

Opinion No. 62-63

April 25, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General L. D. Harris, Assistant Attorney General

TO: Mr. John Block, Jr., Chairman State Corporation Commission, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does Section 3-3-30, N.M.S.A., 1953 Compilation (P.S.) apply in primary elections?
2. May the Democratic or Republican poll clerk insist that he be allowed to go into the voting booth with all voters, regardless of party affiliation?
3. Under Section 3-11-48, N.M.S.A., 1953 Compilation (P.S.)
 - a. Do the watchers have to be voters in the precinct in which they are designated?
 - b. Exactly what are the duties of the watchers?
 - c. Do they have the right to be inside the place where the voting is being conducted?
 - d. What is meant by being present at the polls?
 - e. Exactly what are their duties in the counting of the ballots, and what may they do if they notice a violation?
 - f. If the watchers are denied the right of going into the voting place, are the persons so denying them the right subject to the penalty provided in the above section?

CONCLUSIONS

1. Yes.
2. See analysis.
3. a. through f. see analysis.

OPINION

ANALYSIS

Some of your above questions have been answered by prior Attorney General Opinions, but in the interest of clarity we will again set out the holding of this office, in addition to answering the other questions which you have presented.

You ask if § 3-3-30 is applicable in primary elections, and we call your attention to § 3-11-49, N.M.S.A., 1953 Compilation (P.S.), a portion of which we will quote.

". . . All provisions of law governing general elections in this state, not in conflict herewith, are hereby made applicable to and shall govern primary elections . . ."

We further call your attention to § 3-4-24, N.M.S.A., 1953 Compilation, which provides in part,

". . . the provisions of all other laws relating to the conduct of elections or primary elections shall so far as practicable apply to the conduct of elections and primary elections where voting machines are used unless otherwise provided . . ."

Therefore, the provisions of § 3-3-30, N.M.S.A., 1953 Compilation, (P.S.) apply in primary elections whether the vote is cast by ballot or voting machine.

2. Your second question asks whether the Democratic or Republican poll clerk can insist upon going into the voting booth with all voters, regardless of party affiliation, and as you have used the term "all voters" we will assume you do not mean only those who have asked assistance. We refer you to § 3-3-29, N.M.S.A., 1953 Compilation, which states:

". . . except when assistance may be **required** for marking a ballot as herein provided, **not more than one (1) person shall be permitted to occupy any booth or compartment at the same time**, and no person shall remain in or occupy a booth or compartment longer than may be necessary to prepare his ballot and in no event longer than ten minutes."

You will note that this will be specifically applicable to the situation where the paper ballot is utilized. We will call your attention to § 3-14-16, N.M.S.A., 1953 compilation (P.S.) which provides for instructions to voters using the voting machine and provides a different time limit, but further and most importantly provides that after finishing the instructions, the two assisting the prospective voter will retire from the voting machine, thus leaving only the voter.

As pointed out above, the only occasion where any one but the voter is allowed in the voting booth is where said voter asks assistance, as provided for in § 3-3-30, supra.

3. You have asked for a construction of § 3-11-48, N.M.S.A., 1953 Compilation (P.S.) relative to the following questions:

a. Do the watchers have to be voters of the precinct of which they are designated?

We do not find any requirement in this statute as to the residence of the watchers that are provided for in this section. We will point out that there is no conflict in this section and the sections applicable to watchers in general elections and, on the basis of § 3-11-49, N.M.S.A., 1953 Compilation (P.S.), see § 3-3-16, N.M.S.A., 1953 Compilation (P.S.) which provides that watchers shall be legal residents of the precinct in which they serve.

Primary election statute sets no watcher qualification: General election statute does. Thus, under § 3-11-49, supra. would seem that watcher need be a legal resident of precinct.

b. You have asked the duties of the watchers, and we do not find in the above section, § 3-11-48, supra., any specific duties out-lined for watchers, and we must therefore go to the provision applicable to general elections.

We refer you to § 3-6-3, N.M.S.A., 1953 Compilation, where we find that the watchers shall not handle the ballots or poll books or take any part in the tallying or counting of the votes. In the case of voting machines, § 3-4-14, N.M.S.A., 1953 Compilation, provides that the watchers shall be permitted to be present from the time the election officials convene on election morning until the completion of the canvass after the closing of the polls. They shall be permitted to carefully examine each voting machine before the polls are declared open and to compare the number on the metal seal and the number on the counters, and see that all ballot labels are in their proper places, and that the machine, or machines, are in every way ready for voting at the opening of the polls.

Further, § 3-4-19, N.M.S.A., 1953 Compilation (P.S.) provides that election officials, after closing the polls and doing other specified duties, shall open the counting compartment in the presence of the watchers, giving full view of all the counter numbers and that the presiding officer shall, under the scrutiny of the watchers, in the order of the offices, if their titles are arranged on the machine, read and announce in distinct tones the designating number or letter on each counter for each candidate's name, the results as shown by the counter numbers and shall then read the votes recorded for each office on the regular ballots.

c.-d. § 3-11-48, supra. provides the watchers shall be entitled to be present at the polls. Being present at the polls, which you ask in question d., is tied-in with their right to be inside the polling place inasmuch as the usual interpretation of being present is to be at or inside the area concerned.

e. This question has been answered partially by the duties as outlined in your question b., with specific reference to the counting of the ballots. We are unable to answer your question as to what the watchers should do if they note a violation, because we do not know exactly what kind of violation you have in mind, or whether the action you are thinking about would be a violation. Any irregularities should be reported to this office for investigation.

There must be someone to whom a watcher should report a possible violation, e.g., election judge. See § 3-3-38 to 40, N.M.S.A., 1953 Compilation (P.S.). Violation of penal provisions reported by filing affidavit thereof with Attorney General, § 3-8-32, N.M.S.A., 1953 Compilation (P.S.).

f. The penalty provision states that any person denying the watchers so designated the right to be present at the polls or denying them the right to witness the counting of the ballots shall be deemed guilty of a felony. It is applicable to either or both acts outlined above, denying the right to be present at the polls **or** denying the right to be present at the counting of the ballots.