

Opinion No. [29-77]

April 5, 1929

BY: J. A. MILLER, Assistant Attorney General

TO: Board of County Commissioners, County of Valencia, Los Lunas, New Mexico.

SCHOOLS -- Procedure in bond elections.

OPINION

I am returning herewith the Transcript of Proceedings for Bond Issue of School District No. 3, County of Valencia, recently received in this office.

An examination of this Transcript discloses among other things, the following:

(a) The certificate attached to the petition that "ten per centum of the number of signers on said petition are tax payers of the school district" does not meet the requirements of Sec. 702 of the School Code, that the petition must contain "the genuine signatures of qualified electors of the district who have paid a property tax therein during the preceding year to the number of ten per cent of the combined vote cast in said district at the last preceding general election for governor". The certificate attached to your petition sets forth that there were 277 votes cast in that district, ten per cent of which number would be 28, whereas there are 50 signatures to the petition, and ten per cent of that number is but five.

(b) This Transcript is not authenticated by the original affidavit of authority presenting the same, as is required by Item 10 of Sec. 714 of the School Code. The certificate of authentication of the Transcript is set forth in copy purporting to be signed by the chairman and secretary of the Board of County Commissioners, by A. A. Gutierrez, Deputy. This being in the form of an affidavit, should have been sworn to personally by the subscribers.

(c) Section 707 of the School Code makes it the duty of the authority calling the election to appoint three election judges who shall take the oath provided by Sec. 1982, Code of 1915, before entering upon the discharging of their duties. It appears from the copy submitted, Item 7, page 13, that but two election judges subscribed to it, although it appears that three signed the certificate of election, Item 8, page 14.

(d) Section 1, Chapter 131, Laws of 1925, provides that the governing authority having in contemplation the issuance of any bonds shall, before initiating any proceedings for such issue, forward to the State Tax Commission a notice of such proposal in writing. This statute further prescribes the duties of the State Tax Commission in reference thereto. From the Transcript it appears that notice was not given the State Tax Commission by the county clerk until February 21, 1929, and after some of the

proceedings had been initiated. I do not hold that this is a very material departure from the statute but think best to call your attention to it. The notice was given and the information it was designed to bring forth was obtained.

(e) There appear other omissions in the papers submitted which I assume to be, in most instances at least, due to carelessness in filling in what probably does appear in the originals of which these papers are copies, and which could probably be supplied.

(f) A more serious question demands careful attention. By sec. 703 of the School Code, it is made the duty of the board to which the petition for a bond election is addressed to meet and determine the sufficiency of the petition and the genuineness of the signatures, and in the event of the affirmative finding of sufficiency, to order an election to be held at a designated time **"which shall be not less than 30 nor more than 50 days after such finding."** In this matter the board did find affirmatively the sufficiency of the petition, that it was in accordance with law, and did set a date for an election to be held on the fourth day of March, 1929, such finding and naming of date having been done on the fifth day of February, 1929. You will note that the date for the election on this bond question was but 27 days after the date of such finding. I do not find that this precise question has been before the Supreme Court of this state, but questions somewhat similar were before the court in Board of Education v. Citizens National Bank, 23 N.M. 205, and again in Aldrich v. Gallup State Bank, 25 N.M. 315, where the question came up as to the requirements of the state relative to the publication of notice. The question of time as it appears in this matter is not there involved. Some courts hold that statutory provisions of this character are merely directory and that deviation from the strict statutory requirement will not invalidate an election unless it is made to appear affirmatively that there was fraud or that qualified electors were thereby denied opportunity to vote. Other courts, however, have held that the requirements of such statutes are mandatory and must be strictly complied with or the election held will be void. The rule is more rigidly adhered to, it seems, in cases of special elections where the time and place of the election are not fixed by law but by the authority named in the statute and after the happening of some condition precedent. In such cases, all statutory requirements as to notice are considered mandatory and necessary to be observed in order to the holding of a valid election.

While, of course, I am unable to forecast positively what the holding of our court might be on this point in case of a contest, I fear that bonds issued and based on the procedure shown by your Transcript would not be binding, valid bonds, and that you would be unable to find sale for them.

For the reasons hereinbefore set forth, I am unable to approve the Transcript, which is herewith returned.