

## Opinion No. 56-6475

June 18, 1956

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Lotario D. Ortega, Assistant District Attorney, First Judicial District, Gallup, New Mexico

You request our opinion as to whether or not we would approve the purchase of McKinley County Airport Bonds by the State Treasurer where the following factual situation exists:

Total vote cast on the bond issue question was 1,539, with 967 for and 572 against. The county commissioners acting as a Canvassing Board discovered that 701 of those persons voting on the question had not paid McKinley County property tax in 1955 as shown by the tax roll. It was further shown that in one election district the election officers had not submitted to any of the persons appearing to vote a ballot on the bond issue question. In another election district some persons who might be qualified were not permitted to vote.

In our opinion a reasonable doubt exists as to the validity of the bond election, and thus in accordance with accepted practice of bond counsel we feel compelled to resolve the doubt against the authority to issue the bonds.

Election irregularities which do not affect the results thereof will not invalidate the election, and this principle has been applied to irregularities both in the reception of illegal or improper votes, and in the exclusion of qualified voters from the polls: McQuillin, *Municipal Corporations*, 3d Ed. Sec. 40.14 and 18 Am. Jur. 331, *Elections*, Section 225. The receiving of illegal or improper votes and the failure to receive qualified votes will not alone vitiate an election. It must be shown affirmatively in order to overturn the declared result that the wrongful action changed it. *Sargent vs. Santa Fe*, 24 N.M. 411, 174 Pac. 424. (Also see *Albuquerque vs. Water Supply Co.*, 24 N.M. 368, 174 Pac. 217, 221). That some of the voters were not qualified is immaterial where the necessary majority exists without counting such votes. *Epping vs. Columbus*, 117 Ga. 263, 43 S.E. 803, 812. Where, however, the number of votes in question because of an irregularity is unknown or greater than the majority by which the election carried, courts have held such elections invalid. *Martin vs. Boyle*, 124 Colo. 289, 237. Pac. 2d 110; *State ex rel Dunbar vs. The Proposed Toll Gate Sanitation District*, (1953 Colo.), 261 P. 2d 152.

In an election contest an illegal voter can be forced to testify how he voted. He is not entitled to have his ballot remain secret as in the case of a voter casting a legal ballot. *People vs. Turpin*, 49 Colo. 234, 243, 112 Pac. 539. Thus, illegal votes cast for the bonds and illegal votes cast against the bonds can be deducted from the total votes cast for and against the bonds, both legal and illegal, to determine the total valid votes

cast for and against them. The trial court in the Santa Fe case specifically found that the illegal votes cast did not affect the election results. The McKinley County situation considered by you is somewhat different.

I am informed that the ballots used at the election were numbered; therefore it would be a simple matter in a contest proceeding to remove the ballots of those persons who the court may determine were not qualified to vote on the question. Thus, the expense and inconvenience of calling persons to testify could be avoided.

Evidently affirmative evidence exists that a number of qualified voters were denied the right to vote on the bond question submitted at the election and that 701 illegal votes were received. Presumably no evidence exists, however, as to how many illegal votes were cast for the bonds and how many were cast against them. A total of 967 votes was cast for the bonds and 572 against them. If a substantial majority of the 701 illegal votes were cast for the bonds the remaining legal votes for the bonds could be less than the remaining legal votes against them, in which case the bond question will have failed to have carried. Further, a substantial majority of those persons who were denied the right to vote upon the bond question might have voted against them. This factor makes the approval of the bonds by the electors even more questionable. Thus, we would feel compelled to decline approving them. Sufficient irregularities apparently exist as possibly to affect the election results and the "purity of the ballot box."

If you follow the procedure of removing the illegal votes by contest procedure, it may well be that a sufficient majority will exist to permit us, under the doctrine of the cases and authorities above cited, to approve the bonds. It would be our suggestion that such procedure be instituted and the question again resubmitted to us after that has been done.

We will be glad to be of service in any way possible in whatever legal proceedings may be proper.