

April 12, 2000

OPINION NUMBER 2000-136

Honorable Suzanne Haik Terrell
Commissioner of Elections
P. O. Box 14179
Baton Rouge, LA 70898-4179

ABSENTEE VOTING

R.S. 18:1315(B)
Addresses the circumstances under which an absentee ballot may be challenged for cause for failure to substantially comply with the law.

Dear Commissioner Terrell:

We are in receipt of your request for an Attorney General's Opinion regarding absentee ballots. Your letter states that during counting and tabulation of absentee ballots, challenges may be made to an absentee ballot for cause. You seek our opinion on the following specific instances and question whether each instance warrants rejection by the parish board of election supervisors:

1. The space for the voter's name above the affidavit has been left blank on the absentee ballot envelope flap.
2. The space for the voter's residence has been left blank on the absentee ballot envelope flap.
3. The space for mother's maiden name has been left blank on the absentee ballot envelope flap.
4. The absentee ballot envelope flap is signed by the voter following the affidavit but is not notarized nor signed by two witnesses. [or, notarial statement not dated]
5. The absentee ballot envelope flap is not signed by the voter on the signature line following the affidavit but the name does appear on the flap above the affidavit in the space provided for name.
6. None of the information requested on the absentee ballot envelope flap is provided but the voter has signed the affidavit and the signature is witnessed or notarized.

The Louisiana Supreme Court's recent ruling in *Adkins v. Huckabay*, 99-3605 (La. 2/25/00), 2000 WL 222576, gives us guidance in this area of law. The Court was called upon to determine whether to apply strict compliance or substantial compliance to the absentee voting laws. In concluding "[L]ouisiana's absentee voting law does not require strict compliance", the Court stated:

Thus, in the absence of fraud, undue influence, or intentional wrongdoing, an absentee ballot must be counted unless there is a

substantial failure to comply with the essential requirements of the absentee voting law and that irregularity adversely affects the sanctity of the ballot and the integrity of the election. (Emphasis added).

Id. at **11. The Court emphasized the fact that the Election Code's procedures for absentee voting were "[n]ot designed to ensure a vote but rather to permit a vote by a statutorily limited and prescribed method". *Id.* Although the qualified citizens of the State of Louisiana have a right to vote and to have their votes counted, "[a]bsentee voting is not an absolute right. Instead, it is an exception to the traditional method of voting at the polls and is restricted to specifically enumerated situations and qualifications." *Id.* at *2.

That being said, we turn to the specific questions of your request. Questions 1, 2 and 3 ask whether the parish board of election supervisors should challenge and/or if challenged should they reject or count an absentee ballot where (1) the space for the voter's name above the affidavit has been left blank on the absentee ballot envelope flap, (2) the space for the voter's residence has been left blank on the absentee ballot envelope flap, and/or (3) the space for mother's maiden name has been left blank on the absentee ballot envelope flap. The pertinent part of the flap provides:

I, _____
Name: (Last) (First) (Middle)
Do solemnly swear that I am a resident of
_____, Louisiana
(parish)

(street address)

(wd./dist./pct.) (city or town)
My mother's maiden name is _____
* * *

LSA-R.S. 18:1306 provides for an absentee ballot envelope to have a flap which bears a certificate and shall include certain information of the voter. In executing the certificate of the absentee ballot envelope flap, LSA-R.S. 18:1310(A) provides, in pertinent part:

- A. When a voter receives the absentee voting materials by mail or in person, **he first shall fill in all blanks on the certificate on the ballot envelope flap.** The voter then shall mark the ballot according to the printed instructions on its face. Then the voter shall place the ballot in the envelope, seal the envelope, and

sign the certificate on the ballot envelope flap. (Emphasis added).

This is a mandatory provision of the absentee voting laws, as the word “shall” is mandatory. LSA-R.S. 1:3. In *Adkins, supra*, the Court reviewed several Louisiana cases regarding compliance with our election laws, including *Henry v. Democratic Executive Comm.*, 128 La. 465, 54 So. 943, 943 (La. 1911), where the Supreme Court held that, “[w]here the law required that the elector ‘shall’ designate his choice by stamping or marking to the right of the names of the candidate on his ballot, a ballot stamped on the left side was invalid.” The *Henry* Court noted:

‘form is sacramental’ and stated that ‘[w]hile the intent of the voter is material in determining the validity and effect of ballots, yet such intent, in order to be effectuated, must be expressed conformably to the imperative requirements of the law.’

Adkins, 2000 WL 222576, **9.

Since the Election Code mandates filling in all blanks on the certificate on the ballot envelope flap, the question thus is whether or not partial failure of one, two, or even all lines (except the signature line) equals substantial compliance. The Supreme Court stated that substantial compliance means:

[a]ctual compliance with respect to the provisions essential to the reasonable objectives of the absentee voting law.

The certificate is an important part of the ballot, in that it identifies the person as a registered voter who is entitled to vote in that election, and on that candidate and/or issue. It seeks specific information in identifying the person which is unique to that person, such as mother’s maiden name, so as to prevent fraud.

Considering all of the above, it is our opinion that failure to fill in any and/or all blanks on the certificate of the ballot envelope flap results in substantial failure to comply with a mandatory requirement of the absentee voting laws. Thus, a challenge could certainly be made for cause in such an instance.

With regard to your fourth question, you state that the absentee ballot envelope flap is signed by the voter but is not notarized nor signed by two witnesses. In *Adkins, supra* the Court found that a mail-in absentee ballot which bore a

signature, but lacked the signature of either a notary or two witnesses as required by La. R.S. 18:1310 was correctly disqualified, stating at footnote 14:

It is obvious that the requirement of either a notary or two witnesses to the signature is to verify that the purported signature is indeed the signature of the named elector on the ballot. Without this verification, the signature loses its proof of authenticity. The ballot is then easily susceptible to someone else forging the name of the elector or casting the ballot. This omission does violence to ensuring the integrity of the election and the door to fraud is flung wide. We find this requirement sacramental to the reasonable objectives of the absentee voting law.

Id. at **18.

Therefore, we opine that in the event an absentee ballot envelope flap is signed by the voter but is not notarized nor signed by two witnesses, said ballot is not in substantial compliance with the absentee voting laws and is subject to challenge for cause.

Your staff has also requested by phone that we address the issue of whether the notary fails to fill in the date on the flap. The flap reads:

Sworn to and subscribed before me on:

(DATE)

SIGNATURE OF NOTARY OR REGISTRAR

(TITLE)

R.S. 18:1306(E) requires an absentee ballot envelope to have a flap with a certificate which includes “[l]ines for the signature of two witnesses.” The law further provides, “[t]he voter may sign the certificate in the presence of two witnesses, who must also sign the certificate, and in such a case, the voter shall not be required to obtain the signature of a notary public, but his certificate shall be made under penalty of perjury...”. We could not find any law requiring either the notary’s signature or the witness’s signature to be dated. Therefore, it is our opinion that failure of the witnesses/notary to date the instrument would not amount to a substantial failure of the absentee voting laws.

We next address your fifth question, where the absentee ballot envelope flap is not signed by the voter on the signature line, but the name does appear on the flap in the space provided for name. It is a requirement of law that the voter sign

the certificate on the ballot envelope flap. R.S. 18:1310. Again, it is our opinion that failure to sign the certificate amounts to substantial failure of the voter to comply with a mandatory requirement of the absentee voting laws. This ballot would, therefore, be subject to challenge for cause.

We last address your sixth question, where none of the information requested on the absentee ballot envelope flap is provided but the voter has signed the affidavit and the signature is witnessed or notarized. We refer again to the mandatory requirements of R.S. 18:1310, where the legislature has provided that a voter *shall* fill in all blanks on the certificate on the ballot envelope flap. We reiterate our earlier statement with regard to questions one, two and three, "it is our opinion that failure to fill in any and/or all blanks on the certificate of the ballot envelope flap results in substantial failure to comply with a mandatory requirement of the absentee voting laws. Thus, a challenge could certainly be made for cause in such an instance."

In sum, it is our opinion that in all of these scenarios a challenge could certainly be made for cause [with the exception of the notary failing to date the instrument]. R.S. 18:1315(B) provides that "during the counting and tabulating of absentee ballots, any candidate or his representative, member of the board, or qualified elector may challenge an absentee ballot for cause, other than those grounds specified in R.S. 18:565(A)." The law requires a majority vote of the board in determining the validity of any ballot challenged. Therefore, in response to your questions in general, voting to reject ballots on these basis is supported by the law and jurisprudence of the State of Louisiana. However, this opinion in no way intends to specifically instruct a member of the parish board of election supervisors as to how to vote on challenges. Our purpose is to research and explain the law, so as to provide knowledge to the members of the board so that they in turn can make an informed vote.

We hope this information sufficiently answers all of your questions. If we can be of further assistance, please advise.

Yours very truly,

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ANGIE ROGERS LAPLACE
Assistant Attorney General

RPI/ARL;cwr
Cc: Hon. W. Fox McKeithen

Syllabus

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Date Received:
Date Released: April 12, 2000

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