

N.D.A.G. Letter to Olson (April 26, 1991)

April 26, 1991

Mr. Lonnie W. Olson
Ramsey County States Attorney
Ramsey County Courthouse
Box 16
Devils Lake, ND 58301

Dear Mr. Olson:

Thank you for your April 8, 1991, letter concerning the election of an official newspaper for Ramsey County.

You state that no newspaper filed the proper petition to be placed on the 1990 primary election ballot. Two newspapers, the Devils Lake Daily Journal and the Edmore Herald, both of which apparently are qualified to be designated the official county newspaper, received write-in votes at the 1990 primary election. Neither newspaper had its name on the 1990 general election ballot. At that election, the Edmore Herald received 62 write-in votes and the Devils Lake Daily Journal received 17 write-in votes. The Edmore Herald was declared elected official county newspaper.

You have requested an opinion on the following questions relating to the election:

1. Whether the vote requirement of N.D.C.C. § 16.1-11-36 applies to elections for the official county newspaper;
2. Whether N.D.C.C. § 46-06-05 applies when no newspapers appear on the primary election ballot;
3. Whether a special election is now required.

The selection of the official county newspaper is governed by N.D.C.C. ch. 46-06. That chapter "appears to be a special chapter relating to the selection of an official county newspaper and seems to be complete in itself." Letter from Attorney General Burgum to James Williams (May 14, 1962). Chapter 46-06 provides that the county auditor shall place the name of a newspaper on the primary election ballot provided an application asking the county auditor to do so is timely filed by the owner of the newspaper. N.D.C.C. § 46-06-04. Furthermore, the auditor shall place on the general election ballot the names of the "two newspapers receiving the highest number of votes at the primary election." N.D.C.C. § 46-06-05. The names "shall appear in the same place and in the same manner as on the primary election ballot." Id.

N.D.C.C. § 16.1-11-36 provides:

16.1-11-36. Vote required at primary election for nomination. No person shall be deemed nominated as a candidate for any office at any primary election unless he receives a number of votes equal to the number of signatures required, or which would have been required had he not had his name placed on the ballot through a certificate of endorsement, on a petition to have a candidate's name for that office placed on the primary ballot.

The provisions of title 16.1 govern all "primary, general, and special statewide and legislative elections, and all other elections, unless otherwise provided by law." N.D.C.C. § 16.1-01-02. (Emphasis supplied.) As noted, there are provisions other than those found in title 16.1 which govern selection of an official county newspaper. Section 16.1-11-36 cannot be applied to elections for official county newspapers because chapter 46-06, which governs such elections, does not require a petition containing a number of signatures in order to place the name of a newspaper on the primary ballot; all that is required is an application filed by the owner of the newspaper. Therefore, it is my opinion that section 16.1-11-36 does not apply to the selection of an official county newspaper.

N.D.C.C. § 46-06-05 states that the county auditor shall place the names of the two newspapers receiving the highest number of votes at the primary election on the general election ballot in the "same manner as on the primary election ballot." An earlier opinion by this office concluded that a newspaper receiving write-in votes at the primary election cannot "be considered one of two newspapers with the highest number of votes in the primary as the law does not contemplate nomination by write-in votes for official newspaper." See 1956 N.D. Op. Att'y Gen. at 105, a copy of which is attached for your convenience. Accordingly, it is my opinion that N.D.C.C. § 46-06-05 does not apply when no newspapers appear on the primary ballot. Concerning your final question, it is my opinion that a special election to select an official county newspaper is not required.

The county auditor properly did not place the names of the two newspapers on the general election ballot because neither newspaper appeared on the primary ballot. The Edmore Herald received the highest number of votes at the general election. See N.D.C.C. § 46-06-05. Moreover, even assuming a mistake was made by an election official, the Edmore Herald has been declared the winner of the election, and this result should not be disturbed.

The general rule with respect to elections is stated as follows:

All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obvious obstruction of the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of the election, or

that its omission shall render it void.

City of Fargo v. Sathre, 36 N.W.2d 39,47-48 (N.D. 1949) (citations omitted). The reason behind this rule is that the will of the people freely and intelligently expressed ought not to be defeated because of the mistake of an officer or of any technical fault. Id. at 48.

An election has been held and the people have expressed their choice. There is apparently no evidence of fraud. Therefore, there is no reason to invalidate the election.

I trust this answers your questions.

Sincerely,

Nicholas J. Spaeth

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Enclosure