

Opinion No. 73-38

April 17, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Cecil Cook New Mexico State Representative Box 630 Portales, New Mexico 88130

QUESTIONS

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In a local option election, what is the effect of the ballot boxes being opened and ballots counted before the closing of the polls?

CONCLUSION

See analysis:

OPINION

{*75} ANALYSIS

Elections for local option questions are generally to be conducted in the manner provided by law for general elections within counties or cities, Section 46-3-1(c), N.M.S.A., 1953 Comp., and the votes at said election shall be counted, returned and canvassed as provided for in the case of general elections. Section 46-3-1(d), N.M.S.A., 1953 Comp.

Thus, for a determination of whether or not it is permissible to open ballot boxes and count ballots before the closing of the polls, one must look to the Election Code [Sections 3-1-1 to 3-20-21, N.M.S.A., 1953 Comp.] where the proper method of counting ballots is set forth.

Article 12 of the Election Code indicates the procedures to be followed during an election. Section 3-12-5 states that "when the polls are opened, the presiding judge and the two election judges shall open the ballot box and display it empty to the voters in the polling place. The ballot box shall then be closed and locked, and one key shall be delivered to each of the election judges."

Section 3-12-47 states that the election clerks must certify as to the completion of the election "[i]mmediately upon the closing of the polls and **before the ballot box is unlocked**" (emphasis added); Section 3-12-48 requires the presiding judge to publicly destroy all unused ballots "[i]mmediately upon the closing of the polls and **before any ballot box is unlocked**" (emphasis added); and Section 3-12-51 limits those who may

be present while the votes are counted and tallied. Thus the count and tally must take place at the close of the election when there is no longer a possibility of other persons being present. Further evidence of legislative intent that ballots are to be counted only at the close of the election is found at Section 14-8-10.1(B), N.M.S.A., 1953 Comp. (1971 P.S.), wherein the precinct board is required to "count the votes cast on each question and for each candidate" at "**the close of the polls**" (emphasis added).

However, assuming the ballots were counted during the election rather than at the close of the polls, we must next determine what remedy is available to those questioning this unlawful procedure.

Normally, elections conducted fairly and honestly, where no fraud or illegal voting is shown, will not be set aside. **Walker v. Mechem**, 56 N.M. 529, 246 P.2d 201 (1952); **Wright v. Closson**, 29 N.M. 546, 224 P. 483 (1924); **Carbajal v. Lucero**, 22 N.M. 30, 158 P. 1088 (1916). However, the local option law, Section 46-3-1(d), **supra**, permits recounts in a local option election:

"Except as herein provided, recounts shall be permitted as provided for in the case of candidates for county office in general elections, except that the district judge shall have the same powers in said recount as is provided by law for recounts of municipal elections. Applications for recount may be filed by any person who voted in such election and service shall be made upon the county clerk or city clerk as the case may be."

Therefore, any person who voted in a local option election may file an application with the district court for a recount of that election. The jurisdiction of the district judge in municipal elections is set out in Section 14-8-16, N.M.S.A., 1953 Comp. (1971 P.S.), which provides that the district court shall entertain contests on any question placed on the ballot and that the procedure, "including the recount of ballots," shall be the same as provided in the Election Code for contests of the election of county officers. Sections 3-14-18 to 25, **supra**.

While Section 46-3-1(d), **supra**, suggests that a recount may be the only remedy, (Cf. **State v. Vingard**, 55 N.M. 205, 230 P.2d 238 (1951)) questions arising concerning "error or fraud" committed in counting or tallying ballots or certifying the results of the local option election may also be considered by the court. The person initiating the recount need **not** pay the deposits required in other recount proceedings. Section 3-14-19, **supra**.

You have asked a further question as to residency requirements for voters in a local option election conducted in a municipality. See Opinion of the Attorney General No. 73-35 dated April 9, 1973, for a discussion of that question.

By: Leila Andrews

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