding up the votes cast in said precincts.

The court held if judges and clerks of elections had made mistakes it could only be corrected by the tribunal authorized to determine contested elections and the court issued the peremptory writ. In so holding the court said, l.c. 366 and 367:

"From the foregoing facts stated by the respondent it is manifest that he has mistaken his duty and exceeded his authority. That he acted in good faith, we have no question. It was simply his duty, however, under the law, to certify to the Secretary of State the vote as it was certified to him by the judges and clerks of election. This has been the uniform rule in this State since the decision of this court in Mayo v. Freeland, 10 Mo. 629. If the judges and clerks have made mistakes in casting up the votes, the error can only be corrected by the tribunal authorized to determine contested elections. Mayo v. Freeland, supra. Tally sheets are unknown to the law. They are convenient, perhaps necessary for the judges and clerks of election, in casting up the votes polled for the several candidates, but they are not required to be made, preserved or filed, and if they were, the respondent would have had no right, as the law now stands, to refer to them for the purpose of verifying or correcting the certificates of the judges and clerks. Peremptory writ awarded. All the judges concur."

Honorable Max Oliver

At the time the foregoing decision was rendered there was no law similar to Section 111.720, supra, as that law was first enacted during the 48th General Assembly (See Session Laws 1915, page 282, Sec. 4882 RSMo 1919).

This accounts for the decision holding that no alteration could be made by the county clerk when a discrepancy is found between the tally sheet and the poll book.

Your request is not very clear as to what the return actually shows, whether it gives a candidate more or less votes than shown by the tally sheets. In view of the provisions of Section 111.720, supra, regardless of what the case may be, the county clerk shall issue his certificate of election based upon the total votes shown cast by said tally sheets.

In State ex rel. Garesche, 3 Mo. App. 526, l.c. 535, 536, 537, the Court of Appeals likewise held that a county clerk in canvassing a vote cannot go behind the returns and reads:

"The clerk certainly cannot inquire into, and has nothing whatever to do with, any errors that occur before the poll-book reaches his office. He cannot conduct a contested election in any case. He is bound to presume in favor of the integrity of the return at the time that he canvasses the vote, and cannot certify to anything but the face of the return, unless he knows it has been changed.
* * * *"

* * * * *

"Undoubtedly; but he must know what the returns are before he can cast them up; and to this extent he must have discretion. He cannot go behind the returns, but he must know what are the returns that came to his office. He has nothing to do with fraudulent votes, nor with changes in the books before they are left with him; but between two books, both claiming to be the poll-books left in his custody, he must decide, if such a question arise. He cannot count as a return what he knows not to be a return, nor count as a figure what he knows to be no part of the return made to his office, but something that has been put

Honorable Max Oliver

in its place since the books came there."

The county clerk in canvassing such returns is performing merely a ministerial function, as was held in State ex rel. Hammerstein vs. Williams, 95 Mo. 159, l.c. 162, wherein the court said:

"It needs no citation of authorities to establish the proposition that the duty of respondents in canvassing the returns of said election are purely ministerial and that words readily distinguishable in sound are not idem sonans;* * * *"

In State vs. Osburn, 147 S.W.(2d) l.c. 1068, 1069, the Supreme Court likewise held that the duty of canvassers is purely ministerial and that canvassers have no right to go behind the return. In so holding the court said:

"The duties enjoined upon the speaker place him in the same category as a mere canvassing officer or canvassing board. By the overwhelming weight of authority throughout the country the function and duties of canvassers are purely ministerial. 20 C.J. Sec. 254, 18 Am. Jur. Sec. 254. This state follows the weight of authority. The rule here adopted is that the duty of casting up the vote certified by the returns and ascertaining who received the highest vote is a purely ministerial duty, and being such the canvassers have no right to go behind the returns. Mayo v. Freeland, 10 Mo. 629; State ex rel. Attorney General v. Steers, 40 Mo. 223; State ex rel. Metcalf v. Garesche, 65 Mo. 480; State ex rel. Ford v. Trigg, 72 Mo. 365; State ex rel. Broadhead v. Berg, 76 Mo. 136; Barns v. Gottschalk, 3 Mo. App. 111; State ex rel. v. Stuckey, 78 Mo. App. 533; State ex rel. Glenn v. Smith, 129 Mo. App. 49, 107 S.W. 1051; State ex inf. Anderson v. Moss, 187 Mo. App. 151, 172 S.W. 1180. We see no reason why this is not also true of the canvass which the speaker is required to make by Section 3."

In view of the statutes and decisions it appears that the county clerk, in canvassing returns of an election, is acting as a ministerial officer and is vested with no authority but to issue his certificate as shown by the returns delivered to him by the

Honorable Max Oliver

clerk and judges of the election, the only exception being as provided in Section 111.720, supra. This is particularly true in view of the fact that the law clearly specifies in what instances the stickers on said ballots may be removed from said ballots and certainly this does not present any such problem.

CONCLUSION

Therefore, under the present law, it is the opinion of this department, in this instance, the county clerk shall examine and cast up said votes for the respective candidates and if upon comparison of the poll books and tally sheets there is found a discrepancy then he should give the candidate receiving the highest number of votes as shown by said tally sheets, a certificate of election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Very truly yours,

John M. Dalton
Attorney General