

ELECTIONS - Application of absentee voters in the Armed Forces within and outside of the State, and when such votes shall be placed in the hands of the election officials.

October 1, 1942



Mr. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

Dear Sir:

The Attorney General is in receipt of your request for an opinion, of recent date, which partially reads as follows:

"Sec. 11521 states that ballots must be returned to the County Clerk not later than sixty-six hours preceding the time for opening the polls and that such ballots should be transmitted by the County Clerk to the election judges who are to count same on election day. Does this Section apply to all absentee ballots cast by service men or does it apply only to those who obtain the ballot direct from the County Clerk and vote same in the County Clerk's Office. I do not see how it would be possible for a man to make application within the time limit of from 15 to 5 days prior to election, have his ballot mailed to him, vote it and return it to the County Clerk not later than sixty-six hours before the polls open, if the County Clerk would not even receive his application for ballot until five days before the election.

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"I would also like to know if a letter from a service man asking for an absentee ballot, will be sufficient application or is it compulsory that he use the form provided for in Sec. 11472."

Your request involves two distinct interrogations: (1) Must all absentee ballots cast by persons in military service reach the county clerk at least sixty-six hours preceding the time for the opening of the polls, as provided in Section 11521 R. S. Missouri, 1939, or only those returned to the clerk by mail; and (2) may absentee voters in the Armed Forces apply by letter for a ballot, or are they required to execute an affidavit as required by Section 11472 R. S. Missouri, 1939.

I

Inasmuch as, the "right of suffrage is not a natural or inherent right ** but is purely conventional" (State ex rel Ellis v. Brown, 33 S. W. (2d) 104, l. c. 107, 326 Mo. 627) the solution of your inquiry is to be found in the constitutional provision and certain of the absentee ballot statutes later noted herein.

You mentioned Section 11521 R. S. Missouri, 1939. This applies to absentee voters in military service outside this State. This indicates that there is here involved only the votes of members of the military forces present elsewhere than in Missouri. However, as there is a distinction between absentee voters of the Armed Forces within the State and those without the State the statutes applicable to both will be noted.

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Section 9, of Article VIII of the Constitution authorizes the enabling of qualified voters, absent from this State on military service and qualified voters absent from their counties, but within the State, to exercise their right of suffrage as may be provided by law. These absent electors were placed in two groups, one group being voters in the Armed Forces beyond the confines of Missouri, and the other being voters who are within the State, but without their respective counties.

Accordingly the legislature enacted what is now a portion of Article 2, of Chapter 76, and Article 3, of Chapter 76, both found in the Revised Statutes of Missouri, for the year 1939. This office has ruled that the first mentioned article applies to qualified voters both civilian and members of the Armed Forces outside their respective counties, but within the State, while said Article 3 (of which Section 11521, supra, is a part) governs only qualified electors outside the State on military or naval services. An epitomization to such rulings is hereto attached.

Qualified voters absent from their counties, but within the State, may apply, in person, or by mail, for an absentee ballot (Section 11471 R. S. Missouri, 1939) and such ballots, when voted, must reach the issuing officer not later than six o'clock P. M., of the day after the election. (Section 11474 R. S. Missouri, 1939).

Section 11519 R. S. Missouri, 1939, applies to qualified voters in the Armed Forces and beyond the confines of Missouri, reads as follows:

"Any absent voter as defined under the provisions of this article, who shall have complied with the pro-

visions of the law relating to registration whether by the form outlined in section 11518 of this article or in person may make application by mail not more than fifteen nor less than five days prior to such election, to the county clerk of the county of which he is a resident, or board of election commissioners of the city of St. Louis or clerk of the city, town or township, as the case maybe, for an official ballot to be voted at such election."

The language of this section may be somewhat confusing, as may be the wording of Section 11521, supra, yet certain rules of statutory construction will apparently govern.

While elections should be so conducted as to afford a free and fair expression of the popular will, yet "mandatory statutory requirements must be followed." (State ex inf. McKittrick v. Stoner, 146 S. W. (2d) 891, 1. c. 894.)

It is a primary rule of construction to ascertain the lawmakers' intent from the words used, if possible, and to put on the language of the legislature, its plain meaning. (Artophone Corporation v. Coale, 133 S. W. (2d) 333, 345 Mo. 344.) The intention of the lawmakers will prevail over literal sense of terms. (State v. Swartsmann Service, 40 S. W. (2d) 479.) However, if the meaning of a statute is plain and unambiguous, it may not be construed, but must be given effect as written. (St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 667, 347 Mo. 456.) Furthermore, the statutes should be read together to determine the intent of the legislature.

It was evidently the legislature's intent that a person in the military forces could make written application, if beyond the State, for an absentee ballot, or if he was present in the county of his residence but expected to be outside of the State on election day he could apply in person for an absentee ballot, but that such application in either event should be made no more than fifteen, nor less than five days prior to the election. This is according to Section 11519 R. S. Missouri, 1939, and that portion of Section 11521, supra, which reads as follows:

"The elector shall upon receipt of a ballot or ballots, go before an officer authorized by law to take oath, administer and make and subscribe to the affidavit on back of envelope in which ballot or ballots are to be enclosed, and the voter shall thereupon in the presence of such officer and no other person, mark such ballot or ballots, but in such manner that said officer cannot know how said ballot or ballots were marked, and the ballot or ballots voted shall, in the presence of said officer, be folded by such voter so that each ballot will be separate and so as to conceal the marking and be enclosed in the envelope in which the affidavit was taken, in the presence of said officer, and in case there are rejected or unvoted ballots, the voter shall fold such ballots together and enclose in another envelope marked 'unvoted ballots' and enclose such envelope in the same envelope with the voted ballots which shall be securely sealed and registered to the office from which ballots were received, as per address on face of envelope: * * * * *"

This section proceeds with:

" * * * Provided further, any elector may make application to the clerk, whose duty it is to issue ballots as defined by this article for an official ballot, if such ballots are in such officer's hands, and take oath as prescribed and vote and said clerk shall hold said ballot in his office until time to be sent to the precinct at which said elector is a qualified voter as hereinafter defined: Provided, however, that all absentee ballots shall be in the hands of the county clerk or other official whose duty it is to forward ballots and election supplies to the various voting precincts not later than sixty-six hours preceding the time for opening the polls at such election. And the clerk shall note upon the envelope containing such ballots, the day and hour which he received same."

The last quoted portion is definite and certain and leaves little, if any, room for construction. Section 11522 R. S. Missouri, 1939, provides, among other things, that the absentee ballot shall be delivered to the judges of the election at the same time and in the same manner as the poll books and ballots are delivered, which must be delivered before the polls open; then, of necessity the ballots could reasonably be required to be in the hands of the clerk or election board, as the case may be, a period of time before the other election supplies are delivered.

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It is the opinion of this department that the absentee ballots of qualified voters in the Armed Forces, absent from the State must be in the hands of the county clerk, or board of election commissioners, as the case may be, at least sixty-six hours preceding the time for the opening of the polls at such election. This conclusion, however, does not apply to qualified voters outside their county, but within the State, casting absentee ballots. The latter are governed by Section 11474 R. S. Missouri, 1939.

II

Your second question is to the effect that: May absentee voters in the Armed Forces apply by letter for a ballot, or are they required to execute an affidavit as prescribed by Section 11472 R. S. Missouri, 1939?

The statute you mention in this connection (Section 11472 R. S. Missouri, 1939) requires the execution of an affidavit and application for an absentee ballot and prescribes the form of such. Section 11471, supra, requires such affidavit and application to be made, not more than thirty nor less than five days before the election. Said application and affidavit may be made in person before the county clerk, or board of election commissioners, if the county has such board. As has been pointed out these statutes are a part of Article 2, of Chapter 76, and apply only to absentee voters, including those in the Armed Forces who are within the State, but outside their county on election day.

Section 11519, hereinabove quoted, which is a part of Article 3, of Chapter 76, of the Revised Statutes of Missouri, 1939, apply solely to absentee voters in

military service who will be out of the State on a general election day. By authority of this statute, the application may be in writing, but is not required to be verified. This statute does not prescribe a form for the application, and, as nothing may be added to the requirements of the statute by way of construction, the application may be informal and a request by letter for an absentee ballot would, therefore, be sufficient.

By Section 11521, supra, the legislature evidently intended that a soldier or sailor who would be beyond the confines of the State on a general election day, could vote by applying in person to the county clerk or board of election commissioners, depending upon the size of the county. The oath mentioned in this section refers, no doubt, to the oath on the envelope in which the ballot is placed, and as set out in Section 11519, supra.

Thus Section 11519, supra, provides for a written application for absentee ballot, with reference to soldiers and sailors who may be outside the State on a general election day, and Section 11521, supra, provides that they may appear in person before the clerk or board of election commissioners, and cast their ballots, if they will be outside of the State on election day.

The absentee voters' statutes, as above pointed out, provide that absentee voters, without their respective counties but within the State, shall make an affidavit and application for an absentee ballot not more than thirty nor less than five days before the election, and that their ballots, when cast, shall reach the issuing official not later than six o'clock p. m. of the day succeeding the election; and that those voters without the State in military service shall make application in person, or in writing, not more than fifteen nor less than five days before a general election day, and that their ballots shall be in the hands of the

proper official not later than sixty-six hours preceding the time for opening the polls on election day.

The question then presents itself if the time limitations expressed in such statutes are directory, and may be waived, or mandatory, and therefore to be strictly followed.

The principle of complying with election law provisions is stated in Volume 20 C. J. 152, Section 181, which provides in part as follows:

"Since electors cannot be disfranchised because of the neglect of the officers charged with the duty of preparing the ballots, technical errors on the part of an officer charged with the preparation of official ballots will not destroy the efficacy of the ballots nor invalidate the election, unless the statute expressly makes a specified irregularity fatal. * * *"

This principle has been followed by the Missouri courts. *Horsefall v. School District of Salem*, 143 Mo. App. 541, 128 S. W. 33; *Nance v. Kearbey*, 251 Mo. 374, 158 S. W. 629.

The rule for the procedure for election officials under the election laws is that such officers must follow the provisions of the statute. This principle of law is announced in *Lamar Township v. City of Lamar*, 261 Mo. 171, l. c. 189:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they

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are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. * * * "

See, also, State ex inf. McKittrick v. Stoner, 146 S. W. (2d) 891, l. c. 894, hereinabove cited.

CONCLUSION

It is the opinion of this department that a qualified voter in the Armed Forces who expects to be outside the State of Missouri on a general election day may make application for an absentee ballot by informal letter, or in person, not more than fifteen nor less than five days before such election, and without executing a verified application; and that a qualified voter in the Armed Forces who expects to be inside the State of Missouri but outside his county on election day may make application for an absentee ballot in person, or by mail, but is required to do so by an affidavit and application, as set out in Section 11472, R. S. Missouri, 1939, and not more than thirty days nor less than five days before the election.

It is the further opinion of this office that the time limitations with reference to applying for absentee ballots, voting the same, and returning them to the proper receiving official are mandatory, and must be strictly followed.

Respectfully submitted

APPROVED:

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