

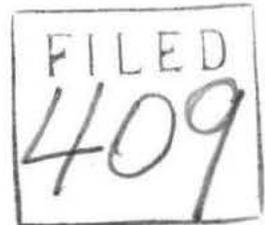
BALLOTS:  
ELECTIONS:  
ABSENTEE VOTING:

1. Official war ballots mailed prior to naming of nominee for county office by county political committee valid notwithstanding that no name placed on ballot for such office.
2. §112.030 prescribes written application for absentee ballot but absentee ballot procured by oral application not invalid.
3. §112.080, relating to challenging of absentee ballots, not modified by the adoption of §114.220, the local option county registration law.

OPINION NO. 409

November 19, 1962

Honorable Merrill E. Montgomery  
Prosecuting Attorney  
Sullivan County  
Milan, Missouri



Dear Sir:

We have your letter of November 12, 1962, wherein you request an opinion of this office on three questions arising out of the general election held in Sullivan County on November 6, 1962.

1. Your first question involves the validity of several official war ballots. It appears that on August 22, 1962, following the primary election of August 6, 1962, the Republican candidate for county clerk nominated at such primary election withdrew his candidacy. On September 7, 1962, the county clerk had printed, and began to mail out, the official war ballots with no Republican nominee for the office of county clerk listed on the ballot. On September 11, 1962, the Republican County Committee met and nominated a candidate for this office whose name appeared on all ballots issued from that date.

It appears that at the time of the printing and mailing of the questioned ballots they were accurate, in that there was no Republican nominee for the office of county clerk. Due to the provisions of Section 112.330, RSMo 1959, the county clerk is required to cause the official war ballots for a general election to be printed within thirty days after the primary election, and under Section 112.370, RSMo 1959, he must mail them to the absentee voter "as soon as practicable" after the receipt of an application for such ballot. It therefore appears that the county clerk is simply performing the duties prescribed by law in mailing out these ballots prior to the nomination of a Republican candidate for county clerk. Moreover, these ballots were

Honorable Merrill E. Montgomery

correct at the time they were mailed and any omission was due solely to the delay of the Republican Committee in naming a candidate. To invalidate the ballots would cause the voter's franchise to be dependent upon the whim of a party committee, a result certainly not consistent with the letter and spirit of our election laws.

We also direct your attention to Section 111.650, RSMo 1959, which reads as follows:

"If a ballot should be found to contain a greater number of names for any office than the number of persons required to fill such office, it shall be considered as fraudulent as to the whole of the names designated to fill such office, but no further; but no ballot shall be considered fraudulent for containing a less number of names than are authorized to be inserted."

The above-quoted section lends further authority to our reasoning in holding that the questioned ballots are not invalid and should be counted.

2. It further appears that a number of persons desiring to vote an absentee ballot appeared in person at the office of the county clerk prior to the election and requested such a ballot, as provided in Section 112.020, RSMo 1959. However, we are informed that no formal written application was furnished to these persons and the absentee ballot was given to them on the basis of their oral application, that each of these persons voted the absentee ballot in the clerk's office at the time of application, and that the necessary affidavit was executed and the clerk's seal affixed. You now inquire whether such ballots must be invalidated due to the failure to make written application.

Section 112.030, RSMo, 1961 C.S., prescribes the manner in which an application is to be made for an absentee ballot. That section states, in part:

"Application for such ballot may be made on a blank signed by the applicant, to be furnished by the county

Honorable Merrill E. Montgomery

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. \* \* \*

While the above-quoted section states that the application "may" be made on a blank furnished by the clerk, it does not appear that the term is used in a meaning which is permissive rather than compulsory. Rather, a careful reading of the statute indicates that the term "may" is used only because the statute provides two alternate methods of application. Thus, the application for an absentee ballot may be made on a blank furnished by the county clerk or it may be made in writing by first class mail. These, however, are the only alternatives provided and, by implication, all others are excluded. Further indication of the legislative intent in this regard can be found in the 1961 amendment of this statute (H. B. 435), wherein an additional requirement was inserted that the application blank must be "signed by the applicant." It is, therefore, our view that a written application for an absentee ballot is required when a voter appears personally at the office of the county clerk to make such application.

There remains the further question, however, of whether the failure to make written application for an absentee ballot invalidates the ballot. The general rule governing the construction to be given election statutes is found in the case of *Nance v. Kearbey*, 251 Mo. 374, 158 SW 629, 631, wherein the court said:

"First. Election laws must be liberally construed in aid of the right of suffrage. *State ex rel. v. Hough*, 193 Mo. loc. cit. 651, 91 S.W. 905; *Hale v. Stinson*, 198 Mo. 134, 95 S.W. 885. 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, 40 Pac. 80, 28 L.R.A. 502. The choice of

Honorable Merrill E. Montgomery

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. loc. cit. 353, 149 S.W. 628; *Hehl v. Guion*, 155 Mo. 76, 55 S.W. 1024. 'Such a construction,' says this court, speaking through Barclay, J., in *Bowers v. Smith*, 111 Mo. loc. cit. 55, 20 S.W. 101, 16 L.R.A. 754, 33 Am. St. Rep. 491, '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 Q.B. Div. 245.' Again (pages 61, 62, of 111 Mo., page 105 of 20 S.W. [16 L.R.A. 754, 33 Am. St. Rep. 491]): '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.'"

This office has had occasion to consider this principle on related questions involving irregularities in the preparation and casting of absentee ballots. In an opinion rendered August 9, 1950, to Albert D. Nipper, it was stated:

Honorable Merrill E. Montgomery

"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."

Similarly, in an opinion rendered by this office on October 21, 1952, to Robert L. Hoy, we held:

"Therefore, it is the opinion of this office that an absentee ballot cast by a person legally entitled to vote the same may be counted although such ballot may have been obtained more than thirty days prior to the election, Section 112.020, RSMo 1949, relating to time of application being directory only."

Honorable Merrill E. Montgomery

Finally, in an opinion dated June 10, 1954, to John P. Peters, this office held:

"It is our further opinion that when such [absentee] ballots are issued by the county superintendent of schools that such issuance is improper, but that it does not nullify such absentee ballots when they are properly cast, and that under such circumstances such absentee ballots should be counted, just as though they had been issued by the proper party."

From an examination of Sections 112.020 and 112.030 it can be seen that the Legislature has not specifically provided that the failure to make written application shall invalidate the ballot. Moreover, a comparison of the application you have furnished us with the affidavit required by Section 112.040, RSMo 1959, to be executed by one who votes an absentee ballot, shows that all the information requested in the former is found in the latter. Thus, if this information should be necessary in order to determine the right of an individual to vote an absentee ballot, it may be obtained from the affidavit. And, as pointed out in the authorities previously quoted, the law does not favor the destruction of the voter's franchise due solely to the omissions of officials charged with certain duties under the election laws. *State ex rel. School Dist. of Jefferson City v. Holman, Mo.*, 349 SW2d 945, 949. We therefore conclude that the ballots in question are not invalid due to the failure to make a written application.

3. You further inquire whether Section 114.220, RSMo 1959, modifies Section 112.080, RSMo 1959, regarding the challenging of an absentee ballot, by imposing an additional procedure upon that stated in Section 112.080. In reading these statutes together we do not see that there is any relation between the two. Section 114.220 relates to events occurring at the time a voter offers to vote on the day of election at the polling place and provides an expeditious procedure by which the qualifications of such voter can be challenged by any other registered voter and the matter quickly resolved. Section 112.080, on the other hand, has application only to the challenging of absentee votes and provides that such challenge may be made "for good cause."

Honorable Merrill E. Montgomery

It is our view that this latter statute is designed for a different purpose, and the judges are not limited by the requirements of Section 114.220 but may determine the qualifications of an absentee voter in whatever reasonable manner they in good faith deem proper and appropriate. For these reasons, it is our opinion that Section 112.080 is not modified by Section 114.220.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

---

THOMAS F. EAGLETON  
Attorney General

JJM:ml