

Opinion No. 63-122

September 23, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Senator Gordon E. Melody c/o Inez Gill /- Legislative Finance Committee State Capitol Building Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does Chapter 79, Laws of 1963, which amends section 3-4-28, New Mexico Statutes Annotated, make it mandatory that voting machines be provided in precincts or voting divisions in which 101 but not more than 200 votes were cast in the previous general election?
2. How many paper ballots must be provided in those precincts or voting divisions where voting machines are used?

CONCLUSIONS

1. Yes.
2. No specific number required. The number to be provided is within the discretion of the County Clerk but the supply of paper ballots should be sufficient to cover any emergency.

OPINION

{*277} ANALYSIS

Question 1. Before being amended by the 1963 Legislature, the law in question, Section 3-4-28, N.M.S.A., 1953 Compilation, provided for voting machines to be placed in precincts or voting districts in which there were 200 or more ballots cast in the previous general election. The 1963 amendment, Laws 1963, Chapter 79, Section 1, changed this requirement. Now, any precinct or voting district having "101 but not more than 500" ballots cast in the previous general election is required to have at least one (1) voting machine and under this 1963 amendment, the districts and precincts mentioned in your first question are included. This is a mandatory requirement. The legislative intent is quite clear since this law is known and cited as "The Compulsory Voting Machine Act." (See Section 3-4-27 and 3-4-28, N.M.S.A., 1953 Compilation (P.S.))

Question 2. The laws governing the conduct of elections in precincts or districts not required to use voting machines, apply, "so far as practicable" to the conduct of

elections where voting machines are used "unless otherwise provided." Section 3-4-24, N.M.S.A., 1953 Compilation. And in the absence of a specific statute prescribing the amount of ballots required for precincts using voting machines, this office in 1954 under the authority as provided in Section 3-4-24, supra, directed the County Clerks to furnish an amount of ballots equivalent to 10% of the number of electors legally registered in their precincts or voting division. **Attorney General Opinion No. 5920-54.** This 10% formula is no longer applicable, however, because it was based on Section 3-3-9, N.M.S.A., 1953 Compilation, which was a general statute setting forth the percentage of ballots required for **all** election districts and this law has since been repealed. Upon the repeal of Section 3-3-9, supra, the Legislature in 1957 enacted Section 3-3-9.1, N.M.S.A., 1953 Compilation (P.S.) which does set forth specific ballot requirements but {*278} which is expressly limited to precincts and voting divisions where voting machines are not required and in view of Section 3-4-24, supra, does not apply in this instance.

At the present time the only statute referring to printed ballots which must be furnished to the voters in precincts or voting districts which are required to use voting machines is Section 3-4-18, N.M.S.A., 1953 Compilation. This law requires the County Clerk to provide emergency ballots to the voters in the event a voting machine breaks down while being used and which cannot be replaced or repaired within a reasonable length of time. However, this statutory provision gives no indication as to the amount or number of emergency ballots to be furnished. It simply provides that "such ballots shall be in the form and manner now prescribed by law" and used only in an "emergency."

Therefore, we conclude that the county clerks have discretion in this matter. In the performance of their statutory duty which is to provide printed ballots for each election, Section 3-3-6, N.M.S.A., 1953 Compilation (P.S.), the County Clerks may provide a number which is deemed sufficient to cover any "emergency" as defined under Section **3-4-18**, supra. We hasten to add, however, that this discretionary power should be exercised with the utmost foresight and wisdom. We agree that it would be desirable to purchase a minimum number of emergency ballots and use the remainder of the fund set aside for such purpose to defray the cost of the acquisition of voting machines. However, such economic considerations should in no way interfere with or jeopardize in any manner the adequate preparation of a voting facility.

Thus the county clerks should insure that an adequate supply of printed ballots are available in the event the voting machines become out of order and cannot be repaired or replaced within a reasonable time on election day. In such circumstances the voters should have immediate access to a printed ballot enabling them to vote on that day and within the time limit as prescribed by law. Otherwise the electorate might be prohibited from exercising this constitutional right since in all probability an election can neither be legally delayed or postponed. **Davy v. McNeil**, 31 N.M. 7, 28, 240 Pac. 482; **Roswell Municipal School District No. 1 v. Patton**, 40 N.M. 280, 283, 58 P. 2d 1192, 29 **C.J.S.** 103, 104; **Attorney General Opinion No. 6532-56.**

By: George Richard Schmitt

Assistant Attorney General