

Opinion No. 52-5526

April 3, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Hon. Beatrice B. Roach Secretary of State Santa Fe, New Mexico

{*234} In your letter of March 27, 1952, you requested an opinion of this office clarifying the matter of absentee voting in New Mexico.

You mentioned in your letter that during World War II military personnel were allowed to vote in absentee. For this reason it seems well to divide this discussion in two parts, the first concerning itself {*235} with the right of civilian personnel, as distinguished from military personnel, to vote by absentee ballot, the second concerning the right of military personnel to vote by absentee ballot.

Civilian personnel have no right to vote by absentee ballot under the laws of the State of New Mexico, either for state candidates or for candidates for any Federal offices. Your attention is respectfully called to Sec. 56-319 (12), N.M.S.A., which is the latest legislative pronouncement upon this question. Our Court in the latest case of Chase v. Lujan, 48 N.M. 261, declared that the Constitution of New Mexico, Art. 7, Sec. 1, also requires the personnel presence at the polls of any elector voting for State or County officials.

Moreover, the rights of civilian personnel to vote by absentee ballot were not enlarged by any privileges given military personnel under legislation dealing with the rights of the latter. Therefore, notwithstanding the rights of civilian voters in other states to vote by absentee ballot, no such right is given civilian voters within the State of New Mexico.

However, despite our constitutional requirement that voters be physically present at the polls, under Art. 1, Sec. 4, U. S. Constitution, the state legislature is given the power to make laws providing for the time, place and manner of electing U. S. senators and representatives. The U. S. Constitution being the supreme law of the land, it is well settled that this grant of power cannot be limited by state constitutional provisions requiring an elector to vote in person. Art. II, Sec. 1, U. S. Constitution, grants this same power to the state legislatures in the election of presidential electors. Furthermore, by express provision in the U. S. Constitution, likewise Art I, Sec. 4, Congress may alter state regulations as to the time, places, and manner of holding elections for senators and representatives, except those regulations pertaining to the places of choosing senators. For a further discussion of the subject of this paragraph, see Attorney General Opinions Nos. 4668 and 4156, previously issued by this office.

Notwithstanding the privilege thus conferred upon our Legislature to provide for absentee ballots in the case of elections for U. S. senators and representatives and presidential electors, even though such legislation be at variance with our constitutional

requirements, our Legislature has at no time abrogated the constitutional requirement of physical presence at the polls in the case of civilian voters.

A different situation exists as far as military personnel are concerned. In 1942, the Congress of the United States enacted a law, 56 Stat. 753, which gave all military personnel the right to vote by absentee ballots for the offices of U. S. senators, representatives, and presidential electors. While that law was in effect, Opinion No. 4156 was written by this office, which stated that military personnel had the right to vote by absentee ballot for the offices of U. S. senators and representatives.

In 1944, 56 Stat. 753 was amended by Congress in P. L. 277, 78th Congress (58 Stat. 136). While the 1942 Federal legislation bestowed an absolute right upon military personnel to vote by absentee ballot without the necessity of enabling legislation by the states, the 1944 Federal law withdrew this absolute privilege and required enabling legislation by the several states in order that military personnel might vote by absentee ballot for Federal offices.

Pursuant to 58 Stat. 136, our Legislature at the special session of 1944 enacted Ch. 2, Laws of 1944, which repealed 56-319(12), N.M.S.A. and provided that military personnel should have the right to vote by absentee ballot for Federal offices until the convening of the next legislature following the termination of the "present World War" (obviously World War II). It is to be noted that while the {236} Legislature thus repealed the statutory requirement that voters must be physically present at the polls in order to vote, the repeal conferred no right upon civilian voters, since the New Mexico Constitution still prohibited their voting by absentee ballot.

To summarize, under the 1942 Federal law the contemporary New Mexico statute was of no effect so far as military personnel were concerned, since that Federal legislation gave the military personnel the absolute right to vote for representatives and senators by absentee ballot, notwithstanding the State law. Pursuant to the 1944 Federal law, which took away this absolute right, our Legislature repealed Sec. 56-319(12), N.M.S.A., as it applied to military personnel and from that time on, during the life of the statute, military personnel had the right to vote by absentee ballot in New Mexico for senators, representatives, and presidential electors.

The question to be determined is whether Ch. 2, Laws of 1944, giving this right, has expired or has been repealed.

It is my opinion that the 1944 New Mexico law has not expired by operation of law. I say this for the reason that the effective period during which the law should be in operation was that period up to and including the convening of the next Legislature following the termination of World War II.

It is well settled public law that wars are terminated only by proclamation of Congress, by Executive order, or by treaty. In the case of Germany, there has been no treaty, but by proclamation dated October 19, 1951, the war with Germany was declared to be

ended. P.L. 181, 82nd Congress. It is axiomatic that we were still at war with Germany following the adjournment of the 1951 New Mexico Legislature. Although this nation has signed and ratified the Treaty of Peace with Japan, to the best of my knowledge the Treaty is not yet effective so far as terminating a state of war for statutory purposes.

Therefore, if we had nothing more to guide us than the 1944 New Mexico legislation, implementing the Federal Act of 1944, it would be my opinion that military personnel would be entitled to vote by absentee ballot in New Mexico for Federal offices. This would be true for the reason that the Legislature has not yet convened following the termination of the period of war.

However, it must be kept in mind that what the Legislature conferred upon the military personnel by the 1944 New Mexico law, the Legislature could subsequently take away. It is to be noted that during the 1951 session, our Legislature again amended Section 56-319(12), N.M.S.A. That section now reads as follows:

"No ballot may be received or counted, which is not cast in the polling place by the qualified voter in person."

This is precisely the way it read before the 1944 amendment.

A legislature is presumed to enact legislation for a definite purpose. One must look to all the circumstances to determine the legislative intent. It is apparent that the Legislature, in amending Section 56-319(12) during 1951, could not have had in mind any question of absentee voting by civilian personnel. It follows, therefore, that the Legislature had in mind absentee voting by military personnel since they are the only class of voters whose rights could be affected by the 1951 amendment.

While no outright repeal of Section 56-319(12) as it existed prior to the 1951 amendment is found in the amendment, it is well settled law that statutes will be deemed to be repealed if the latest expression of the Legislature is repugnant to an earlier declaration. The earlier declaration of the Legislature conferred a right upon military personnel to vote by absentee ballot for Federal offices. That legislation could in no event confer this right upon civilian personnel by reason of the Constitutional prohibition. {237} No amendment to Section 56-319(12) was required to enunciate the law that civilian personnel could not vote by absentee ballot in New Mexico for any candidate for any office.

Since the statute was amended, however, the only conclusion that can be reached is that the Legislature, in amending the law to require all voters to be physically present at the polls, was repealing the 1944 statute conferring the absentee ballot privilege upon military personnel.

Therefore, it is my opinion that at the present time the right to vote by absentee ballot for either State or Federal offices is not possessed by either civilian or military personnel in New Mexico.

Attorney General Opinion No. 5515, dated March 26, 1952, stated that military personnel had the right to vote by absentee ballot for candidates for Federal offices. That opinion was predicated upon the misconception that proposed legislation, presently pending before Congress, had in fact become law. We have recently learned that this legislation has been in house committee since February 4, 1952. We believe that the proposed law is aimed at remedying the absentee voting question so far as military personnel are concerned.

I trust that this opinion fully answers your inquiry.