

OPINION
56-96

October 22, 1956 (OPINION)

ELECTIONS

RE: Absent Voters' Ballots - Delivery

This is in reply to your letter of 18 October 1956, requesting an opinion of this office in re delivery of absentee ballots to the elector.

Section 16-1809 of the North Dakota Revised Code of 1943 provides insofar as here applicable:

Upon receipt of an application for an absent voter's ballot properly filled out and duly signed, or as soon thereafter as the official absent voter's ballot for the precinct in which the applicant resides has been printed, the county auditor shall send to such absent voter by mail, postage prepaid, one official absent voter's ballot. * * "

Your question is stated as: "Is it legal for the County Auditor to hand a ballot to some person authorized by the absentee voter in his application to receive the ballot from the County Auditor in person and deliver to the absentee voter for the purpose of casting his vote or must it be mailed regardless of the circumstances?"

You further inform us that mailing of the ballots presents no hardship to the County Auditor but point out that during the last two or three days before the election it would be impossible for the sick or disabled voter to receive the ballot by mail and have it back before the day of election.

We find no decision of the Supreme Court of this state indicative of whether the provisions of the above-quoted statute are mandatory or directory, or indicative of what would be a substantial compliance with same.

In regard to the construction of election statutes as mandatory or directory, we find that general rule stated in 29 C.J.S. 310, Elections, Section 214, is as follows:

The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance; an act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed "irregularities", and as has been shown in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the

result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election * * * ."

It is readily apparent from a reading of Chapter 16-18 as amended, as a whole that the legislative assembly intended by the enactment of same to give qualified electors the opportunity to vote though absent from the county, though in the military or naval service and though suffering from physical disability. Having made specific provision that these persons might vote, it is difficult to believe that the legislative assembly intended that, by a technical interpretation of section 16-1809, such persons as you mention in the circumstances you suggest, should in effect be disenfranchised. (See: Sommerfeld v. Board of Canvassers of the City of St. Francis. 69 N.W.2d., 235, 269 Wis. 299. But see: Clark v. Quick, 36 N.E.2d. 563, 377 Ill. 424). We note that section 16-1817 of the North Dakota Revised Code of 1943 specifies particular grounds for the rejection of absentee ballots. We find no provisions, however, for the rejection of ballots on grounds concerned with the method of delivery of the ballot to the voter.

The only decision we find directly in point on this question is State ex rel Pemberton v. Superior Court of Whatcom County, 83 P 2d. 345 (Wash.) wherein under a statute requiring that the county auditor or city or town clerk as the case may be, on receiving the certificate of registration or a request for an absentee ballot, shall compare the same with the duplicate retained, and upon satisfactory comparison, " * * * shall deliver to the elector, or mail to the elector at the post-office address to be designated by such elector, the proper blank ballot of such election * * * " the court determined that the auditor did not violate any mandatory duty in giving the ballot to the voter's agent instead of mailing them or delivering them personally to the voter, and therefore did not reject any of the ballots there concerned on this ground.

In view of the above, it is the opinion of this office that at least in the circumstances you set out ballots may be delivered to the elector's agent.

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