

## **Opinion No. 58-114**

June 2, 1958

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

**TO:** Honorable Natalie Smith Buck, Secretary of State, Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

Pursuant to § 3-9-15, N.M.S.A., 1953 Compilation, money posted for recounts after a general election shall be refunded if such recounts change the result of the election.

Does this principle apply equally in the case of recounts demanded and held after a primary election, as per § 3-11-63?

#### CONCLUSION

No.

### **OPINION**

#### ANALYSIS

Section 3-9-15, N.M.S.A., 1953 Compilation, being a section of the general election laws, provides:

"Any applicant for such recount upon applying therefor shall deposit with the state canvassing board fifty dollars (\$ 50.00) in cash, or a sufficient surety bond in an amount equal to fifty dollars (\$ 50.00), for each precinct or election district for which a recount is demanded as security for the payment of the costs and expenses of such recount in case the result of such recount is not sufficient to change the result of the election; if it shall appear that error or fraud sufficient to change said result has been committed, then the costs and expenses of such recount shall be paid by the state upon warrant issued by the state auditor supported by voucher of the state canvassing board; but if no error or fraud shall appear sufficient to change the result then the costs and expenses for such recount shall be paid by the applicant. Said costs shall consist of mileage of the sheriff in serving summons and fees and mileage of election officers, at the same rates allowed witnesses in civil actions, but if the recount shows that error or fraud has been committed by election officers in any precinct or election district they shall not be entitled to such mileage or fees."

We believe the clear and logical inference to be drawn therefrom is that a refund shall be given if the result is changed. The statute is not restricted to mere directions about bookkeeping.

But does this principle apply in respect to § 3-11-63, N.M.S.A., 1953 Compilation, 1957 Supplement? It deals with recounts after primaries, and provides:

"Any candidate of any party for nomination to any office to which this act (3-11-36 to 3-11-68) applies, having reason to believe that any error or fraud has been committed by the election officials of any polling places in counting or tallying the ballots or certifying the results thereof, whereby the results of the election in such polling place were not correctly determined or certified, shall have the right to have the ballots cast in such polling place for and against such candidate recounted and the result in such polling place redeclared and recertified, if such candidate so considering himself aggrieved as hereinabove set out, shall within five (5) days after the issuance of the certificates of nomination in the case of precinct or county offices and within ten (10) days after the issuance of the certificates of nomination in the case of all other offices file with the county clerk, who shall immediately notify the members of the board of county commissioners, acting as a canvassing board, his petition therefor, setting forth the particular polling place or places in the county in which such error or fraud was committed, accompanied with the sum of ten dollars (\$ 10.00) for each polling place in which such recount is sought; all moneys so paid in shall be placed in the election fund; Provided, that such candidate must accompany each such petition with at least thirty dollars (\$ 30.00), although only one (1) or two (2) voting divisions are sought to be recounted.

It shall thereupon be the duty of the board of county commissioners acting as a canvassing board, within three (3) days thereafter, to open the ballot boxes of said polling place and recount and retally and recertify the result of the primary in said polling place, as to the particular office affected, and the result of said recount shall be certified by said board of county commissioners acting as a canvassing board. All candidates affected by such recount shall at all times, have the right to be present at such recount in person and by attorney and such clerical help as he may desire for his own use.

In the event of a recount of ballots cast for any **office** other than a county or precinct office, the said board of county commissioners acting as a canvassing board, shall certify the number of ballots cast for each candidate whose office is so recounted in said county as shown by the said recount to the state canvassing board, and the state canvassing board, shall be bound thereby. This provision shall be mandatory, and may be enforced by mandamus.

It shall be the duty of the state canvassing board to issue its certificate of nomination as to all offices other than county or precinct offices in accordance with the results of said recount, and for the purpose of examining the returns, the state canvassing board shall meet within fifteen (15) days after said election and shall canvass the returns of such recount made by the several county canvassing boards as hereinabove provided.

In the event notice is filed with such state canvassing board that the certification as to the recount of ballots has not been returned from any county, it shall be the duty of the state canvassing board to remain in session, adjourning from day to day until the returns from such county are before it, and for this purpose may employ messengers to procure said returns and return them to it when, in its judgment, such messenger is necessary. Such state canvassing board shall certify the results as shown by the returns from the several counties as amended by such recount."

Not only is a different procedure contemplated in the latter statute, but by no stretch of the imagination is a refund authorized.

Of course, § 3-11-49, N.M.S.A., 1953 Compilation, 1957 Supplement, does provide that the provisions of law applicable to general elections shall govern primary elections, unless the general election provisions conflict with the primary election laws. We think such conflict, within the evident meaning of § 3-11-49, obtains here. Accordingly, § 3-11-63 governs. It does not authorize refunds.