

## **Opinion No. 80-36**

November 14, 1980

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Reese Fullerton, Assistant Attorney General

**TO:** Honorable George Fettinger, State Representative, Post Office Drawer M,  
Alamogordo, New Mexico 88310

### **ELECTIONS**

Write-in votes with errors in spelling the surname or in stating the correct initials or given name may be counted when it is sufficiently clear that the vote was cast for the person who had publicly solicited support for his write-in candidacy.

### **FACTS**

James Weldon ran as a write-in candidate for district attorney in the twelfth judicial district. The count of the write-in votes indicates that numerous variations of the name James Weldon have appeared on the write-in ballots, e.g., Jim Weldon, Weldon misspelled, only the surname Weldon, different christian names, and initials.

### **QUESTIONS**

May election officials count write-in ballots for James Weldon which have other than "James Weldon" written in the space provided?

### **CONCLUSIONS**

Yes.

### **ANALYSIS**

The case law follows two strong and often-times conflicting principles: 1) preserving the purity of the election system, and 2) effectuating the intention of the electorate. The Supreme Court of New Mexico has provided guidance as to how these principles are to be applied.

### **OPINION**

In **Bryan v. Barnett**, 35 N.M. 207, 292 P. 611 (1930), the Court concluded that the law favors the right to vote and gives effect to the expressed will of the electorate. "It upholds the validity of votes cast and of elections held, without fraud, though irregular." 35 N.M. at 211.

More recently the Court in **Telles v. Carter**, 57 N.M. 704, 262 P.2d 985 (1953) considered a mandatory and specific statute requiring a cross to be placed in the empty square on the ballot. Although holding that a "check" did not count because of the specificity and mandatory nature of the statute the Court stated:

". . . in cases involving such fundamental problems as the right to vote and the preservation of that right for all, each case must be weighed very closely on its own specific facts and on the specific sections of the applicable statutes." 57 N.M. at 710.

The statute applicable to this question, Section 1-12-19 NMSA 1978, provides little guidance. It states: "In general elections, a write-in vote shall be counted and canvassed as if the name written in was printed on the ballot . . ." In **Turner v. Judah, Jr.**, 59 N.M. 470, 286 P.2d 317 (1955), the Supreme Court interpreted a similar statute allowing write-in votes. The record reflected that there were ten persons other than the appellant with {*\*191*} the same surname, one of whom was the appellant's father and all of whom were qualified registered electors of the voting district and qualified to hold the office sought. In view of these facts, the Court limited the countable votes to the following: D. B. Judah, Jr.; Bean's Judah or words of the same sound written thereon; D. B. Juda Jr.; D. B. Judy Jr.; Judah Jr.; B. D. Judah Jr.

What emerges from New Mexico case law is that election cases must be decided on a case-by-case basis with consideration given to the surrounding facts and applicable statutes. The Supreme Court has, however, provided certain guidelines to those with authority to count and canvass votes. The intent of the voter is paramount if it can be discerned and if it does not violate any mandatory statutory provisions. The existence of one or more than one person qualified for the position is a critical factor. By inference, had D. B. Judah, Jr. been the only eligible candidate for the position in question with that surname, then write-ins containing only the name Judah could be validly counted.

It would appear, therefore, that depending upon the pool of possible candidates, write-in votes with errors in spelling the surname or in stating the correct initials or given name may be counted when it is sufficiently clear that the vote was cast for James Weldon. In order to effectuate the intent of the voters, an election official may reasonably presume that the write-in vote was cast for the person who had publicly solicited support for his write-in candidacy and can be counted as such.

## **ATTORNEY GENERAL**

Jeff Bingaman, Attorney General