

LETTER OPINION
97-L-92

July 1, 1997

Honorable Bill Devlin
State Representative
District 23
P.O. Box 475
Finley, ND 58230-0475

Dear Rep. Devlin:

Thank you for your June 13, 1997, letter requesting an opinion on various matters relating to the election of a school board member.

You indicate the following: A person who resides in the Hope School District and is a citizen of Canada ran as a write-in candidate for the school board in the June 10, 1997, election. The incumbent, whose name was listed on the ballot, ran for re-election. Although you indicate the write-in candidate received 60 votes and the incumbent received 23 votes, you state that on the night of the election, the school board, acting on the advice of the School Board Association's attorney, did not count the votes of the write-in candidate because that person is not a United States citizen. Voters in the Hope School District have contacted you and conveyed their strong belief that their votes for the write-in candidate should have been counted and the write-in candidate should be declared the winner of the election, subject to meeting the legal requirements to serve. You suggest that at the time of the official seating of the candidates in July, the school board could determine whether the write-in candidate meets the United States residency qualifications required to be sworn in to the position. The incumbent was previously elected to a three-year term and that term will be up at the July meeting.

State law provides:

Any person who is a qualified elector of this state is qualified to vote for the election of school officers in any school district in which he is a resident, and is eligible to the office of business manager of the school district, or member of the school board

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North Dakota Century Code (N.D.C.C.) § 15-47-05 (emphasis added). Thus, a qualified elector of the state is eligible to hold the office of school board member. In order for a person to be a qualified elector, that person must be a citizen of the United States. N.D. Const. art. II, § 1; N.D.C.C. § 16.1-01-04(1). The North Dakota Supreme Court has determined that the statutory language that requires a person to be a qualified elector to be "eligible to an office," does not prohibit a candidate from seeking office when the person is not a qualified elector. Nielsen v. Neuharth, 331 N.W.2d 58, 60 (N.D. 1983). Cf. Enge v. Cass, 148 N.W. 607 (N.D. 1914); 1994 N.D. Op. Att'y Gen. L-101 [April 12 letter to Peterson]; 1978 N.D. Op. Att'y Gen. 58 [September 14 letter to Splitt]. It does, however, prohibit a person who is not a qualified elector from holding the office, unless the Legislature determines otherwise. Id. at 60-61. There is no law that requires a write-in candidate for school board member to be a qualified elector at the time of the election. But cf. N.D.C.C. § 15-28-09(3) (a person whose name is not on the ballot who provides stickers with his name to be attached to the official ballot by electors who so choose, must be qualified to hold the office to be a candidate at the school election). Thus, it is my opinion that a person does not have to be a qualified elector to seek the office of school board member.

The law on school elections provides, in part:

Immediately after the polls are closed, the judges shall count and canvass the votes for each office and within forty-eight hours after the polls are closed, the returns must be signed by the judges and clerks of the election and filed with the business manager of the school district. . . . The school board shall canvass all election returns and shall declare the result of any election within three days of the election The person receiving the highest number of votes for each office in the district must be declared elected.

N.D.C.C. § 15-47-06 (emphasis added). The North Dakota Supreme Court has determined that the duty of a school district canvassing board to declare the result of an election is purely ministerial. Stearns v. Twin Butte Pub. Sch. Dist. No. 1, 185 N.W.2d 641, 644 (N.D. 1971). After the canvassing board determines who has received the highest number of votes for a particular office, the canvassing board has no alternative but to perform its ministerial duty and issue to that person a certificate of election. Id. at 644. The canvassing board has no authority to set itself up as judge of the qualifications of the candidates and issue a certificate to someone other than the

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highest vote-getter. Id. at 644. Thus, it is my opinion that all of the votes should have been counted, including those of the write-in candidate, and the canvassing board had the ministerial duty of declaring the write-in candidate the winner if the write-in candidate received the highest number of votes.

"The term of any elected [school board] member commences at the annual meeting in July following the member's election, and continues until a successor is elected and qualified." N.D.C.C. § 15-28-03(1). "An office becomes vacant if the incumbent . . . [f]ail[s] to qualify as provided by law" N.D.C.C. § 44-02-01(6). See also N.D.C.C. § 15-29-06 (a vacancy occurs on a school board by death, resignation, removal from the school district, or otherwise). "At each annual election, members of the school board must be elected to fill all vacancies caused by the expiration of terms of office or otherwise." N.D.C.C. § 15-28-03(1). This office has previously determined:

In those situations where the undisputed facts show that a vacancy does exist (e.g. due to a death, resignation, or failure to discharge the duties of the office), I see no reason why a board may not consider the office vacant and proceed to fill that vacancy without an intervening court order declaring the vacancy.

. . . .

[W]here facts are in dispute and are not clear as to whether an office holder is able to qualify for his office and to assume his responsibilities, such disputes may not be resolved by the board Instead, such questions of fact can only be resolved through an appropriate legal action.

Letter from Attorney General Nicholas J. Spaeth to Steven J. Wild (February 2, 1987). See also Nielsen v. Neuharth, 331 N.W.2d 58, 60 n.1 (N.D. 1983) ("ineligibility to hold office ordinarily nullifies election").

Thus, if the undisputed facts show, at the annual meeting in July, that the write-in candidate fails to qualify as a school board member, i.e., is not a United States citizen in this case, it is my opinion that the school board may declare the office vacant and proceed to fill the vacancy. See Letter from Attorney General J. Spaeth to Steven L. Vogelpohl (June 18, 1986). If the facts are disputed or if undisputed facts do not show, at the annual meeting,

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that the write-in candidate fails to qualify as a school board member, i.e., is not a United States citizen in this case, it is my opinion that the write-in candidate shall assume the office and may be subject to a challenge that the candidate has failed to qualify for that office as required by law. See Letter from Attorney General Nicholas J. Spaeth to Michael S. McIntee (March 9, 1990). The write-in candidate, as office holder, could be challenged via an election contest pursuant to N.D.C.C. § 16.1-16-05(1) or a quo warranto action pursuant to N.D.C.C. ch. 32-13. See Letter from Attorney General Nicholas J. Spaeth to Senator Bryce Streibel (August 14, 1991) and Letter from Attorney General Nicholas J. Spaeth to Michael S. McIntee (March 9, 1990). If a court determines that a person is not qualified to hold the office, a vacancy exists. See Letter from Attorney General Nicholas J. Spaeth to Senator Bryce Streibel (August 14, 1991).

If it is determined that a vacancy exists, either by a court or by the school board when the undisputed facts indicate the candidate has failed to qualify, the vacancy must be filled in accordance with N.D.C.C. § 15-29-06, which states, in part:

The school board has power to fill by appointment any vacancy which may occur on the board. An appointee shall hold office until the next annual election and until a successor is elected and qualifies. . . . In the event that the school board fails to fill such vacancy within sixty days after notice of a vacancy has been filed with the county superintendent of schools, the county superintendent shall call a special election for the purpose of filling the vacancy.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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