



MTA Guidance on Absent Voter Ballot Question

A recent publication from the State of Michigan Bureau of Elections has caused some Townships to ask questions regarding the mailing of applications for AV ballots to every Township registered voter, regardless of whether or not it was directly requested by the voter. The information provided by the Bureau of Elections states “[t]he Bureau’s view is that municipal or county clerks are not prohibited from distributing absent voter ballot applications to registered voters.”¹ The article goes on to say that since this is a legal question that clerks should consult their respective attorneys for advice on the matter.

Elections law begins within the Michigan Constitution of 1963, Article II, Section 4. Specifically, Section 4(1)(g) pertains, in this instance; and that section states:

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(g) The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. During that time, election officials authorized to issue absent voter ballots shall be available in at least one (1) location to issue and receive absent voter ballots during the election officials' regularly scheduled business hours and for at least eight (8) hours during the Saturday and/or Sunday immediately prior to the election. Those election officials shall have the authority to make absent voter ballots available for voting in person at additional times and places beyond what is required herein.

That section was altered to the above language by a vote of the people in 2018; under Proposal 2018-3, which added the right to vote by absentee ballot without previously necessary qualifying reasons.

State law also governs the issuance of AV ballots under MCL 168.759. The pertinent part of the statute reads:

¹ Michigan Bureau of Elections News Update, Absent Voter Applications, May 13, 2020.

...[A]t any time during the 75 days before an election, but not later than 8 p.m. on the day of an election, an elector may apply for an absent voter ballot. **The elector shall apply in person or by mail with the clerk of the township, city, or village in which the voter is registered.** MCL 168.759(2), Emphasis added.

The statute goes on to say how an application for AV ballot may be completed.

An application for an absent voter ballot under this section may be made in any of the following ways:

- (a) By a written request signed by the voter.
- (b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.
- (c) On a federal postcard application. MCL 168.759(3).

Regarding applications for issuance of an AV ballot to a voter, MCL 168.759(5) states in pertinent part:

The clerk of a city or township shall have absent voter ballot application forms available in the clerk's office at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request.

While the Constitutional provisions regarding who is eligible to receive an AV ballot changed with the passage of Proposal 2018-3, the statute regarding how an AV ballot application may be submitted has not been altered.

The Bureau of Elections publication cited Proposal 2018-3 and that the change occurred after caselaw was decided that held that clerks could not send AV ballot applications in mass mailings, and while this is true, both the statute and the Constitution provide that AV ballots can be received by whomever requests them, however, the procedure for distributing the application is still clearly delineated within statute, and statute requires the voter to request an application.

The caselaw cited by the Bureau of Elections, *Taylor v Currie*, 277 Mich App 85 (2007) held, “[the] statute governing distribution of applications for absentee ballots does not authorize [a] city clerk to mail unsolicited applications for absentee ballots to prospective voters...” The court cited MCL 168.759(5), stating that verbal or written request is necessary in order for an application for an AV ballot to be sent to a qualified voter, stating “...this subsection establishes two duties for city clerks. First, the clerk must have applications for absent voter ballots available in the clerk’s office at all times. Second, the clerk ‘shall’ provide an application to anyone upon verbal or written request.” *Id.* at 94.

“The general rule, with regard to municipal officers, is that they have only such powers as are

expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted....[o]r as our Supreme Court has stated, '[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority.' As such, [p]ublic officers have and can exercise only such powers as are conferred on them by law...." *Id.* at 94-94. (internal citations and punctuation omitted.) Extrapolating on this idea, the court opined that, "[a]pplying this rule to MCL 168.759, it is clear that the city clerk has no powers concerning the distribution of ballot applications other than those that are expressly granted in the statute. And the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute." *Id.* at 95. In not being expressly stated, the court concluded that the mass mailing of AV applications was therefore not allowed, as it was not implied within the statute. *Id.* at 96.

The *Taylor* court went on to analyze the statute in light of the Michigan Constitution and discussed, Article II, Section 4(2) of the Constitution of 1963, which states in part:

Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

Taylor analyzed the purity aspect of the Constitutional language.

"The Michigan Supreme Court has interpreted the 'purity of elections' clause to embody two concepts: 'first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" *Socialist Workers Party v. Secretary of State*, 412 Mich. 571, 596, 317 N.W.2d 1 (1982), quoting *Wells v. Kent Co. Bd. of Election Comm'rs*, 382 Mich. 112, 123, 168 N.W.2d 222 (1969). *Id.* at 96-97.

Ultimately, the *Taylor* court in analyzing the purity of elections clause held that "[t]o construe MCL 168.759 to permit Currie to distribute, in her official capacity, what amounts to propaganda at the city's expense is certainly not within the scope of Michigan election laws or the Michigan Constitution. MCL 168.759(5) does not permit a city clerk to mail absent voter ballot applications without having received a verbal or written request." *Id.* at 97.

The statute did not state that mass mailings of AV ballot applications were allowed, and as the legislature is charged with carrying out laws regarding elections, and the legislature did not expressly state that AV ballot applications can be distributed via mass mailing, therefore the distribution is not allowed.

Judge Smolenski submitted a dissent to this portion of the opinion, opining that while the law requires AV ballot applications be sent upon written or verbal request, this does not limit any other method used when distributing AV ballot applications. While this argument makes a

certain amount of sense, dissenting opinions are not current law, and what is current case law must be followed.

The *Taylor* opinion was again reinstated in the unpublished Court of Appeals opinion, *Fleming v Macomb County Clerk*, 2008 WL 2553266, a case whereby the Macomb County Board of Commissioners authorized the County Clerk to send AV ballot applications to all registered voters over the age of 60. The Court of Appeals used the same criteria for analyzing this case as was used in *Taylor*, finding that “...the city clerk has no powers concerning the distribution of ballot applications other than those that are expressly granted in the statute. And the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute. Nor have appellants cited any other statute that confers this power on the city clerk.” *Id.* at *4. The court here also stated that the *Taylor* opinion sets precedence and therefore must be followed. *Id.* at *5.

Fleming also delineated the difference between a county clerk and a local municipal clerk, stating, “[i]n relation to the absent voter process, the county clerk has express authority to safeguard and distribute the absent voter ballots to local clerks in advance of an election, MCL 168.715–717, but no statute expressly allows a county clerk to deliver a ballot directly to a voter or to deliver absent voter ballot applications.” *Id.* at *5. Not even a resolution by the County Board can grant the power to deliver ballots to the county clerk. *Id.* at *5.

Again, in following *Taylor* as precedent, *Fleming* stated “[w]e fail to see how public mailings of apparently neutral absent voter ballot applications methodically promote anything besides the mere act of voting. However, we are compelled by *Taylor* to find that the neutrally-designed absent voter ballot applications constitute propaganda and, therefore, violate the purity of elections clause of our constitution.” *Id.* at *6, footnote omitted.

There is no aspect of the statute that has changed since these cases were decided, and therefore a conservative view of the situation would be that mass mailing of AV ballot applications is not allowed.

In looking at recent Executive Orders signed by the Governor in light of the recent pandemic, EO 2020-27 addressed the May 5 election and allowed for ballot questions to be removed and placed on the August ballot, and encouraged voters to register by mail or internet access and not in person. Section 9 of the EO stated:

The Department of State may assist local clerks, county clerks, and election administrators with: the mailing of absent voter ballot applications with a postage-prepaid, pre-addressed return envelope to each registered voter within any jurisdiction conducting a May 5, 2020 election; the preparation of postage-prepaid absent voter ballot return envelopes; the coordination of county and state assistance in processing ballots; changes to election dates; and other local clerk functions to the extent local jurisdictions are unable to perform them.

The above fails to address whether mass mailing of AV ballot applications was required, only that the State would help with such. Regardless, this EO was for the May 5 election only. Any EO that would concern the August election would need to be enacted in order for that to take effect. If the wording of the EO contained the above language, then it may be possible to infer that mass mailing of AV ballot applications would be allowed for that election, however, until that time, the current caselaw stands and the mass mailing of AV ballot applications by the municipal clerk is not allowed under Constitutional or state law.