

Opinion No. 44-4612

November 10, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. Fred J. Federici, District Attorney, Raton, New Mexico

We have been advised that in one of the precincts in your district the election officials failed to complete a count on the votes cast in that precinct, and failed to fill in the tally sheet or the certificate showing the results of such election, thereby failing to complete or make any returns for such precinct.

In view of the fact that the County Canvassing Board of such county meets within a few days, you have requested an opinion of this office concerning whether or not the Canvassing Board would have the power to summon such election officials in, and require them to count the ballots and prepare the returns by filling in the tally sheet certificate, or whether this can only be done in a proper proceedings by Order of a District Judge.

Section 56-349 concerns the procedure to be followed in the county canvass. It is noted that it is contemplated that the Canvassing Board shall only canvass returns, and it is provided that if the returns are defective, that they may be corrected according to the provisions of the various subsections of Section 56-349.

However, there is no provision concerning the County Canvassing Board considering a precinct where there are no returns at all. It is, therefore, questionable whether under subsection 5 of Section 56-349 a District Judge could, in a canvassing procedure, order the recounting of the ballots, since the ballots have not been counted in the first instance, and therefore a recount could not be had until an original count has been made.

Further, subsection 5 concerns defective returns, and would literally seem to have no application to a precinct where there were no returns at all. However, the question concerning the applicability of subsection 5 may, of course, be passed upon by a District Judge who, upon being presented with a full statement of the facts and circumstances, would be in a position to determine whether or not subsection 5 might be resorted to in the circumstances which you have in mind.

Subsection 5 of Section 56-349 of the N.M. 1941 Compilation provides, in part, as follows:

"If it appears that such defective returns can not be corrected without a recount of the ballots, said county canvassing board shall immediately notify the district judge in writing who shall fix a time and place which shall be not more than one (1) week thereafter, for a recount of the ballots from such precinct or election district, and the

county clerk shall immediately give notice to the county chairman of each of the dominant political parties of the time and place for such recount; and at said time and place the ballot box shall be opened in the presence of the district judge or some person designated by him to act for him, of the election officers so summoned, and of the county canvassing board, and such other persons as desire to be present; and the election officers shall then and there recount the ballots and make a new certificate in duplicate to conform to the facts. After said recount is complete, said election officers shall replace in the ballot box said ballots and other things taken therefrom, and shall lock and return the ballot box and one (1) key to the county clerk and return the other key to the district judge or his representative. The poll books, after being properly corrected, shall be disposed of as in the first instance: one (1) to the county clerk and one (1) to the secretary of state. * * *"

It is, therefore, our opinion that the County Canvassing Board may not, itself, order the counting of the ballots in the precinct involved, and the question concerning whether it may be done under the provisions of subsection 5 should be passed upon by a District Judge.

By HARRY L. BIGBEE,

Asst. Atty. General