

October 21, 2008 Overseas Voters

The Honorable Nathan P. Cote
New Mexico State Representative
P.O. Box 537
Organ, NM 88052

Re: Opinion Request - Overseas Voters

Dear Representative Cote:

You have requested our opinion regarding the voting rights of New Mexico residents who are temporarily residing overseas and who are working with the United States Department of Defense. According to your letter, New Mexico county clerks are currently interpreting the law to limit the "voting capability" of these voters. Specifically, these voters are being provided with a ballot with the federal candidates and no local district candidates. Based on our examination of NMSA 1978, Section 1-6-5.1, relevant opinions and case law authorities, and on the information available to us at this time, we conclude that New Mexico residents who are temporarily residing overseas, working with the United States Department of Defense and who are not members of the uniformed services are authorized to receive ballots with federal candidates only.

The issue of whether voters who are residing overseas should be given the opportunity to vote has a storied history.

Recognizing half a century ago that the right to vote of all citizens is an integral part of this country's democratic system, Congress enacted the Federal Voting Assistance Act (FVAA) in 1955. The FVAA was designed to make it easier for military personnel abroad to cast votes through absentee balloting procedures and thereby to prevent their being denied the right to exercise their voting franchise. Under this statute's mandate, every state by 1968 permitted members of the Armed Forces to register and vote in elections through absentee ballots.

Civilian citizens residing abroad were still not enfranchised ... Congress responded to this problem by enacting the Overseas Citizens Voting Rights Act of 1975 (OCVRA). This Act's primary purpose was to "assure the right of otherwise qualified private U.S. citizens residing outside the United States to vote in Federal elections," and it was designed to eliminate the unreasonable residency requirements imposed by so many states.

1 A.L.R. Fed. 2d 251.

In 1986, Congress combined the two laws into the current Uniformed and Overseas Citizens Absentee Voting Act ("Act"), which mandates that "absent uniformed services voters" and "overseas voters" have a right "to vote by absentee ballot in general, special, primary and runoff elections for federal office...." 42 U.S.C.A. § 1973ff-1(a)(1)

(amended through 2004) (emphasis added). The Act also provides several relevant definitions, which have been subsequently adopted into the New Mexico Election Code. See NMSA 1978, § 1-6-2 (amended through 2003). An “overseas voter” is defined as a person in the “uniformed services” or “a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.” 42 U.S.C.A § 1973ff-6(5); NMSA 1978, § 1-6-2(H) (2003). A “uniformed services” person is defined as a “member of a uniformed service on active duty” or his “spouse or dependent.” 42 U.S.C.A § 1973ff-6(1)(A) (2004); NMSA 1978, § 1-6-2(A) (2003).[1] The Act limits “uniformed services” to “Army, Navy, Air Force, Marine Corps, and Coast Guard, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.” 42 U.S.C.A § 1973ff-6(7)(2004); NMSA 1978, § 1-6-2(I) (2003).

The federal law is silent on whether voters who are residing overseas should be given the opportunity to vote for non-federal candidates. The leading federal court case provides: “[T]he question is: Where legally may mobile minions of military members mark ballots for local offices? For the answer, the federal courts are directed to look to the election law of the state where the controversy arises....” See Casarez v. Val Verde County, 957 F. Supp. 847, 849 (W.D. Tex. 1997).

Most, if not all, states authorize uniformed services voters to receive a ballot including federal and non-federal candidates. See, e.g., N.J.S.A. 19:57-25 (1977) (New Jersey); U.C.A. 1953 § 20A-3-405 (1993) (Utah). States, however, are split on whether overseas voters who are not part of the “uniformed services” has the right to vote for non-federal candidates. For example, Washington permits:

Any registered voter of the state or any out-of-state voter, overseas voter, or service voter may vote by absentee ballot in any general election, special election, or primary in the manner provided in this chapter. Out-of-state voters, overseas voters, and service voters are authorized to cast the same ballots, including those for special elections, as a registered voter of the state would receive under this chapter.

RCWA 29A.40.010 (2003) (emphasis added); See also N.J.S.A 19:59-12 (2008) (New Jersey). In contrast, Indiana provides “[a]n overseas voter who resides outside the United States and who is no longer a resident of a precinct in Indiana is only entitled to receive absentee ballots for a federal office under this chapter.” IN ST 3-11-4-8(b) (2005). New Hampshire provides: “Any person who is registered as an overseas voter in any city or town ... may vote in federal elections as provided in this chapter.” N.H. Rev. Stat. §657:3 (1979)

There are two rules of statutory construction that apply to this matter. First, a statute should be read according to its plain, written meaning. See Wilson v Denver, 125 N.M. 308, 314, 961 P.2d 153 (1998). Second, a specific statute will trump a more general statute. See Cordova v. Taos Ski Valley, 121 N.M. 258, 265, 910 P.2d 334, 341 (Ct.

App. 1995). New Mexico law reads: “Any voter may vote by absentee ballot for all candidates and on all questions appearing on the ballot as if he were able to cast his ballot in person at his regular polling place on election day.” NMSA 1978, § 1-6-3(A) (1999). However, there is a more specific statute that applies to overseas voters: “In the distribution of federal absentee ballots ... members of the uniformed services shall receive the entire ballot; and all other overseas voters shall receive only ballots for federal candidates.” NMSA 1978, § 1-6-5.1 (2003) (emphasis added). Consequently, New Mexico residents who are temporarily residing overseas, working with the United States Department of Defense and are not members of the uniformed services are authorized to receive ballots with federal candidates only.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY A. SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

The Honorable Mary Herrera, New Mexico Secretary of State

Lynn Ellins, Doña Ana County Election Director

[1] The New Mexico Election Code also uses the term “federal qualified elector” to refer to uniform services members. See NMSA 1978, § 1-6-3(F) (2003).