

Opinion No. 70-90

December 7, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Senator Emmett C. Hart P.O. Box 782 Tucumcari, New Mexico 88401

QUESTIONS

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1. Under what conditions and how can a person in a hospital, nursing home or private home vote absentee?
2. Are county and state officers or their deputies free to campaign for re-election or for their deputies while on duty in their office?
3. During registration and absentee voting at the courthouse, is it lawful for candidates to pass out cards for some candidate in the courthouse?

CONCLUSIONS

1. See Analysis.
2. See Analysis.
3. No, see Analysis.

OPINION

{*153} ANALYSIS

1. Sections 3-6-1 through 3-6-23, N.M.S.A., 1953 Compilation, the "Absent Voter Act", provides for absentee voting in New Mexico. Section 3-6-3 of that Act states that:

Any voter, any federal voter or any federal qualified elector who cannot be present at his precinct poll on election day, because of illness, injury or disability, or who will be absent from his county of residence because of his duties, occupation, business or vacation require him to be elsewhere, or who cannot attend his precinct poll because of the tenets of his religion, may vote by absentee ballot for all candidates and on all state-wide questions appearing on the ballot at his precinct poll as if he were able to cast his ballot in person at the precinct poll.

The above language clearly enables any person confined either to a hospital, nursing home or private home because of illness or disability to vote by absentee ballot.

The "Absent Voter Act" is quite explicit in setting forth the procedure to be followed in absentee voting. The first step is absentee ballot application. Section 3-6-4, **supra**. This application must be made to the county clerk of the county in which the voter resides on a form prescribed by the Secretary of State. This application shall be subscribed and sworn to by the applicant before a person authorized to administer oaths. Section 3-6-4, **supra**.

The county clerk, upon receipt of the application must determine if the applicant is a qualified voter (registered). If he is determined to be such, the applicant's name is removed from his precinct's registration binder and filed alphabetically in a special binder for absentee voters.

Absentee ballots, envelopes, and instructions {**154*} are mailed to voters not later than ten [10] days prior to the date of election. Section 3-6-5(G), **supra**. Once the absent voter ballot is issued to an individual, he is prohibited from voting in person at his precinct poll. Section 3-6-15, **supra**.

Section 3-6-9(A), **supra**, specifies the manner of voting:

Any person voting under provisions of the Absent Voter Act [3-6-1 to 3-6-17] shall secretly mark his ballot, place it in the official inner envelope and securely seal the envelope. He shall then place the official inner envelope inside the official outer envelope and securely seal the envelope. The person voting shall then fill in the form on the reverse of the official outer envelope and subscribe and swear to it before a person authorized to administer oaths.

Section "B" of this provision then states that voters shall either deliver or mail the official envelope to the county clerk of the county of residence. These ballots will be destroyed unless received by the clerk before noon of the day before the election. Section 3-6-10, **supra**.

Upon completion of the election, the absentee voter's Affidavit of Registration will be removed from the special absentee voter binder and returned to the registration binders for the proper precincts. Section 3-6-17, **supra**. This procedure necessitates that the voter reapply for an absentee ballot for each election.

2. The State "Personnel Act" [Sections 5-4-28 to 5-4-46, N.M.S.A., 1953 Compilation], sets forth a list of "prohibited acts." Section 5-4-42(F), **supra**, states:

"No **employee or probationer** shall engage in partisan political activity while on duty." (Emphasis added.)

This language is directed to employees only and from the wording of Section 5-4-42(F), **supra**, the legislature did not choose to prohibit officers from campaigning in any manner for themselves or others while on duty in their office. Whether a deputy would

be subject to this prohibition would depend on whether or not he held an exempt position.

By existing statute, the acts of county officers and their employees are not subject to the "Personnel Act". Section 5-4-31, **supra**. Further, we find no other provision in our laws which would prohibit these individuals from campaigning while on duty in their offices except as will be discussed below.

3. The answer to number 2, **supra**, applies to that portion of your question regarding candidates passing out cards for some candidate in the courthouse. Regarding candidates passing out cards for some candidate in the courthouse during absentee voting, the State Election Code declares that "whoever commits electioneering too close to the polling place is guilty of a misdemeanor." Section 3-20-14, N.M.S.A., 1953 Compilation. This same section states that:

Electioneering too close to the polling place consists of any form of campaigning on election day within one hundred [100] feet of the building in which the polling place is located, and includes the display of signs or distribution of campaign literature.

The Absent Voter Act provides the method for processing absentee ballots and for the method of mailing absentee ballots, Section 3-6-5, **supra**. This procedure can take place anytime between forty-two [42] days before the election until 5:00 **P.M.** on the Thursday immediately prior to the date of the election. See Section 3-6-5, **supra**, and Section 3-6-7, **supra**. The effect of these provisions is to create an "election day" within a county courthouse during the above period. Since the Election Code applies to general elections, primary elections, state-wide special elections, and elections to fill vacancies in the office of congressional representatives, (Section 3-1-18, N.M.S.A., 1953 Comp.), these provisions also apply to the Absent Voter Act if the absentee voting is for such elections. The above cited statute on electioneering [3-20-14, **supra**] therefore prohibits any person from passing {**155*} out cards for candidates in the courthouse during application for or absentee voting from forty-two [42] days before an election until 5:00 P.M. of the Thursday before an election.

By: Leila Andrews

Assistant Attorney General