

Opinion 23-001

SUBJECT: Authority of County Clerks or Election
Commissioners to Manually Count Ballots

REQUESTED BY: Senator Steve Erdman
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
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INTRODUCTION

You have requested an opinion of the Attorney General concerning the authority of individual county clerks or election commissioners to choose to exclusively hand count ballots without the use of vote counting machines. You have asked that we provide our opinion whether legislation would be needed to authorize those local election officials to opt to manually count ballots or whether current state law already permits them to do so. You are considering introducing legislation in January which would allow local election officials to make that choice.

ANALYSIS**I. Applicable Nebraska Statutes**

The State's Election Act ["the Act"] is found at Neb. Rev. Stat. §§ 32-101 to 32-1551 (2016 and Cum. Supp. 2022). The provisions of Article 10 of the Act pertain to counting and canvassing ballots.

Neb. Rev. Stat. § 32-1012 (Cum. Supp. 2022) provides requirements for counties using optical scanners at either a centralized location or at polling places while § 32-1027(6) (Cum. Supp. 2022) provides for the unfolding and flattening of early voting ballots for purposes of using the optical scanner. Section 32-1016 (2016) spells out how to treat a ballot that is damaged or defective so that it cannot properly be counted by a vote counting device. Section 32-1018 (2016) requires the sealing and storage of all tapes, programming boards, and other materials used with vote counting devices. Section 32-1049 (Cum. Supp. 2022) lists additional requirements for the use of a vote counting device in a centralized location. Sections 32-1041 (Cum. Supp. 2022), 32-1042 (2016), and 32-1043 (2016) all authorize the use of optical-scan ballots or voting systems approved by the Secretary of State. The term "voting system" is defined at Neb. Rev. Stat. § 32-119.01 (Cum. Supp. 2022) to mean "the process of creating, casting, and counting ballots and includes any software or service used in such process."

The only mention of manual counting currently found within Article 10 is § 32-1012 which provides that if "it becomes impracticable to count all or

a part of the ballots with optical scanners," the local election official "may direct that the ballots be counted manually following as closely as possible the provisions governing the manual counting of ballots." There are no current provisions in the Act which govern the procedure of manually counting the ballots. In fact, several provisions related to manual counting and counting boards were deleted from the Act by LB 646, Laws 2007. References to certain types of counting boards were eliminated because, "[w]ith the new voting equipment, counties no longer manually count ballots and therefore, these counting boards are no longer necessary." Committee Statement on LB 646, 100th Leg., 1st Sess. 2 (March 14, 2007).

The Election Act grants no general authority to local election officials with regard to hand counting or manually counting ballots. Rather, the Act, limits the discretion of election officials to employ manual counting to only those narrow circumstances in which it is "impracticable" to count the ballots with optical scanners. Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Pettit v. Nebraska Dept. of Correctional Services*, 291 Neb. 513, 522, 867 N.W.2d 553, 560 (2015). *Merriam-Webster's [Online] Dictionary* defines "impracticable" as "incapable of being performed or accomplished by the means employed or at command."¹ The context of § 32-1012 suggests that manual counting would, thus, be statutorily limited to unforeseen circumstances such as a temporary power outage or equipment failure.

Your opinion request letter refers to "county officials" and a "discrepancy regarding the extent of their control versus that of the Secretary of State." To the extent any local official may have discretion to choose a ballot counting method, it would be an election commissioner or county clerk. The Nebraska statutes provide for two types of local election officials: election commissioners and county clerks. Neb. Rev. Stat. § 32-207 (Cum. Supp. 2022) provides that "[t]he office of election commissioner shall be created for each county having a population of more than one hundred thousand inhabitants." Neb. Rev. Stat. § 32-211 (2016) provides that the county board of each county with not less than twenty thousand nor more than one hundred thousand inhabitants may create the office of election commissioner. And, Neb. Rev. Stat. § 32-218 (2016) provides that the county clerk will perform the duties assigned to the election commissioner, except in those counties which have an election commissioner pursuant to either § 32-207 or § 32-211. However, as explained above, the discretion of an election commissioner or county clerk to employ a manual count of ballots is limited to the narrow circumstances spelled out in § 32-1012.

Further, Neb. Rev. Stat. § 32-1041 requires that election commissioners and county clerks use vote counting devices and voting systems approved by the Secretary of State. "The election commissioner or county clerk may use vote counting devices and voting systems approved by the Secretary of State for

tabulating the votes cast at any election. Vote counting devices shall include electronic counting devices such as optical scanners." Neb. Rev. Stat. § 32-1401(1). "Any new voting or counting system shall be approved by the Secretary of State prior to use by an election commissioner or county clerk." Neb. Rev. Stat. § 32-1401(3). It is our understanding that the voting system currently approved by the Secretary of State requires the use of optical scanning devices for tabulating the votes cast and that no counties are currently approved by the Secretary of State to use manual counting of ballots. Thus, any local election official who wishes to use a new manual counting system would first need to seek the approval of the Secretary of State.

Finally, you have stated that you are considering introducing legislation to allow local election officials to choose whether to count ballots by hand. We note that the federal Help America Vote Act of 2002 ["HAVA"], Public Law 107-252, 42 U.S.C. §§ 15301 to 15545 (2002), was enacted to address improvements to voting systems and voter access. A Nebraska State Plan to implement HAVA was adopted in 2004 and amended in 2009 and 2011.² HAVA provided federal funding to states, including funding for upgraded voting systems, and all Nebraska counties received new ballot tabulation equipment. HAVA also created new mandatory minimum standards for states to follow in certain areas of election administration. As we have only your general reference to introducing legislation, we will not discuss HAVA or the State Plan further within this opinion. However, we wanted to make you aware of the federal legislation and related State Plan as you determine whether to introduce legislation.

CONCLUSION

In conclusion, the Nebraska Election Act provides for two types of local election officials: election commissioners and county clerks. It is our opinion that current Nebraska statutes grant no general authority to those officials to choose to count their ballots by hand. Rather, the Act limits the discretion of local election officials to employ manual counting to only those narrow circumstances set out by Neb. Rev. Stat. § 32-1012 in which it is not possible to count a ballot with optical scanners. And, under current law, any local election official who wishes to use a new manual counting system would need to obtain the approval of the Nebraska Secretary of State.

Very truly yours,
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pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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