

Opinion No. 62-82

July 5, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General J. E. Gallegos, Assistant Attorney General

TO: Mrs. Betty Fiorina, Secretary of State, Santa Fe, New Mexico

QUESTION

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1. Are write-in votes allowed in the general election for an office when no candidate was nominated for that office in the primary election?
2. If write-in votes are allowed for such an office, how are they cast on a voting machine?

CONCLUSIONS

1. Yes.
2. See analysis.

OPINION

ANALYSIS

The specific facts giving rise to the questions are that in Springer there was no candidate of either party who ran in the primary election for the office of constable. Under the New Mexico Election Code, as construed in **State v. Bd. of County Comm'rs of Lincoln County**, 46 N.M. 472, 131 P. 2d 278, there will thus be no candidate for that office on the ballot in the general election. Voting machines will be used in the election.

Section 3-3-6, N.M.S.A., 1953 Compilation, makes it explicit that in the general election a voter shall be able to cast a write-in vote "for any person . . . for any office." This right is not hampered by the fact that voting is on machine, as witness the provision in Section 3-4-17, N.M.S.A., 1953 Compilation.

We are of the opinion that the failure of the primary election to nominate a candidate for any office has no derogatory effect on the allowance of write-in votes in the general election. In fact, where no candidate appears on the ballot the write-in vote becomes of greater importance. Were it not true that write-in votes are permissible, then how would be fulfilled the mandate of the Legislature that various officials are to be elected at the

general election? (See § 36-1-1, N.M.S.A., 1953 Compilation, with respect to constables.)

Notwithstanding that no candidate for an office appears on the ballot, the name of the office should and does, we are informed, appear in the appropriate place on the voting machine. This is proper and for authority and applicable reasoning we point to Attorney General Opinion No. 4160, September 25, 1942. There the question was whether a ballot should be printed for the offices of justice of the peace and constable in a certain precinct where there were no candidates. It was concluded that it should. The analogy between placing the office on the paper ballot and on the voting machine is obvious.

We are informed that the voting machines used in this state -- in compliance with the law (§ 3-4-2, N.M.S.A., 1953 Compilation) -- have a facility for write-in votes. Numbered slots are found at the upper part of the machine which correspond with the columns containing the elective offices. To cast a write-in vote the voter raises the slide and writes the name of his choice.

The write-in is recorded on a paper roll which is in the machine and numbered to correspond with the office columns. When the voter pulls the lever which records his vote, the roll turns so it is blank for the next voter. After the election the rolls are removed from the machine, the votes are tabulated and the results placed on the return sheets.

We observe that many votes have already been cast in general elections in this state by a write-in on a voting machine.