

5474

1. VOTE — BALLOT — SECRETARY OF STATE — WITHOUT AUTHORITY TO TRANSMIT TO LAND AND NAVAL FORCES, UNITED STATES, WHO APPLY TO VOTE UNDER H.R. 7416, 77 CONGRESS, OHIO OFFICIAL BALLOT, WHICH CONTAINS NAMES OF CANDIDATES FOR STATE AND COUNTY OFFICES.
2. UPON APPLICATION, OFFICIAL WAR BALLOT SHALL BE TRANSMITTED AND SHALL CONTAIN NAMES AND ADDRESSES, NOMINATED CANDIDATES FOR REPRESENTATIVES IN CONGRESS AND A BLANK SPACE TO WRITE IN CERTAIN NAMES.
3. SHOULD BALLOT TRANSMITTED BY SECRETARY OF STATE CONTAIN ONLY A BLANK SPACE, HE SHALL TRANSMIT PRINTED BOOKLET — CONTENTS.

SYLLABUS:

1. The Secretary of State is without authority to transmit to members of the land and naval forces of the United States who make application to vote in accordance with the provisions of H. R. 7416, the official ballot of Ohio containing the names of the candidates for state and county offices.

2. When such application is made by such person, the Secretary of State is required to transmit to the applicant therefor the official war ballot provided for in H. R. 7416, which shall contain (1) only the names and addresses of the nominated candidates for representatives in Congress and include a blank space for writing in the name of any person for whom the voter desires to vote, or (2) blank space for the insertion by the voter of the name of the nominated candidate or other person for whom the voter desires to vote.

3. In the event the ballot transmitted by the Secretary of State contains only a blank space, there shall be transmitted by him therewith a printed booklet containing the name and address of each nominated candidate for representative in Congress from this state, the party or independent body nominating him and a designation of the political subdivision to be represented by him.

Columbus, Ohio September 22, 1942.

Hon. John E. Sweeney, Secretary of State,
Columbus, Ohio.

Dear Sir:

You have submitted for my opinion the question of whether or not you or a board of elections may lawfully transmit to members of the land and naval forces of the United States who are absent from their places of residence and who make application to vote in accordance with H. R. 7416, recently passed by the 77th Congress of the United States, the official ballot to be voted on in Ohio in the November election.

Said H. R. 7416 is entitled:

“AN ACT

To provide for a method of voting, in time of war, by members of the land and naval forces absent from the place of their residence and serving within the continental United States.”

Section 1 thereof reads as follows:

“In time of war, notwithstanding any provision of state law relating to the registration of qualified voters, every individual absent from the place of his residence and serving in the land or naval forces of the United States, including the members of the Army Nurse Corps, the Navy Nurse Corps, the Women's Navy Reserve, and the Women's Army Auxiliary Corps, who is or was eligible to register for and is qualified to vote at any election under the law of the state of his residence, shall be entitled, as provided in this Act, to vote for electors of President and Vice President of the United States, United States Senators, and Representatives in Congress.”

From the above, it will be observed that any member of the armed forces of the United States absent from his place of residence, who is or was eligible to register and is qualified to vote under the law of this state, shall be entitled to vote for electors of President and Vice President, United States Senators, and Representatives in Congress, notwithstanding any provision of law of Ohio relating to the registration of qualified voters.

Nowhere in the election laws of Ohio do we find any provision which entitles an elector required to be registered to cast his vote for state and county candidates, unless he is so registered. Section 4785-34 of the

General Code of Ohio contains provisions for the registration of qualified electors. Reference to said section will disclose that all electors living in cities where registration is required thereunder or where registration is provided for by ordinance or resolution passed pursuant thereto, must register in order to exercise their right of franchise. Obviously, therefore, a person who is not registered in accordance with the law of Ohio, when such law requires registration, may not vote for state or county candidates even though he be in the armed forces of the United States and absent from his place of residence.

It is also pointed out that nothing is contained in said section 1 of H. R. 7416 concerning the right of the individuals specified therein to vote for candidates for state and county offices, the names of which candidates will appear on the official ballot for this state, along with those of the candidates for representatives in Congress.

The method prescribed in said H. R. 7416 for obtaining the official war ballot provided for therein is set out in section 3 of said Act, which reads as follows:

“SEC. 3. Every member of the land or naval forces of the United States absent from the place of his residence may make request of the *secretary of state of the state of his residence for a ballot suitable for use in voting in accordance with the provisions of this Act*. The Secretary of war and the Secretary of the Navy shall cause to be printed and distributed to such members of the land and naval forces an adequate number of post cards which shall be used by each such member in making such request. All such post cards shall be transmitted free of postage in the United States Mails. Upon one side of such post card the following shall be printed:

—————(Date)

Secretary of State of:—————

Being on active duty in the armed forces of the United States and desiring to vote in the coming election, I hereby apply for an official war ballot.

My home address is—————, in the city,
(Number and street)

town, or village of—————in the county of—————,
in the State of—————, and my voting district or precinct
to the best of my knowledge is—————. I desire that the

ballot be sent to me at the following address: _____

(Signed)

Signature certified by:

(To be signed by any
commissioned officer)

Upon the other side of such postcard shall be printed the following:

F R E E
(Official War Ballot)

Secretary of State of: _____

(City)

(State)

In each year in which an election for Senators and Representatives in Congress is to be held, such post cards shall be made available on February 1, or as soon thereafter as practicable, and from time to time thereafter, prior to the holding of the election."

It will be noted that under the above section, application for the ballot to be used by the person requesting the same must be made to the Secretary of State of the state of such person's residence.

In this connection, your attention is directed to sections 4785-135 and 4785-136 of the General Code of Ohio, which contain provisions relative to the application for and delivery of absent voters' ballots. Said sections, in so far as the same are material hereto, read:

Section 4785-135.

"Such elector, not more than thirty days nor later than six-thirty P. M. of the Thursday preceding the date of a primary or general election, or twelve o'clock noon of the third day preceding a special election held on another date, shall make application in person or in writing *to the clerk of the board of such county*, for any official ballot to be voted at such election."

(Emphasis mine.)

Section 4785-136.

“Upon receipt of such application, and not more than thirty days nor later than 6:30 p. m. of the Thursday preceding the date of a primary or general election, or twelve o'clock noon of the third day preceding a special election held on another date, it shall be the duty of such clerk, after he shall have satisfied himself that the applicant is a qualified elector and entitled to vote, to deliver or mail by registered letter, postage prepaid, to the applicant an official ballot or ballots.”

The Secretary of State, as a public officer, has of course only such powers as are expressly conferred upon him by law and such implied powers as are necessary to carry those expressly granted into effect. This is likewise true of members of boards of elections. The Legislature of Ohio has provided a method for obtaining an absent voter's ballot and unless that method is pursued by an applicant for such ballot, neither the Secretary of State nor a board of elections has authority to deliver the same.

It is also noteworthy that H. R. 7416 provides that the request made thereunder is for a ballot “suitable for use in voting in accordance with the provisions of this Act.” It has already been pointed out that under the provisions of section 1 of the Act, members of the land and naval forces of the United States are entitled to vote for electors of President and Vice President of the United States, United States Senators and Representatives in Congress.

Any rights that such individuals have with respect to voting for state and county candidates are given to them, not by the Congress, but by the General Assembly of this state. The method by which citizens of Ohio may exercise their right to vote for state and county candidates is prescribed by the law of Ohio and not by the statutes of the United States. The only power that Congress has with respect to elections is conferred upon that body by Article I, Section IV of the Constitution of the United States. Said section reads in part:

“The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.”

It will be noted that the above section deals only with the times,

places, and manner of holding elections for *Senators* and *Representatives*.

In this connection your attention is likewise invited to section 5 of H.R. 7416. You will note that said section provides in part:

“(a) The secretary of state of each State shall cause to be prepared and printed, for use in voting under this Act, an appropriate number of official war ballots. Such ballots shall provide for voting for electors of President and Vice President of the United States, United States Senators and Representatives in Congress, and may, in case the State Legislature of his State shall have authorized it, also provide for voting for candidates for state, county, and other local offices, and with respect to any proposed amendment to the state constitution or any other proposition or question which is to be submitted to a vote in the state.”

It appears to me that the above section alone furnishes a complete answer to your question. In said section, it is stated in clear, unambiguous language that the official war ballots shall provide for voting for electors for President and Vice President of the United States, United States Senators and Representatives in Congress, and *may, in case the State Legislature of his State shall have authorized it*, also provide for voting for candidates for state, county and other local offices. In terms free from any doubt as to the meaning thereof, the above section provides that unless and until our General Assembly shall enact a law providing therefor, the official war ballots shall not be used for voting for candidates for state and county offices.

Since the General Assembly has passed no law providing for the voting for such candidates on the official war ballots prescribed by Congress in H. R. 7416, it seems to me that no further argument is necessary to support the conclusion that state and county officers may not be voted for in this state on such ballots.

The fact, however, that Congress made no provision in said Act by which persons in the armed forces who are absent from their residences may vote for their local, state and county officers, does not preclude such persons from voting for such officers in Ohio. A reference to the Ohio statutes will disclose the fact that the General Assembly has provided a detailed and specific method for the registration of and voting by persons in the armed forces of the United States. Adequate and ample provision for voting by persons in the armed forces who are absent from their voting residences is contained in our present statutes.

Section 4785-141 of the General Code, as amended in 119 O.L. 547, reads as follows:

“Whenever any qualified voter of this state shall be on active duty in the land or naval forces of this state or of the United States, in the army or navy or militia thereof, and by reason thereof is unavoidably absent from his election district on election day, such absent voter shall be entitled to vote as fully as if he were present at his place of residence in the same manner herein provided for other absent voters. If such member of the army or navy or militia is a legal resident of any subdivision of the state where registration is required, said person, if not duly registered, shall be registered by mail or in person and allowed to cast an absent voter’s ballot in the same manner herein provided for other absent voters. Provided, that any affidavit required in connection with the registration of such person and the voting of an absent voter’s ballot may be made or subscribed before a commissioned officer of the land or naval forces. The secretary of state, in such cases, if the number of such voters exceeds one hundred, shall have authority to organize a staff to visit such headquarters and to care for the casting, sealing and return of such absent voters’ ballots to their appropriate counties.”

Such section not only contains provisions authorizing persons in the armed forces, when registered, to vote by absentee ballot, but also contains provisions authorizing those persons who were not electors by reason of failure to register at the time of entering the service to register and thus become qualified voters by absentee registrations. It further provides that if a hundred or more voters are quartered at a particular camp or place, you as Secretary of State, may organize a staff to care for such voting at the headquarters of persons in the armed forces; thus, in such case further facilitating such soldier and sailor vote. Since such section provides that the registration must be in the same manner as provided for other absentee voters, except that the affidavit may be made before a commissioned army or navy officer, it would appear to be the requirement of the General Assembly that the registration may be made at any time except within twenty-eight days before or ten days after an election as provided in section 4785-39, General Code.

Such section further provides that the voting of the soldier or sailor “shall be in the manner herein provided for other absent voters.” Such being true, we must refer to section 4785-135 of the General Code in order to determine such manner. Section 4785-135, General Code, specifies that the application shall be made “on a blank to be furnished by the clerk of the board of the county in which the applicant is an elector,”

and suggests a form to be so used. Section 4785-141, General Code, provides that this application may be made before any commissioned officer of the armed forces. Section 4785-136, General Code, provides the manner of furnishing the ballot to the absentee voter. Section 4785-137, General Code, specifies the manner of voting an absentee ballot and of its return to the proper election board. The procedure provided in this section is slightly modified by section 4785-141, General Code, in the case of persons in the armed forces in the respect that the affidavit on the envelope in which the ballot is to be returned on the reverse side from the mailing face may be made before a commissioned officer of the armed forces other than a person authorized to administer oaths. When such sections are superimposed on each other, they specify the following method for voting:

1. The affidavit on the back of the mailing envelope must be executed before a commissioned officer of the land or naval forces of the United States.

2. He shall mark the ballots in the presence of such officer and of no other person, but in such manner that the officer cannot learn of the markings.

3. In the presence of the officer he shall fold each ballot separately so as to conceal the markings and deposit them in the envelope provided by the election board as specified in Section 4785-136, General Code, and securely seal it.

4. Having thus voted the ballots and sealed them in such envelope, he is to mail them to the board of elections of the county in which he is an elector and which mailed the ballots to him.

5. Section 4785-135, General Code, then provides that the ballot, when received, shall be carefully preserved by the clerk of such board of elections, until the board of elections shall deliver election supplies to the voting precincts, at which time such ballot shall be delivered to the presiding judge of the voting precinct in which the person in the armed forces is an elector.

6. Such presiding judge at the time of the opening of the polls is required to deposit such ballots unfolded in the proper ballot boxes and enter the voter's name in the poll book.

7. After such depositing, the ballots of the persons in the armed forces are to be treated in precisely the same manner as are the ballots of voters cast in person at the election booth.

It is thus to be seen that the General Assembly has made complete provision not only for the registration of but also voting by persons in the armed forces at all state elections. There is a well established rule of law that where the General Assembly has authorized the doing of an act and in the same legislation has specified the method of the performance of the act, such designated method is exclusive and it may be done in no other manner. *Frisbee Co. v. City of Cleveland*, 98 O.S. 256; *Anderson v. P. V. Madson Investment Co.*, 72 Fed. (2d) 768; *Botany Worsted Mills Co. v. U. S.*, 278 U. S. 282.

Such being true, it would follow that the method prescribed by Congress for the voting of representatives in Congress by persons in the armed forces absent from their places of residence must, if such voting is effected by official war ballot, be adhered to, and it is likewise obvious that the method prescribed by the General Assembly of Ohio must be followed in all cases where members of the armed forces absent from their homes desire to vote the official Ohio ballot or ballots.

This principle was clearly recognized by this Congress when it enacted H. R. 7416. Section 9 of said Act reads in part:

“ * * * but no official war ballot shall be valid if the voter has voted in person or by absentee ballot in accordance with the procedure provided by the laws of the state * * * .”

That cognizance was taken by Congress of the various state laws governing absent voting, is also manifest from section 12 of the Act:

“Nothing in this Act shall be deemed to restrict the right of any member of the land or naval forces of the United States to vote, whenever practicable, in accordance with the law of the State of his residence, if he does not elect to vote in accordance with the provisions of this Act.”

From the above resume, it is seen that the present laws of Ohio governing absent voting are complete in every respect. Special provisions are contained therein which are designed to expedite the handling of absent voting by men and women in the armed forces of the United

States. When the application of a person in our military forces who is absent from his place of residence reaches a board of elections, the complete ballot or ballots to be voted in Ohio, including of course the names of the nominated candidates for United States Senators and Representatives, is sent to such applicant with the utmost dispatch, thereby enabling him not only to cast his vote for congressional candidates, but also for all state, county and local candidates, and in addition thereto, for all proposed amendments to the State Constitution, and any other questions which are submitted to the electors of Ohio.

The passage of H. R. 7416 by the Congress gives to the men and women of Ohio who are away from their homes serving their country in the armed forces, no rights which they did not already have. In fact, if the laws of each of the various states of our Union relative to absent voting by soldiers and sailors were as complete as those in Ohio, the passage of H. R. 7416, in so far as facilitating such absent voting is concerned, could have served no useful purpose.

In view of the above, you are advised that in my opinion:

1. You, as Secretary of State, are without authority to transmit to members of the land and naval forces of the United States who make application to vote in accordance with the provisions of H. R. 7416, the official ballot of Ohio containing the names of the candidates for state and county offices.

2. When such application is made by such person, you are required to transmit to the applicant therefor the official war ballot provided for in H. R. 7416, which shall contain (1) only the names and addresses of the nominated candidates for representatives in Congress and include a blank space for writing in the name of any person for whom the voter desires to vote, or (2) blank space for the insertion by the voter of the name of the nominated candidate or other person for whom the voter desires to vote.

3. In the event the ballot transmitted by you contains only a blank space, there shall be transmitted by you therewith a printed booklet containing the name and address of each nominated candidate for representative in Congress from this state, the party or independent body nomi-

nating him and a designation of the political subdivision to be represented by him.

Respectfully,

THOMAS J. HERBERT
Attorney General.