

Opinion No. 376  
Answered by letter

October 16, 1962



Mr. George E. Schaaf, Attorney  
St. Louis Board of Election Commissioners  
7751 Carondelet  
Clayton 5, Missouri

Dear Mr. Schaaf:

We have your request for an opinion relative to a factual situation involving absentee voting in St. Louis County.

Your letter states that there are 65 Roman Catholic Nuns at Visitation Academy who belong to a Papal Cloistered Group and cannot leave their premises without permission of Rome, since they are a Papal Order. At the last primary election, all of these Nuns were permitted to vote by absentee ballot on the theory that, realistically considered, they were "absent" to the same extent as if they were in some other country.

Sections 112.010 to 112.120 RSMo "provide a method of voting by voters absent from their county, or prevented by illness or physical disability from going to the polls to vote on election day."

Section 1.090 RSMo provides that "words and phrases shall be taken in their plain or ordinary and usual sense." The word "absent," as ordinarily used, means "not present" or "being away from a place." That the word may have been used in this frame of reference could be inferred from the fact that it is part of the phrase "absent from the county."

However, it is possible, within the meaning of some statutes, to be "absent from the county" even though the

person involved is physically present therein. An example of such a situation is afforded by the Kentucky case of *Dark Tobacco Growers Co-operative Ass'n. v. Wilson*, 257 S.W. 1092, which construed a statute empowering the clerk of a court to grant a declaratory injunction if the judge of the court be absent from the county. In that case, the judge had disqualified himself. In these circumstances, it was held that the judge was "absent from the county" within the meaning of the statute.

In the later Kentucky case of *Northcutt v. Howard*, 279 Ky. 219, 130 S.W.2d 70, the court agreed that the Commonwealth's attorney is "absent" in legal effect when he is either disqualified or, for some reason, disabled from performing the duties of his office. And in *Bingham v. Cabbot*, 3 U.S. 19, 1 L.Ed. 491, the court held that, although a district judge was on the bench, yet if he did not sit in the cause, he was "absent in contemplation of law."

Under the statute, the right to cast an absentee ballot is given, not only to those absent from the county, but also to those who "through illness or physical disability" are prevented from personally going to the polls. There is no claim that the Nuns in question are ill, so that the only remaining question would be whether they are under a "physical disability" which would prevent them from personally going to the polls.

By the phrase "physical disability" is ordinarily meant an incapacity caused by a physical defect or infirmity, or a bodily imperfection. Such is undoubtedly the sense in which the term is used in Section 111.590 RSMo, which provides a means of voting for a person who "by reason of physical disability is unable to mark his ballot." However, it may well be that the phrase "physical disability" is broad enough to cover the situation described in your letter.

Because of the restraints imposed upon them, the Nuns in question are deprived of the ability to leave their cloister and, therefore, incapable of personally going to the polls. Such disability, in our view, is not mental, because the latter would ordinarily connote weakness of mind and lack of understanding. In this case, the restraint imposed upon the Nuns is upon their bodies, even though such restraint has resulted from the vows they have taken; and hence the disability might conceivably be deemed "physical."

Militating against such a construction of the phrase "physical disability" is the fact that the word "illness" is joined with such phrase by the conjunction "or." And prior to the amendment of this statute in 1959, a physician's (or Christian Science practitioner's) supporting certificate was required to be attached to the application of every voter who expected to be prevented from going to the polls through illness or "disability." But on the other hand, the very fact that the requirement of such a certificate has now been affirmatively omitted by the amendment might well evidence a legislative intent to broaden the meaning of "physical disability," so that it should not necessarily be of a character which could be certified to by a doctor or Christian Science practitioner.

In our view, the statutory provisions relating to absentee voting, like other provisions of election laws, "must be liberally construed in aid of the right of suffrage." To this effect are cases such as Application of Lawrence, 353 Mo. 1028, 185 S.W.2d 818, 820. In this connection, consideration should also be given to the provisions of Article I, Section 7, of our Constitution, which provides in part that "no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Hence, the absentee voting law should be liberally construed in such manner as not to discriminate unfairly against persons who, because of their religion, are prevented from personally going to the polls to vote.

The responsibility of ruling upon a challenge to a particular absentee ballot is ultimately that of the courts, after a hearing in which the facts are fully developed. Because of the uncertainty inherent in the application of the law to the facts of cases such as described in your letter, we have concluded that it would be inadvisable for this office to issue an official opinion with respect thereto, but trust that the views expressed in this letter will be of help in resolving the problems with which you may be confronted.

Yours very truly,

JOSEPH NESSENFELD  
Assistant Attorney General

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