

scribes an affidavit with his absent voters ballot, and if said affidavit is in compliance with Section 39-106, Revised Codes of Montana, 1947, such ballot is properly attested and should be accepted.

November 1, 1952.

Mr. Michael G. Chilton
County Attorney
Lewis and Clark County
Helena, Montana

Dear Mr. Chilton:

You have requested my opinion on the following questions:

1. If a member of the Armed Forces, who has met all other statutory requirements, applies for an absent voters ballot and subscribes and swears to his application before a commissioned officer in active service of the Armed Forces of the United States, is he entitled to receive an absent voters ballot?

2. If a member of the Armed Forces makes and subscribes to the affidavit on the envelope in which the absent voters ballot is enclosed before a commissioned officer in active service of the Armed Forces of the United States, has he so complied with statutory requirements that his ballot is entitled to be accepted?

Sections 23-1301, through 23-1321, R. C. M., 1947, set forth the manner in which absent electors may vote. By Section 23-1301, supra, it is provided that any qualified elector of this State who has complied with the laws in regard to registration and who is absent from the County or physically incapacitated from attending the precinct poll of which he is an elector on the day of election, may vote by absent ballot. Section 23-1303, supra, sets out the form of application for an absent voters ballot and specifically states that such "application must be subscribed by the applicant and sworn to before some officer authorized to administer oaths and the application shall not be complete without this affidavit." Section 23-1306, provides that the absent voters ballot must be enclosed in an envelope, on which envelope shall be printed an

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Absent Ballots—Affidavits—Armed Forces, Members of—Elections.

Held: 1. That if a member of the armed forces, who has met all other statutory requirements, applies for an absent voters ballot and subscribes and swears to his application before a commissioned officer in active services of the armed forces of the United States, he is entitled to receive an absent voters ballot.
2. That if a member of the armed forces makes and sub-

affidavit to be filled out by the absent voter. Upon receipt of the ballot by the absent voter, he must make and subscribe the affidavit on said envelope, pursuant to the statutory provisions relative thereto. Section 23-1307, supra, provides as follows:

"Marking and Swearing to Ballot By Elector. Such voter shall make and subscribe the said affidavit before an officer authorized by law to administer oaths, and who has an official seal, and may do so at any place in the state of Montana, or in any other state or territory of the United States, before any officer authorized by the laws of this state to take acknowledgments of instruments without the state, and such voter shall thereupon, in the presence of such officer and of no other person, mark such ballot or ballots, but in such manner that such officer cannot see the vote, and such ballot or ballots thereupon, in the presence of such officer, shall be folded by such voter so that each ballot shall be separate, and so as to conceal the vote, and shall be, in the presence of such officer, placed in such envelope securely sealed with mucilage and in addition thereto sealing wax in not less than two places thereon, the sealing wax to contain the impression of the official seal of the officer administering the oath. Said officer shall thereupon append his signature and official title and affix his seal at the end of said jurat and affidavit. Said envelope shall be mailed by such absent or physically incapacitated voter, postage prepaid, or delivered to the county or city or town clerk, as the case may be." (Emphasis supplied)

Sections 39-101, 39-102, 39-103, 39-104, 39-105, 39-106, Revised Codes of Montana, 1947, enumerate those individuals who can take acknowledgments within and without the State of Montana and the United States.

Section 39-106, supra, enacted in 1945 as Section 1 of Chapter 117, Laws of 1945, provides as follows:

"Acknowledgments and Other Notarial Acts May Be Done By Designated Officers in Armed Services. (1) In addition to the acknowledgment of instruments and the performance

of other notarial acts in the manner and form and as otherwise authorized by law, instruments may be acknowledged, documents attested, oaths, and affirmations administered, depositions and affidavits executed, and other notarial acts performed, before or by any commissioned officer in active service of the armed forces of the United States with the rank of second lieutenant or higher in the army or marine corps, or with the rank of ensign or higher in the navy or coast guard, or with equivalent rank in any other component part of the armed forces of the United States, by any person who either (a) is a member of the armed forces of the United States, or (b) is serving as a merchant seaman outside the limits of the United States included within the forty-eight (48) states and the District of Columbia; or (c) is outside the limits of the United States of America by permission, assignment or direction of any department or official of the United States government, in connection with any activity pertaining to the prosecution of any war in which the United States is then engaged.

(2) Such acknowledgment of instruments, attestation of documents, administration of oaths and affirmations, execution of depositions and affidavits, and performance of other notarial acts, heretofore or hereafter made or taken, are hereby declared legal, valid and binding, and instruments and documents so acknowledged, authenticate or sworn to shall be admissible in evidence and eligible to record in this state under the same circumstances, and with the same force and effect as if such acknowledgment, attestation, oath, affirmation, deposition, affidavit or other notarial act, had been made or taken within this state before or by a duly qualified officer or official as otherwise provided by law.

(3) In the taking of acknowledgments and the performing of other notarial acts requiring certification, a certificate endorsed upon or attached to the instrument or documents, which shows the date of the notarial act and which states, in substance, that the person appearing before the officer acknowledged the instrument as his act or made

or signed the instrument or document under oath, shall be sufficient for all intents and purposes. The instrument or document shall not be rendered invalid by the failure to state the place of execution or acknowledgment.

(4) The signature, rank, and branch of service or subdivision thereof, of any such commissioned officer shall appear upon such instrument or document or certificate and no further proof of the authority of such officer so to act shall be required and such action by such commissioned officer shall be prima facie evidence that the person making such oath or acknowledgment is within the purview of this act." (Emphasis supplied)

In view of the specific language of this statute, I concur in your opinion that a commissioned officer in active service of the Armed Forces of the United States is an "officer authorized by the laws of this State to take acknowledgments of instruments without the State" under the conditions specified in that statute.

Due to the difficulty of meeting the more formal requirements for attestation under the conditions encountered in the governmental services and in order that no man serving his country should be deprived of the right to vote, the legislature wisely provided for a less formalistic method of attestation by the statute set out above.

It should be noted with regard to the execution of the affidavits which must be made and subscribed, both on the application for the absent voters ballot and the envelope in which the absent voters ballot is enclosed, that when such affidavits are to be executed by a member of the armed forces before a commissioned officer the form of affidavit need not be filled out as prescribed by statute, in Sections 23-1303 and 23-1306, supra. Specifically, the place of execution or acknowledgment need not be shown. Such affidavits will be considered sufficient if they show the date of the notarial act, the signature, rank and branch of service or subdivision thereof, of the officer taking the acknowledgment, and if they show in substance that the person appearing before the officer acknowledged the instrument as his act or made or signed the instrument or docu-

ment under oath.

It is therefore my opinion that if a member of the Armed Forces, who has met all other statutory requirements, applies for an absent voters ballot and subscribes and swears to his application before a commissioned officer in active services of the Armed Forces of the United States, he is entitled to receive an absent voters ballot.

It is further my opinion that if a member of the Armed Forces makes and subscribes an affidavit with his absent voters ballot, and if said affidavit is in compliance with Section 39-106, Revised Codes of Montana, 1947, such ballot is properly attested and should be accepted.

Very truly yours,
ARNOLD H. OLSEN
Attorney General