Opinion No. 70-36

April 7, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Honorable Fidel |Chief_ Gonzales New Mexico State Representative 2313 Hot Springs Blvd. Las Vegas, New Mexico 87701

QUESTIONS

FACTS

Under the city charter for the consolidated City of Las Vegas, New Mexico, the City Council is composed of eight councilmen. The City is divided into four wards so as to include within ten per cent of one-fourth of the total number of qualified electors in each ward. Candidates must file for a particular ward position without regard to residence within the ward. Two councilmen from each ward are elected at large by a vote of all qualified electors in the city. In the recent municipal election in Las Vegas, one candidate received a plurality of votes at large for his particular ward position and was elected to the council for that position even though he received fewer votes than did other candidates for other ward positions.

QUESTIONS

Is this election procedure valid?

CONCLUSION

Yes.

OPINION

*{*64}* **ANALYSIS**

Candidates in the Las Vegas election filed for a particular ward position, pursuant to Section 14-8-8 (A.) (2), N.M.S.A., 1953 Compilation. Section 14-8-13 (B.), N.M.S.A., 1953 Compilation, directs:

"If more than one candidate is to be elected to an office, and the candidates are not running for a designated position or term, the candidates, in the number to be elected, receiving the largest pluralities shall be elected."

After the vote at large, the two candidates with the greatest number of votes for each ward position were declared elected as councilmen. The Las Vegas election procedure complied with the above statutory directives.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that the vote of each voter be given the same weight as that of other voters. **Reynolds v. Sims,** 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The United States Supreme Court has expressly reserved the question of whether the "one man-one vote" rule applies to city council elections. **Sailors v. Bd. of Education,** 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967). It has been held uniformly by the lower federal courts, however, that this rule does apply to the election of a city council. **Davis v. Dusch,** 361 F.2d 495 (4th Cir. Va. 1966), rev'd on other grounds, 387 U.S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656 (1967); **Ellis v. Baltimore,** 352 F.2d 123 (4th Cir. Md. 1965); **Blackie v. Wagner,** 258 F. Supp. 364 (D.C. N.Y. 1965). In light of the *{*65}* recent decision of **Hadley v. Jr. College Dist.,** U.S. Sup. Ct. No. 37, Oct. Term, 1969, issued February 25, 1970, where the Court applied the "one man-one vote" rule to local elections, it seems apparent that this rule does apply with equal vigor to an election for city council.

The holding in **Hadley** is dispositive of the question arising from the Las Vegas election.

"We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."

The constitutional test under the Equal Protection Clause is whether there is "invidious discrimination." **Reynolds v. Sims, supra.** The **Hadley** holding above emphasizes that this test must be applied first to the vote involved and secondly to the *manner of apportionment* of the representation.

Looking to the vote involved in the Las Vegas election, the question is whether the vote of each voter was given the same weight as that of other voters. Since all councilmen were elected at large, the right of each voter was given equal treatment. **Davis v. Dusch,** 387 U.S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656 (1967). Each voter was given the right to vote for all four ward positions. This procedure does not amount to invidious discrimination under the above United States Supreme Court decisions.

Looking next to the manner of apportionment of the representation by the councilmen, the constitutional standards do not require mathematical exactitude, but a plan that does not automatically discriminate in favor of certain wards is required. **Hadley v. Jr. College Dist., supra.** The Las Vegas City Charter contemplates that the number of electors be counted and determined every tenth year. This decennial determination complies with the minimum constitutional standards. **Reynolds v. Sims, supra.** The number of qualified electors in each ward must include within ten percent of one-fourth of the total number of all qualified electors in the city. This numerical apportionment is within the minimum constitutional standards. **Avery v. Midland County,** 390 U.S. 474,

88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968). The apportionment scheme for the election of city councilmen in Las Vegas does not automatically discriminate in favor of certain wards. This scheme does not lead to nor does it amount to invidious discrimination.

Article V, Section 13 of the New Mexico Constitution requires that:

"All . . . municipal officers shall be residents of the political subdivisions for which they are elected or appointed."

The councilmen elected in the recent Las Vegas election were required to reside in the municipality, but there was no requirement that they reside in the ward for which position they ran. These requirements and this procedure comply with New Mexico constitutional standards. **Gibbany v. Ford,** 29 N.M. 621, 225 P. 577 (1924); Attorney General Opinion No. 67-14, issued January 24, 1967.

By: James C. Compton, Jr.

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