

OPINION
78-1

November 6, 1978 (OPINION)

Mr. Richard L. Schnell

Morton County State's Attorney

Box 190

Mandan, North Dakota 58554

Dear Mr. Schnell:

This office is in receipt of your letter of November 4, 1978, wherein you state:

It has been brought to my attention by a letter which is enclosed, by the Morton County Auditor, Edmund Bauer that current Morton County commissioner, Clarence West, who is a candidate for reelection has obtained a number of absentee voter application on which he has signed as agent and that these ballots will be brought in and filed with the Morton County Auditor.

I am aware that things of this nature have caused considerable controversy and expense in the past in other areas and I am requesting an opinion on this matter as there is still time prior to election to probably correct this.

This office is also in receipt of your enclosure: a letter from Edmund T. Bauer, Morton County Auditor; affidavit of Barbara Senn; and affidavit of Pamela I. David.

Section 16-18-09, N.D.C.C. Supplement, provides as follows:

16-18-09. DELIVERING BALLOTS - ENVELOPE ACCOMPANYING - STATEMENT ON ENVELOPE - INABILITY OF ELECTOR TO SIGN NAME. Upon receipt of an application for an official ballot properly filled out and duly signed, or as soon thereafter as the official ballot for the precinct in which the applicant resides has been prepared, the county auditor, auditor of the city, or clerk of the school district, as the case may be, shall send to such absent voter by mail, postage prepaid, one official ballot, or personally deliver said ballot to the applicant or his agent, which agent may not, at that time, be a candidate for any office to be voted upon by the absent voter; provided that the agent deposit with the auditor or clerk, as the case may be, authorization in writing from the applicant to receive such ballot or according to requirements hereinafter set forth for signature by mark. (Emphasis added)

* * *

First of all we must point out that a candidate for office is prohibited from acting as an agent for an absentee voter. Therefore,

it was improper for the candidate to act as such agent and was improper for the county auditor's office to accept applications for absentee ballots where the agent was a candidate for office. As state's attorney you may consider it appropriate to investigate possible criminal violations relating to the failure of a county official to perform his duties in accordance with the law and to a candidate for public office performing an act that is prohibited by the election laws. For your information a candidate who act as an agent for absentee voters was found guilty of undue influence in violation of the corrupt practices act in the case of Kee v. Redlin, 203 N.W.2d. 423 (1973), which resulted in the candidate being deprived of the nomination of the voters at a primary election to be the Republican Party state senate candidate on the general election ballot. The case was appealed to the Supreme Court on procedural grounds. Enclosed for your information is a copy of Appellant's Brief which sets forth the facts, complaint, findings of fact, conclusions of law and order for judgment.

Concerning absentee ballots that are improperly obtained, we must conclude, however, that such ballots must be counted.

Absent any evidence of fraud, these ballots must be counted for the voters are presumed to have acted in good faith. The law should not operate to arbitrarily disenfranchise voters. We note that Section 16-18-17, N.D.C.C., sets forth the circumstances in which absentee ballots should not be counted. The fact that the ballots were obtained by an agent-candidate is not among the reasons for voiding a ballot. (See Attorney General Opinion dated October 22, 1956, copy enclosed.)

The intent of the election laws in this instance seems to be that the candidate is to suffer the consequences of violating Section 16-18-09 (See, Kee v. Redlin, supra) rather than the voter. Presumably these voters cast votes for many local and statewide offices and several constitutional measures and initiated measures. It would not be appropriate to disenfranchise these voters under the circumstances when an adequate alternate remedy appears to be available.

I trust this sufficiently answers your inquiry.

Sincerely,

Allen I. Olson

Attorney General