

Opinion No. 71-19

February 10, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Betty Fiorina Secretary of State Legislative-Executive Building
Santa Fe, N. M. 87501

QUESTIONS

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The following questions have arisen concerning canvassing the recent school board election:

- (1) If a ballot was marked with a check ([checkmark]) instead of an X, is the ballot spoiled?
- (2) If there was overvoting for one position and the other two positions were correct, is the entire ballot spoiled or just the position that was overvoted?

CONCLUSIONS

- (1) Yes.
- (2) The entire ballot is spoiled.

OPINION

{*30} ANALYSIS

Provisions applicable to school district elections are set forth at Sections 77-5-7 through 77-5-20, N.M.S.A., 1953 Comp. Because there is no section within this Article dealing with the marking of paper ballots, the Election Code [§§ 3-1-1 through 3-20-21, N.M.S.A., 1953 Comp.] must be used as authority for determination of the above two questions. § 77-5-13(B), *supra*. The pertinent sections are:

"Paper Ballots -- Marking. -- The voter in preparing a paper ballot . . . shall . . . [mark] a cross (X) in the box immediately to the right of the name of every candidate or person for whom he desires to vote, and his vote shall be considered as having been cast only for the candidate or person opposite whose name the cross has been marked." § 3-12-19(C), N.M.S.A., 1953 Comp.

"Paper ballot -- Identification marks. -- A voter shall not place any mark on his paper ballot by which it may be afterwards identified as one voted by him." § 3-12-22, N.M.S.A., 1953 Comp.

(1) The New Mexico Supreme Court in **Telles v. Carter**, 57 N.M. 704, 262 P.2d 985 (1953), determined that under such statutes, an elector can vote **only** by marking a cross [X] with pen and ink or indelible pencil and that no elector shall place any mark upon his ballot by which it may afterwards be identified. Therefore, a ballot marked with a check [[checkmark]] inside the square opposite the name of a candidate must be rejected. The court reasoned that:

". . . we can see no end to the problems that would be raised by an opposite conclusion. If a check mark is sufficient, why not any other mark which appeals to the individual voter. Those burdened with the task of tallying ballots would be faced, as each vote was counted, with a judicial as well as a mathematical problem. In addition, such a decision would destroy one section of our election law which is vital to the protection of the ballot, namely, Sec. 56-501, supra, [§ 3-12-22] enacted for the purpose of eliminating from the ballot any distinguishing marks through which the secrecy of the ballot would be lost."

Relying upon this decision, therefore, we conclude that if a ballot is marked with a check [[checkmark]] instead of a cross [X], the ballot is spoiled. See **Romenesko v. Barber**, 79 N.M. 83, 439 P.2d 919 (1968); **Hicks v. Lucero**, 72 N.M. 430, 384 P.2d 697 (1963); and **Turner v. Judah**, 59 N.M. 470, 286 P.2d 317 (1955).

(2) Section 3-12-22, **supra**, states that a "ballot" shall have no identifying marks. This mandate, see **Romenesko v. Barber, supra**, along with the reasoning in **Telles v. Carter, supra** is determinative of whether an entire ballot is spoiled because one portion is incorrect.

{*31} Although the **Telles** opinion stressed that each case must be weighed very closely on its own specific facts and on the specific sections of the applicable sections, application of the **Telles** reasoning to the instant question, forces us to conclude that the entire ballot is spoiled when one portion is marked in a manner making it identifiable contrary to Section 3-12-22, **supra**.

Also, it should be noted that the term "ballot" is used in Section 3-12-22, **supra**. In school board elections, designation of separate positions are included on the "ballot." § 77-5-9(C), **supra**. The inclusion of more than one position on a ballot does not result in more than one "ballot." Thus, the only conclusion that can be reached is that if the "ballot" has **any** identifying mark other than the cross [X] for each position it is totally invalid.

Romenesko v. Barber, supra, lends further support to our opinion. One question in that case was whether a ballot marked with "a cross in the square for recall and a single line in the square against recall" was spoiled. The court stating that pertinent provisions in the Election Code are mandatory, concluded that, based on **Telles**, in the interest of

public policy, "secrecy of the ballot is more important than attempting to determine the intention of the voter . . ." Therefore, the ballot was spoiled. As stated above, we agree.

By: Leila Andrews

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