

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-09

Date issued: March 17, 1994
Requested by: Alvin A. Jaeger, Secretary of State

- QUESTION PRESENTED -

Whether a biennial city election which is not held pursuant to an agreement with a county as required by either N.D.C.C. ? 40-21-02 or ? 41-21-03, or which is held on a date other than the second Tuesday in June in each even-numbered year, is invalid.

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It is my opinion that a biennial city election which is not held pursuant to an agreement with a county as required by either N.D.C.C. ? 40-21-02 or ? 41-21-03, or which is held on a date other than the second Tuesday in June in each even-numbered year, is invalid, unless the city holding the election is acting in a manner consistent with a home rule charter and an ordinance properly implementing that portion of the charter which permits the city to hold the election in that manner.

- ANALYSIS -

The North Dakota constitution provides that "[t]he legislative assembly shall provide by law . . .for administration of elections." N.D. Const. art. II, ? 1. In 1991 the North Dakota Legislature passed Senate Bill 2023, which amended N.D.C.C. ?? 40-21-02 and 40-21-03 regarding the administration of city elections. The amendments provided:

40-21-02. Elections in commission cities - When held - Notice polls - Agreements with counties - Judges and inspectors. Biennial municipal elections in cities operating under the commission system of government ~~shall~~ must be held on the ~~first~~ second Tuesday in ~~April~~ June in each even-numbered year ~~at~~

~~such place or places as the city council shall designate. Ten days' notice of the time and place of the election and of the offices to be filled at such election shall must be given by the city auditor by publication in the official newspaper of the city as provided by section 40-01-09. The polls shall be opened and closed as provided by state law for the opening and closing of polls at primary, general, and special elections. For all general city elections, the board of city commissioners shall appoint one inspector for each precinct at least twenty-one days before the election is held, and two judges of election for each precinct at least ten days before the election is held. The board of city commissioners shall enter into an agreement with the governing body of the county or counties in which the city lies concerning the use of a single canvassing board, the sharing of election personnel, the printing of election materials, and the apportioning of election expenses. For special city elections the board of city commissioners shall appoint one inspector and two judges of election for each precinct in the city at least ten days before the election is held and the polls must be opened and closed as provided for the opening and closing of polls at statewide elections. For any a special city election in a precinct in which seventy-five or fewer votes were cast in the last city election, the board of city commissioners may appoint one inspector and one judge. Each precinct election judge, in ~~either a general or a special city election~~, shall appoint a poll clerk who ~~shall be~~ is a qualified elector of the precinct in which he the poll clerk is to serve.~~

40-21-03. Elections in council cities - Polling places - Polls open - Notice - Judges, clerks, and inspectors - Agreements with counties. Biennial municipal elections in cities operating under the council form of government shall must be held on the first second Tuesday in ~~April~~ June in each even-numbered year at ~~such place or places as the city council shall designate.~~ In cities where aldermen are elected at large, the council shall designate one polling place only. The polls shall be opened and closed as provided by state law for

~~the opening and closing of polls at primary, general, and special elections. Ten days' notice of the time and place of holding each election and of the offices to be filled thereat shall must be given by the city auditor by publication in at least two newspapers published in said the city if two are published therein in the city. Publication in one such newspaper shall be is sufficient if only one newspaper is published in the city. For all general city elections the city council shall appoint one inspector for each precinct at least twenty-one days before the election is held, and two judges and two clerks of election for each precinct at least ten days before the election is held. The city council shall enter into an agreement with the governing body of the county or counties in which the city lies concerning the use of a single canvassing board, the sharing of election personnel, the printing of election materials, and the apportioning of election expenses. For special city elections the city council shall appoint one inspector, two clerks, and two judges of election for each precinct in the city at least ten days before the election is held and the polls must be opened and closed as provided for the opening and closing of polls at statewide elections. For any a special city election in a precinct in which seventy-five or fewer votes were cast in the last city election, the city council may appoint one inspector, one clerk, and one judge.~~

1991 N.D. Sess. Laws ch. 442, ?? 15 and 16. The changes in N.D.C.C. ?? 40-21-02 and 40-21-03 became effective on January 1, 1994. 1991 N.D. Sess. Laws ch. 442, ? 18. As amended, N.D.C.C. ?? 40-21-02 and 40-21-03 now provide that in both commission and council cities "[b]iennial municipal elections . . . must be held on the second Tuesday in June in each even-numbered year." N.D.C.C. ?? 40-21-02 and 40-21-03. City elections must also be administered pursuant to the agreement reached between the city and the county. Id. These statutes do not specifically state the date by which the agreements must be entered. By necessity however, the agreements must be entered into in sufficient time for the city and county to meet the deadlines applicable to running an election on the second Tuesday in June, 1994.

Although the Legislature amended the general city election provisions, it left intact a city's power to adopt a home rule charter and choose its own election administration and procedures. N.D.C.C. ? 40-05.1-06 provides in part:

From and after the filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this chapter, such city, and the citizens thereof, shall, if included in the charter and implemented through ordinances, have the following powers set out in this chapter:

. . . .

6. To provide for all matters pertaining to city elections, except as to qualifications of electors.

. . . .

. . . The statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters.

N.D.C.C. ? 40-05.1-06. Thus, a home rule city's charter and implementing ordinance may enable the city to have its biennial city election on another date and to hold an election without entering into an agreement with the county.

Prior to an election, all election requirements are considered mandatory and must be followed. Great Northern Railway Company v. Flaten, 225 N.W.2d 75 (N.D. 1974). However, the North Dakota Supreme Court has been reluctant to void elections and disenfranchise the electors after the election has occurred. The court will declare a completed election invalid if the requirement which has been violated is "mandatory." A provision is "mandatory" if noncompliance with the provision would defeat "the intent and purpose of the statute." Morgan v. Hatch, 274 N.W.2d 563, 578 (N.D. 1994) (citing Grubb v. Dewing, 187 N.W. 157 (N.D. 1922)).

The primary intent and purpose of the requirement that cities and counties enter into an agreement to conduct joint

elections on the same day using the same election officer and boards is to save taxpayer dollars by conducting elections together, resulting in the use of fewer personnel, and savings on equipment and facilities. Hearing on S.2023 Before the Senate Comm. on Political Subdivisions, 52nd Leg. (January 17, 1991) (Statements of John Walstad, Legislative Council and Jim Kusler, Secretary of State); Hearing on S. 2023 Before the House Comm. on Political Subdivisions, 52nd Leg. (February 28, 1991) (Statements of John Bjornson, Legislative Council, and Jim Kusler, Secretary of State). This purpose cannot be achieved if cities ignore the legal requirement that biennial city elections be held in conjunction with the county election.

Furthermore, voters have the right to rely upon the city to follow the law and hold the election on the date it is to be held. This is particularly true with regard to military personnel. Because of their mobility and the likelihood that they may be out of the country, Congress has taken special pains to assure that members of the military are not disenfranchised. See 42 U.S.C. ? 1973ff et seq. (Supp. 1993) (Uniformed and Overseas Citizens Absentee Voting Act) (requiring states to make special concessions to permit military personnel to vote absentee on federal ballots and encouraging them to do so for other elections). The Federal Voting Assistance Program publishes literature each year concerning elections including the dates of the elections and how to obtain absentee ballots. This literature is distributed to members of the military and their dependents who are overseas. The content of the literature is based in part upon information received from the Secretary of State's office. The Secretary of State informs them that, unless the city involved is a home rule city, the law requires a biennial city election to be held on the second Tuesday in June. Therefore a city's failure to comply with the law will result in the disenfranchisement of military personnel. This is also a result the courts will seek to prevent.

Other courts which have addressed similar issues have held the elections invalid. An election which is not held on the date set by the legislature is void. Simpson v. Teftler, 5 S.W.2d 350 (Ark. 1928). An election held without affirmative statutory authority is a nullity. Smith v. Morton Independent School Dist., 85 S.W.2d 853 (Tex. App. 1935).

Absent a home rule charter and implementing ordinance enabling

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the city to set the terms of its election, a city must comply with N.D.C.C. ?? 40-21-02 and 40-21-03 by holding its biennial city election on the second Tuesday in June in each even-numbered year and by entering into an agreement with a county.

To do otherwise would not only violate the affirmative legislative requirement for how and when the election is held, it would defeat the very purpose of the Legislature's amendments.

It is therefore my opinion that a court would invalidate a biennial election held by a city which has not entered into an agreement with a county or a biennial election held by a city on a date other than the second Tuesday in June in each even-numbered year, unless the city has a home rule charter which permits it to hold an election on a different date and an ordinance properly implementing that portion of the charter.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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