

LETTER OPINION
96-L-226

HAND DELIVERED

November 29, 1996

Alvin A. Jaeger
Secretary of State
600 East Boulevard
1st Floor
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your letter requesting an opinion on whether the ballots that were disqualified by the election board after the close of the polls but prior to the convening of the county canvassing board should be included in a recount conducted by the county auditor. You also ask whether absentee ballots that were legally postmarked but were not received by the county auditor until after the county canvassing board had already canvassed the vote for the county should be included in a recount.

N.D.C.C. § 16.1-16-01 (5) provides that during a recount:

The county auditor shall review all paper, machine, electronic voting system, and absentee ballots, whether or not the ballots were counted at the precinct or the county canvass, to determine which ballots were cast and counted according to the law.

Words in a statute are to be given their usual meaning unless a contrary intention plainly appears or the words are defined by statute. N.D.C.C. § 1-02-02; Kim-Go v. J.P. Furlong Enterprise, Inc., 460 N.W.2d 694, 496 (N.D. 1990). A plain reading of N.D.C.C. § 16.1-16-01(5) and related statutes answers your first question. All paper, machine, electronic voting system and absentee ballots are to be reviewed by the county auditor during a recount regardless of whether they were counted at either the precinct or at the county canvass. The purpose of the recount expressed in the last phrase of the quoted portion of the statute is to determine which ballots were cast and counted according to law. To achieve that purpose ballots that were excluded from the vote tally must be examined to determine whether they were properly excluded. In other words, the auditor must consider whether a ballot that was included in the vote tally was properly cast and counted and whether a ballot that was excluded from the vote tally was properly excluded. For this factual

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determination to be made the actual ballots, both those counted and those determined to be void or defective, must be examined.

Eligible participants in the recount may challenge the acceptance or exclusion of any ballot, stating the legal reason for the challenge. N.D.C.C. § 16.1-16-01(6). The auditor then determines whether to count the ballot. Once the recount is completed, the auditor submits all challenged ballots along with a note reflecting how they were counted to the recount board for a decision. The recount board determines by majority vote how each challenged ballot will be counted. The decision of the recount board is final subject to an election contest. N.D.C.C. § 16.1-16-01(6). The acceptance or exclusion of the ballot that is challenged by the participants of the recount, of necessity, must be the acceptance or exclusion that had been made by the election board because the participants' challenges are made prior to the auditor's counting the ballot during the recount process.

The initial canvass of the ballots by the election board after the election is governed by N.D.C.C. §§ 16.1-15-01 through 16.1-15-14. Section 16.1-15-01 provides that a ballot is void and not to be counted in the canvass of votes if it is not endorsed with the official stamp and initials or if it is impossible to determine the elector's choice for the ballot. During the election board's canvass the inspector and the election judges examine each ballot and count those found to be validly cast. Ballots not validly cast, including defective absentee ballots and void ballots, are wrapped and kept separately. N.D.C.C. § 16.1-15-08. It is my opinion that N.D.C.C. § 16.1-16-01 requires that the ballots that were determined to be not validly cast, as well as those that were counted, must be reviewed during the recount.

Your second question requires a review of N.D.C.C. § 16.1-07-09, which governs the canvassing of absentee ballots. This section requires that envelopes postmarked before the date of the election containing an absent voter's ballot that arrive too late to be sent to the precinct to be counted in the election board's tabulation must be forwarded to the county canvassing board to be tallied at the time the returns are canvassed. If no postmark exists or if the postmark is illegible, the absentee ballot must be received by the proper official within forty-eight hours after the polls close on election day in order to be canvassed and counted. N.D.C.C. § 16.1-07-09. The statute specifically addresses the counting of absentee ballots by the county canvassing board if the ballot is received prior to the canvass by the county canvassing board.

In 1993, N.D.C.C. § 16.1-07-09 was amended to increase the time allowed for receipt of an absentee ballot that did not arrive in an envelope with a legible postmark from twenty-four to forty-eight hours after the closing of the polls. 1993 N.D. Sess. Laws ch. 201, § 13. During the House Judiciary Hearing on Senate Bill 2361, which made the change, there was discussion of the problems with absentee ballots that had legible postmarks but did not arrive until several days after the election. Hearing on SB 2361 Before House Judiciary Comm. 53d ND Leg. (March 2, 1993) (Tape 1, Side B). In response to legislators' questions, Burleigh County Auditor Kevin Glatt testified that the ballots must arrive prior to the canvass by the county in order to be counted. Hearing on SB 2361 Before House Judiciary Comm. 53d ND Leg. (March 2, 1993) (Testimony of Kevin Glatt) (Tape 1, Side B). Although the legislators predicted the late arrival of ballots would become an even greater concern because the postal service was routing more of the state's mail through the larger cities, the Legislature took no action to address that concern.

The statutes do not authorize the state canvassing board to count absentee ballots that are received after the county canvassing board has completed the county canvass. When the North Dakota Supreme Court was construing former N.D.C.C. § 16-13-38, the predecessor statute to N.D.C.C. § 16.1-15-36, the court stated:

The language "The . . . [State Board of Canvassers] shall canvass only the regular returns made by the county board of canvassers as provided in this chapter" . . . , we believe, was employed to clearly point out that the State Board of Canvassers was restricted from counting absentee ballots which arrived too late to be counted by either the election board or the county canvassing board.

State ex rel. Olson v. Thompson, 248 N.W. 2d 347, 355 (N.D. 1976). The pertinent language was carried over to N.D.C.C. § 16.1-15-36 without change.

It would not make sense to allow the ballots received after the county canvass committee had completed the county canvass to be counted in a recount, but not counted if no recount was requested or mandated by law. The absentee ballots received after the county canvass was complete were not considered and, therefore, neither accepted nor excluded by the election board or the county canvassing board. Under these circumstances, reviewing them during a recount would not serve the purpose of determining whether the ballots had been counted according to law. It is, therefore, my opinion that any absentee ballots that were legally postmarked but were not received

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until after the county canvassing board had completed the canvass of the county may not be included in the recount conducted by the county auditor.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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