

El. Bd. Op. 77-5 (Reaffirmed 10/6/08)

**Summary:**

**When a vote is not recorded on a voting machine for an elector who registers to vote on a referendum proposal, and there is no evidence that the absence of a recorded vote for the elector is the result of a machine malfunction, the elector should not be counted among the total of votes cast from which the majority necessary for passage of the proposal is calculated. (Issued to William Winch, July 21, 1977)**

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on October 6, 2008.

**Opinion:**

Your request concerns the proper counting of machine-recorded votes at a special election on a referendum proposal.

You have described a situation in which the total number of electors registering to vote at such election exceeds the total number of affirmative and negative votes recorded by the voting machines. You ask whether the total number of votes cast, from which the majority necessary for passage of the referendum question is calculated, is (a) the number of electors registering to vote at the election or (b) the total of affirmative and negative votes. In other words, when no vote is recorded on a voting machine for an elector who registers to vote at a special referendum, is that elector to be counted among the total from which the majority necessary for passage of the referendum is calculated?

In the absence of evidence that the lack of a recorded vote for an elector is the result of machine malfunction, he should be treated as having cast a blank ballot. Therefore, your question is essentially whether blank ballots are to be counted in arriving at the total cast for the purpose of determining a majority.

In the Board's opinion, §7.50 (2)(b), Stats., provides the answer: "A ballot cast without any marks shall not be counted." The term "ballot" includes the recording of a vote by voting machines. State ex rel. McCarty v. Thim, 37 A. 2d 223 (Conn.).

Even if §7.50 (2)(b), Stats., were not applicable, the policy which underlies it would require a conclusion that unrecorded machine votes should not be counted in the total from which a majority is calculated in a special referendum. The ultimate criterion in application of the election laws must be elector intent. §5.01 (1), Stats. When a voter has refrained from exercising his right to vote on a question he manifests an intent to allow those who do so to determine the proposition. See Sanford v. Prentice, 28 Wis. 358, Eufaula v. Gibson, 98 P. 565 (Okla.). To count a blank ballot in the total out of which a majority of affirmative votes must be reached would be, in effect, to count such ballot as a negative vote. That result would be inconsistent with the intent of one who exercises his choice to cast neither a negative nor an affirmative vote.

The rule in most other jurisdictions appears to be consistent with the conclusion reached by the board here. The case of McLaughlin v. Rush City, 142 N.W. 713 (Minn. 1913), on which you

rely, represents the viewpoint of a minority of courts which have considered this question. See the annotation at 131 ALR 1382, 26 AM. Jur. 2d, ELECTIONS, sec. 343 at page 162, and cases and authorities cited therein.

12 Op. Atty. Gen. 227 (1923) also supports the position expressed here. The attorney general assumed the ballots in question there were "defective" (marked unintelligibly) rather than blank (not marked), and therefore counted them in the total from which a majority was determined. The opinion made it clear that the result would be different if the ballots had been blank. (The Board takes no position on the question of whether "defective" ballots should be counted in the total from which a majority is calculated.)

The Board concludes that, when a vote is not recorded on a voting machine for an elector who registers to vote on a referendum proposal, and there is no evidence that the absence of a recorded vote for the elector is the result of a machine malfunction, the elector should not be counted among the total of votes cast from which the majority necessary for passage of the proposal is calculated.