

Opinion No. 75-23

April 1, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Honorable Ernestine D. Evans Secretary of State Capitol Building Santa Fe, New Mexico 87503

QUESTIONS

FACTS

Section 3-4-21, NMSA, 1953 Comp., provides for the biennial purge of voter registration lists. Section 3-4-22, NMSA, 1953 Comp., lists four separate grounds for cancellation of affidavits of voter registration. One ground is the "certain failure of the voter to vote." (Section 3-4-22(D), **supra**). Section 3-4-26, NMSA, 1953 Comp., sets forth the procedures to be followed in determining a voter's failure to vote. If the voter's name does not appear in the pollbook, the board of registration shall **suspend** the voter's affidavit of registration for sixty [60] days pending cancellation after which time it shall be cancelled, unless the voter takes certain action specified by Section 3-4-26, **supra**, during the suspension period.

QUESTIONS

May a voter, whose affidavit of registration is **suspended** for sixty days pending cancellation, nevertheless vote at an election held during the period of suspension?

CONCLUSION

Yes.

OPINION

{*79} ANALYSES

Section 3-4-3, NMSA, 1953 Comp., states:

"The registration of a qualified voter is permanent for all purposes during the life of such person **unless and until his registration is cancelled** for any cause specified in the Election Code." (Emphasis added).

Sections 3-12-10, 3-12-11, and 3-12-37, NMSA, 1953 Comp., make it clear that a person may vote in certain elections unless his name appears on the purged list and a person presenting himself to vote may be challenged if his name appears on the purged list. We are informed by the Secretary of State's Office that the purged list contains only

those persons whose affidavits of registration have been **cancelled**. (There are additional requisites under the foregoing statutes but they are not material to this discussion). Stated differently, a person may vote if his affidavit of registration is suspended, and he is not subject to challenge for that reason.

In our opinion, a person whose affidavit of voter registration is merely suspended may lawfully vote at an election held during the period of suspension. Our reasoning is based primarily on Section 3-4-3, **supra**, which provides that a voter's affidavit of registration is permanent unless and until cancelled. Additionally, we are persuaded that Sections 3-12-10, 3-12-11, and 3-12-37, together with Section 3-4-3, **supra**, provide evidence of clear legislative intent that a voter may vote unless and until his voter registration is cancelled.

Recent United States Supreme Court decisions have held that, in order for a state to impair a person's constitutional right to vote, the state must demonstrate a compelling state interest. See e.g., **Dunn v. Blumstein**, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). Moreover, one state court has held unconstitutional a state statute which provided for suspension and cancellation of registration of all electors who had not voted or taken other specified action for two years. **Michigan UAW Com. Action Prog. Coun. v. Austin**, 387 Mich. 506, 198 N.W. 2d 385 (1972). This case was not decided on the basis of the U. S. Constitution, however.

The trend nationally is to invalidate state restrictions on voting where no compelling state interest is demonstrated. **Dunn v. Blumstein, supra**. The state argued in the **Michigan** case that the suspension and cancellation requirement was necessary to purify the ballot box, but the court rejected this argument. The state's argument in **Michigan** is identical to the argument New Mexico would rely upon to justify suspension and cancellation of voter registration under Section 3-4-26, **supra**, but as indicated by **Michigan**, this is not a compelling state interest which justified that state's restriction on voting. The purpose of this discussion is not to cast doubt upon the constitutionality of Section 3-4-26, **supra**. Rather the **Michigan** case indicates the length to which a court will go to invalidate any impairment, however slight, of a person's constitutional right to vote. **Dunn v. Blumstein, supra**, and the **Michigan** case serve to fortify our conclusion that the State of New Mexico may not impinge upon a voter's right to vote during the period of time in which his affidavit of registration is suspended.

{*80} This opinion specifically over-rules an advisory letter issued by this office to the Secretary of State Office, dated March 11, 1971. We have very carefully considered the issues on both sides of the question and we have concluded that the trend of the law is heavily in favor of our present position. Further, the opinion issued today is completely justified by both New Mexico statutes and by the trend of judicial decision nationally.

By: Ralph W. Muxlow II

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