

Opinion No. 72-69

December 13, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Leila Andrews, Assistant Attorney General

TO: Honorable Betty Fiorina, Secretary of State, State of New Mexico, Legislative Executive Building, Santa Fe, New Mexico 87501

QUESTIONS

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Must absentee ballots be provided for voters in special county or municipal elections?

CONCLUSION

No; see analysis.

OPINION

{*113} ANALYSIS

In construing the various absentee voters' laws, the courts continually emphasize the fact that absentee voting is a privilege granted electors and not an absolute right. While most state constitutions contemplate that the franchise be exercised by the elector in person at the appointed polling places, absent voting is an outgrowth of modern social and economic conditions and was devised to accommodate those engaged in military or civil life whose duties as such made it impractical for them to attend their polling places on the day of election, and was "not intended as a convenience for those who absented themselves on account of pleasure of free will, since voting is a public duty which rises above one's personal responsibility." **State ex rel. Whitley v. Rinehart**, 140 Fla. 645, 192 So. 819 (1939).

The types of elections at which absentee voting is permitted are usually specified by the statutes themselves. While apparently no distinction has been made between the general and primary elections, some questions have been raised as to the applicability of absentee voting laws to municipal, special, district and local option and excise elections. However, the result reached in the different cases is primarily determined by the particular language of the absentee voters' law construed or applied. The United States Supreme Court has followed this policy in its opinions concerned with the subject of absentee voting.

McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969), is a case brought by unsentenced inmates awaiting trial

in the Cook County jail who, though they were qualified Cook County electors, could not readily appear at the polls either because they were charged with nonbailable offenses or were unable to post bail. The case tested the constitutionality of an Illinois statute which made absentee balloting available to four classes of persons: (1) those who were absent from the county of their residence for any reason whatever; (2) those who are "physically incapacitated," so long as they present an affidavit to that effect from a licensed physician; (3) those whose observance of a religious holiday precludes attendance at the polls; and (4) those who are serving as poll watchers in precincts other than their own on election day.

Appellants in **McDonald** argued that the Illinois absentee ballot provision violated the Equal Protection Clause of the Fourteenth Amendment. Underlying these contentions was the assertion that since voting rights are involved, there is a narrower scope for the operation of the presumption of constitutionality than would ordinarily be the case with state legislation challenged in the United States Supreme Court.

The court replied that "because of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely scrutinized and carefully confined' with a careful examination especially warranted where lines are drawn on the basis of wealth or race." However, since the distinction made by the Illinois absentee provision was not drawn on wealth or race, and there was nothing in the record to indicate that the statutory scheme had an impact on appellants' ability to exercise the fundamental right to vote, it is thus not the right to vote that was at stake here but a *{*114}* "claimed" right to receive absentee ballots. The court then held that the Illinois failure to allow these individuals the right to vote absentee was not arbitrary.

In recognizing Illinois' right to refrain from making absentee voting available for all voters, the United States Supreme Court appeared to reassert the fact that absentee voting is a privilege rather than a right. The only exception is in the area of presidential elections where Congress has provided uniform national rules for absentee voting. **Oregon v. Mitchell**, 400 U.S. 112, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970). We must therefore look to New Mexico law to determine whether the legislature has granted the privilege to those voting in municipal and county elections.

Chapter VII, Section 1 of the New Mexico State Constitution states that the legislature "may enact laws providing for absentee voting by qualified electors." In accordance with this provision, the legislature has enacted the Absent Voter Act [Sections 3-6-1 to 3-6-17, N.M.S.A., 1953 Comp. (P.S.)]. Section 3-6-3, of this act grants the right to any voter "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 requires him to be elsewhere, or who cannot attend his precinct poll because of the tenets of his religion," to vote by absentee ballot "for all candidates and on state-wide questions"

Thus, absentee voting is provided for in those elections governed by the Election Code. Elections excluded from the Code are:

A. Local school board or local school bond elections;

B. Municipal officer or municipal bond elections, or

C. Special district offices or special district bond or other special district elections.
Section 3-1-19, N.M.S.A., 1953 Comp.

Sections 77-5-21 to 34, N.M.S.A., 1953 Comp. (1971 P.S.), specifically grant the right to vote by absentee ballot in a regular school district election, thereby nullifying the exclusion set forth in Section 3-1-19, **supra**. However, we find no other legislation expressly granting the right to vote by absentee ballot in the area of either municipal or special county elections. See the Municipal Election Act, [Sections 14-8-1 to 16, N.M.S.A., 1953 Comp.]; The Bond Election Act [Sections 11-6-35-40, N.M.S.A., 1953 Comp.]; provisions relating to nonresident municipal electors [Sections 14-29-2 to 4, N.M.S.A., 1953 Comp.].

We must conclude, therefore, that because the opportunity to vote by absentee ballot is a privilege rather than a right -- a privilege granted only by legislative mandate -- where the legislature has not specifically granted the privilege, voting by means of absentee ballots is not permitted.