

ELECTIONS: Mandatory for Secretary of State to prescribe weight and size of ballot for absentee soldier voting.

August 25, 1944

8-29



Honorable Gregory C. Stockard  
Secretary of State  
Jefferson City, Missouri

Dear Sir:

In your letter of August 24, 1944, you ask whether or not it is mandatory for the Secretary of State to prescribe the weight and size of the envelopes and ballots to be used in connection with the absentee balloting of members of the armed forces at the General Election.

Section 3, Senate Bill No. 6, 62nd General Assembly, in Special Session, provides in part:

"The maximum size and weight of the ballot for all elections for all parties shall be prescribed by the Secretary of State. \* \* \*

\* \* \* \* \*

"Notwithstanding any of the provisions of the primary or general election laws with regard to form, weight, size, content, type and color of paper of the absent voter's ballot, and envelopes, for any election covered by this Act, the clerks of the county courts, or the boards of election commissioners, in such precincts where such boards conduct elections, may, if necessary to comply with any federal regulations with respect to size and weight of such ballots, reduce the size and weight of the absentee voter's ballot, and the Secretary of State may do likewise with respect to the envelopes, without

elimination of, or addition to, the contents of the ballot. Such election officials may, for the same reasons, change or reduce the size of type to be used in the printing of the ballots.\*\*"

It would thus appear that the Secretary of State has certain duties to perform relative to the size and weight of these ballots and envelopes. Several rules must be considered to determine whether this requirement is mandatory.

In State ex rel. Stevens v. Wurdeman, 246 S. W. 189, 194 (Mo. Sup.), it is stated:

"Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute."

It is to be specifically noticed that the clause under consideration uses the word "shall" in connection with stating the duty of the Secretary of State.

On the other hand, it is said in State ex inf. Attorney General v. Bird, 244 S. W. 938, 939:

"that, if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory."

Section 11 of this same Act provides:

"\* \* \* If the Secretary of State, any county clerk or any election official refuses or neglects to perform any of the duties prescribed by this Act and within the time prescribed by this Act, or shall violate any of the provisions thereof, he shall upon conviction be adjudged guilty of a misdemeanor."

It thus appears that the Act in question does prescribe the result to follow in the event the Secretary of State fails to

perform his duties, and under the rule of the Bird case, supra, it cannot be said to be directory.

In State ex rel. Dietrich v. Schado, 167 S. W. (2d) 135, 141 (Mo. App.), it is said:

"When a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed."

In view of these rules we are of the opinion that the duty imposed upon the Secretary of State with respect to prescribing the size and weight of the envelopes and ballots for the absentee voting of persons in the armed forces, is mandatory and must be exercised. However, what constitutes compliance with the statute is another question. The Secretary of State in carrying out this function in the recent primary election, sent the following instructions to the county clerks:

"FREE POSTAGE, WEIGHT AND SIZE OF BALLOTING MATERIAL. Congress has provided free postage for the transmission of the war balloting material. However, free postage is contingent upon the observance of army, navy and postal specifications as to size, weight and contents of the postal parcel. Size and weight must conform to Federal ruling in order to overcome the practical difficulties of air carriage in wartime. Earlier specifications of the army and navy limited the total weight of all the balloting material including ballots and envelopes to eight-tenths of an ounce. However, the latest instructions from the War Ballot Commission do not carry this specific weight limitation and the latest postal instructions are silent on this point. It is believed that the Federal authorities might permit some slight excess in weight, but the safest course to pursue is to reduce the weight in every possible way so as not to exceed eight-tenths of an ounce.

"PRINTING OF BALLOTS, SIZE AND WEIGHT. It is permissible for county clerks and boards of election commissioners to condense the printing and arrangement of type and reduce the size of the official war ballot according to the provisions of Senate Bill Number 6. Voting instructions must be printed on the reverse side of the official war ballot to conserve space and weight. The Secretary of State does not deem it practical to prescribe the maximum size and weight of the official war ballot due to the wide divergence of tickets in the various counties, but recommends that county clerks and boards of election commissioners give due consideration to the printing problems in connection with their respective ballots and conform to the above army, navy and postal regulations as nearly as possible. Nothing but the ballot or ballots and return envelope may be placed in the sending envelope."

You have informed us by telephone that you have a telegram from the Postal Authorities in Washington, D. C., to the effect that said agency has placed no limitation on the size and weight of this absentee balloting material. You also state you have a like telegram from the War Department.

In such circumstance the need for the Secretary of State to place a rigid limitation on the weight and size of these articles has disappeared, yet we feel the Secretary of State must nevertheless act in conformity with the statutes. We think an explanation and statement similar to that given in connection with the primary election will constitute compliance, if the underlined portion in the foregoing quotation therefrom is rephrased to read: "The envelope in which the ballot is sent to the voter shall be a No. \_\_\_\_, and the return envelope shall be a No. \_\_\_\_, or in the event such are not obtainable in the locality then the next nearest sizes thereto which may be obtained, keeping in mind that the return envelope must be of such size that it can be inserted into the envelope

in which the ballot is sent to the voter. The ballot shall not be larger than is necessary to carry the ticket of the nominees who are to be voted upon (or the proposition) at the General Election in the manner required by law. The ballot and envelope shall not weigh more than \_\_\_ ounces, except in those election districts where the prescribed envelopes cannot be obtained and substitutes must be used, or where ballots of unusual length or number are to be voted upon, in which cases slight excesses are permissible."

Respectfully submitted,

LAWRENCE L. BRADLEY  
Assistant Attorney General

APPROVED:

---

ROY MCKITTRICK  
Attorney General

LLB:EG