

Opinion No. 04-05

November 9, 2004

OPINION OF: PATRICIA A. MADRID, Attorney General

BY: Glenn R. Smith Deputy Attorney General

TO: The Honorable Governor Bill Richardson State Capitol Building, Room 400 Santa Fe, New Mexico 87503

QUESTIONS

1. Whether or not an absentee provisional ballot should be disqualified if the voter placed appropriate identification inside the inner envelope instead of the outer envelope? In other words: When the outer envelope lacks sufficient identification, should the inner envelope be checked for sufficient identification prior to a determination of disqualification?
2. With regard to absentee provisional ballots: May the ballot be qualified in accordance with NMSA 1978, Section 1-12-25.3(B), if the voter provides a valid signature and provides sufficient information to determine voter eligibility?
3. When casting an election-day or early provisional ballot, should a voter be disqualified if a poll worker failed to obtain the voter's signature on both the voter roll and the provisional ballot or can the ballot be qualified by a signature on either, pursuant to NMSA 1978, Section 1-12-25.4(B)?

CONCLUSIONS

1. A first time voter, who registered by mail and had to provide identification with an absentee ballot, only submitted a qualified ballot if the voter's proper identification was contained in the outer envelope.
2. Other than a first time voter, who has registered by mail and must show proper identification before casting a ballot, a voter who cast a provisional ballot shall have that ballot qualified if the voter provided a valid signature and sufficient information on the ballot to determine eligibility pursuant to NMSA 1978, § 1-12-25.3(B).
3. A provisional ballot shall be subject to qualification if the voter casting the ballot validly signed either the voter roll or the provisional ballot.

DISCUSSION

As a preliminary matter, it appears that the first two issues regarding the casting of absentee and provisional ballots are directed at only the first time voter who registered

to vote by mail and who had an obligation to provide a form of identification at or before the time the ballot was cast. This limited class of voter will be referred to herein as an "ID voter."

When voting either absentee or with a provisional ballot, the voter is presented with outer and inner envelopes. The outer envelope is designed to contain information personal to the voter. The inner envelope is designed to contain only the naked ballot reflecting the voter's choices. This procedure ensures the secrecy of the ballot cast, which is the first imperative of the Election Code. "It is the purpose of the Election Code [Chapter 1 NMSA 1978] to secure the secrecy of the ballot, the purity of the election and to guard against the abuse of the elective franchise." NMSA 1978, § 1-1-1.1.

The first question poses the following hypothetical question. If the ID voter failed to provide a proper form of identification in the outer envelope, may the election worker examine the inner envelope containing the naked ballot to determine if perhaps the proper form of identification was mistakenly placed in the inner envelope? The short answer is no.

The Secretary of State is the chief election officer of the state and is authorized to supervise and instruct on the conduct of elections. NMSA 1978, §§ 1-2-1 & 1-2-2. In accord with that directive and the purposes of the Election Code, the Secretary of State has promulgated administrative rule 1-10-22.9(B) NMAC, which provides that if the voter cannot be verified, the unqualified ballot shall not be opened. See 1-12-25.4 (I) ("The secretary of state shall issue rules to ensure securing the secrecy of the provisional paper ballots..."). Consequently unless the election worker can qualify the ID voter based upon documents provided in the outer envelope, the election worker is not to open the inner envelope. As a practical matter, this result is the only way to effectively protect the security and privacy of a person's vote in the inner envelope.

The second issue may again be directed at the ID voter. In completing the outer envelope of a provisional ballot, a voter is asked to provide personal identifying information, including the voter's name, address, date of birth and social security number as well as the precinct and polling place where the ballot was cast and the reason for using the ballot. NMSA 1978, 1-12-25.3(A). This section, however, further provides that the failure to complete all of the requested information shall not be a basis to reject the provisional ballot "as long as the voter provides a valid signature and sufficient information to determine eligibility." NMSA 1978, § 1-12-25.3(B). That is certainly the case for all regular, non-ID voters.

The question then is whether an ID voter satisfies the obligation to provide proper identification by simply filling out the information set out on the outer envelope of a provisional ballot. Again, the answer is no. There is a limited class of first time voters who registered by mail and who, before casting a ballot, are obligated to present a form of identification pursuant to NMSA 1978, § 1-12-8(B). This form of identification includes either a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck or other government document that shows the

name and address of the voter. The outer envelope of the provisional ballot does not fall into any of the statutorily enumerated forms of identification. The independent identification requirement for this small class of first time voters registering by mail must be honored as a separate requirement of law.

The last question is specifically addressed by NMSA 1978, § 1-12-25.4 (B). This statute provides that “[a] provisional ballot shall not be counted if the registered voter did not sign either the signature roster or the ballot’s envelope.” Under its clear and unambiguous language, the law provides that a voter who casts a provisional ballot is obligated to sign either the voter roster or the outer envelope of the provisional ballot itself, but not both.