

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 19

ELECTIONS - Determination of the percentage of voter turnout at a school bond election;
SCHOOL BOARDS - Determination of the percentage of voter turnout at a school bond election;
MONTANA CODE ANNOTATED - Sections 7-2-2205, 13-1-111, 13-2-401 to 13-2-404, 20-9-428;
OPINIONS OF THE ATTORNEY GENERAL - 24 Op. Att'y Gen. No. 86 (1952);
REVISED CODES OF MONTANA, 1947 - Section 23-518.

HELD: The provisions of section 20-9-428, MCA, do not permit school trustees to revise the number of voters on the certified list of registered electors when determining the percentage of voter turnout at a school bond election.

18 June 1987

Jim R. Morey
Lawrence A. (Larry) Dolezal
Board of County Commissioners
512 California Avenue
Libby MT 59923

Gentlemen:

You have requested my opinion on the following questions:

1. Do the provisions of section 20-9-428, MCA, allow the trustees of a school district, at a bond election canvass, to remove names from the certified list of electors, supplied by the county election administrator, as being unqualified under the provisions of sections 13-1-111 and 20-20-301, MCA?
2. If they are allowed to remove names from the list of electors, must they apply the provisions of section 20-20-301, MCA, to voters and nonvoters equally? What criteria must be used to establish an unqualified elector?
3. What are the implications of sections 13-2-403, 13-2-404, 13-35-205, and 45-7-208, MCA?

OPINIONS OF THE ATTORNEY GENERAL

Your questions have arisen in the context of a recent school bond election in Libby School District No. 4. The certified list of electors provided by the county registrar (election administrator) contained 5,479 names. The total number of votes cast on the bond issue was 1,623, with 1,048 in favor and 575 opposed.

Section 20-9-428(1), MCA, sets forth the procedure for determining the approval or rejection of a proposition at a school bond election.

Determination of approval or rejection of proposition at bond election. (1) When the trustees canvass the vote of a school district bond election under the provisions of 20-20-415, they shall determine the approval or rejection of the school bond proposition in the following manner:

(a) determine the total number of electors of the school district who are qualified to vote under the provisions of 20-20-301 from the list of electors supplied by the county registrar for such school bond election;

(b) determine the total number of qualified electors who voted at the school bond election from the tally sheet or sheets for such election;

(c) calculate the percentage of qualified electors voting at the school bond election by dividing the amount determined in subsection (1)(b) by the amount determined in subsection (1)(a); and

(d) when the calculated percentage in subsection (1)(c) is 40% or more, the school bond proposition shall be deemed to have been approved and adopted if a majority of the votes shall have been cast in favor of such proposition, otherwise it shall be deemed to have been rejected; or

(e) when the calculated percentage in subsection (1)(c) is more than 30% but less than 40%, the school bond proposition shall be deemed to have been approved and adopted if 60% or more of the votes shall have been cast in favor of such proposition, otherwise it shall be deemed to have been rejected; or

OPINIONS OF THE ATTORNEY GENERAL

(f) when the calculated percentage in subsection (1)(c) is 30% or less, the school bond proposition shall be deemed to have been rejected.

If voter turnout is determined by using the total number of registered voters provided by the election administrator, the Libby school bond proposition failed, since it was not voted upon by more than 30 percent of the qualified electors. § 20-9-428(1)(f), MCA.

However, the trustees in School District No. 4, acting upon legal advice, determined that nearly 300 of the individuals whose names appeared on the registration list were not qualified to vote, apparently because of changes in residency. This revised number of qualified electors resulted in a voter turnout of over 30 percent and approval of the bond proposition. Your first question concerns whether the school trustees have authority under section 20-9-428(1), MCA, to revise the number of voters whose names appear on the list furnished by the election administrator. I conclude that such authority does not exist under current law.

Early Montana case law held that the presence of a name on a list of registered voters did not necessarily establish the qualifications of an elector and that those who determined the number of qualified electors were not bound by the names which appeared on the registration list. State ex rel. Lang v. Furnish, 48 Mont. 28, 134 P. 297 (1913); State ex rel. Bogy v. Board of County Commissioners, 43 Mont. 533, 117 P. 1062 (1911). Those cases involved the canvassing of names on petitions to create new counties. The law then required that the petitions contain at least 50 percent of the names of qualified electors. The Court suggested that the voter registration books were not yet reliable and that the law did not contemplate registration as an electoral qualification. Lang, 134 P. at 299. See also State ex rel. Fadness v. Eie, 53 Mont. 138, 145, 162 P. 164, 166 (1916) (statute failed to point out source of information to be consulted in determining number of qualified electors).

Montana law has changed since these early cases were decided, not only with respect to the issue in Lang and Bogy, *supra*, i.e., the correct method of determining the number of signatures needed on a petition to create a new county, but with respect to the procedure for revising registration lists in general. The statutory changes convince me that the early case law is no longer of binding force.

OPINIONS OF THE ATTORNEY GENERAL

As has been noted, the status of voter registration lists at the time of the decisions in Lang and Bogy, supra, were not reliable and registration was not even contemplated as a voter qualification. By contrast, current law specifically requires registration as a qualification for voting. § 13-1-111(1)(a), MCA. In addition, the use of voter registration lists has been clarified. Section 7-2-2205, MCA, the successor statute to those relied upon in Lang and Bogy, supra, provides in subsection (3):

For the purpose of determining the number of signatures needed on a petition to meet the percentage requirements of this section, the number of registered electors in a territory proposed to be included in a new county is the number of people registered to vote in that territory in the most recent general election.

Similarly, the statute governing the counting of votes on a school bond proposition expressly provides for the use of the voter registration list. Section 20-9-428(1)(a), MCA, requires that the school trustees determine the qualified voters "from the list of electors supplied by the county registrar."

Additional support for my conclusion is found in the statutes that address the procedure for revising registration lists. Sections 13-2-401 to 404, MCA, set forth detailed procedures for the purging of unqualified voters by the county election administrator from the registration list. The names of registered electors who do not vote in a general election are regularly removed from the list according to a specific schedule. § 13-2-401(1), MCA. The only additional grounds for cancelling the registration of an elector include receipt of a written death certificate or report, a court decision that the elector is of unsound mind, the filing of a court order directing cancellation, a successful challenge brought by another elector (which must follow the specific steps set forth in section 13-2-403 or 13-2-404, MCA), and receipt of a notice from another county or state that the elector has registered in that county or state. § 13-2-402, MCA.

It is noteworthy that the statutes on the procedure for revising registration lists were changed in 1969 so that cancellation may no longer be based upon the election administrator's personal knowledge of the death or change of residency of an elector. It is also significant that the statutes provide that electors whose names are to be removed from the registration list are put on actual or constructive notice of the

OPINIONS OF THE ATTORNEY GENERAL

impending cancellation, and thus have an opportunity to rebut the grounds therefor. See § 23-518, R.C.M. 1947. By contrast, the recent revision of the voter registration list in Libby School District No. 4 was apparently based on the personal knowledge of the school trustees, with no notice given to electors who may have wished to appeal the decision to drop their names from the total number of voters in the district.

Although in the case of School District No. 4 the trustees did not physically remove names from the certified list of registered voters, nearly 300 names were cancelled from the total count for purposes of determining the percentage of voter turnout. I fail to see the distinction between actual removal of a name from the certified registration list so that a previously registered elector becomes disqualified from voting, and refusing to count a name on the registration list for purposes of determining whether there is sufficient voter interest in a bond proposal. My reasoning is consistent with an earlier opinion, 24 Op. Att'y Gen. No. 86 (1952), and an informal opinion I issued in 1980 concerning a high school bond election in Augusta, Montana.

I conclude that current Montana law does not permit the exercise of discretion by anyone other than the election administrator under sections 13-2-401 to 404, MCA, to revise the number of names on a voter registration list. Section 20-9-428, MCA, merely authorizes school trustees to use the registration list as the source of information for counting the total of registered voters in the appropriate school district. Trustees may not drop names from the total without pursuing the regular statutory procedure provided for challenging registration.

This response makes it unnecessary to answer your second question. With respect to your inquiry concerning the statutes on tampering with election records, the question of whether violations of law have occurred must be considered by local law enforcement officials in light of all of the surrounding facts. It would be inappropriate for me to discuss the effect of criminal statutes under these circumstances.

THEREFORE, IT IS MY OPINION:

The provisions of section 20-9-428, MCA, do not permit school trustees to revise the number of voters on the certified list of registered electors when determining the percentage of voter turnout at a school bond election.

OPINIONS OF THE ATTORNEY GENERAL

Very truly yours,

MIKE GREELY
Attorney General