

**LETTER OPINION
93-L-219**

June 29, 1993

Mr. Fabian E. Noack
Foster County State's Attorney
P.O. Box 15
Carrington, ND 58421

Dear Mr. Noack:

Thank you for your June 16, 1993, letter regarding school board elections.

N.D.C.C. ? 15-47-06 sets forth the election procedures for school districts. Your first question relates to the manner of resolving a tie vote under this provision. The last sentence of N.D.C.C. ? 15-47-06 provides that the recount provisions found in N.D.C.C. ? 16.1-16-01 apply to school district elections. Under N.D.C.C. ? 16.1-16-01(1), a recount must be conducted when a person has failed to be elected by one-half of one percent or less of the highest votes cast. The recount procedures established under N.D.C.C. ? 16.1-16-01 provide for the participation of various persons in the recount process. N.D.C.C. ? 16.1-16-01(6). Pursuant to N.D.C.C. ?? 16.1-16-01(4) and 15-47-06, the school district business manager must call for a recount within four days of the canvassing of the vote. The failure to meet the four-day requirement, however, is not fatal. The North Dakota Supreme Court has said:

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 obstruction to 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

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the validity of an election, or that its omission shall render it void.

Kiner v. Well, 71 N.W.2d 743 at 750 (N.D. 1955) (quoting Jones v. State, 55 N.E. 229, 233 (Ind. 1899)). Thus, the school district business manager could still set the date for the mandatory recount and give appropriate notice. Should any ballots be contested, it is important to keep in mind that N.D.C.C. ? 16.1-15-01 applies to school district elections. N.D.C.C. ? 15-28-10. "If a ballot is marked so only a part of the voter's intention can be determined, the election judges shall count such part. If a voter votes for more than the number of persons to be elected to any office, his ballot may be invalidated only insofar as his vote for such office is concerned, and the balance of his ballot, if otherwise proper, may not be invalidated." N.D.C.C. ? 16.1-15-01.

If there exists a tie after the recount, the tie should be broken in the manner provided in N.D.C.C. ? 15-47-06. With respect to situations where the parties cannot agree on a manner to break a tie in a school district election, this office has previously said:

Apparently one of the candidates is unwilling to agree upon a method of deciding the election. We have previously indicated that the above cited statute requires the tie to be broken within three days. The law gives the candidates the opportunity to determine the method in which this will be done. However this does not include the holding of another election or the selection of a method which would not permit the election to be decided within three days. If the parties are unwilling to agree upon a method we believe the judges and clerks of election must select a method of determining the election, such as drawing lots, etc. The law requires the election to be determined within three days. The candidates are entitled to select the method. If, however, they do not do so, we believe the judges and clerks must select a method which will give both candidates equal opportunity to prevail.

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Letter from Assistant Attorney General Gerald W. Vandewalle to Mr. Ray Walton, Williams County State's Attorney (June 8, 1966). In my opinion, this is the correct approach to take. Although N.D.C.C. ? 15-47-06 appears to require the tie to be broken within three days after the election, N.D.C.C. ? 15-47-06 must be read and interpreted as a whole. In 1989 this section was amended to add the last sentence which incorporates the recount provisions of N.D.C.C. ? 16.1-16-01. 1989 N.D. Sess. Laws ch. 236. Consequently, the period of time for breaking the tie is within three days of the recount. This interpretation is consistent with the sequence of events in N.D.C.C. ?? 16.1-15-29 and 16.1-15-30 regarding the breaking of tie votes at county elections and at elections for the Legislative Assembly. Thus, if there is still a tie after the recount and the candidates will not agree on a means of breaking the tie, the judges and clerks must decide the means of breaking the tie. A special election to break the tie may not be held.

Your second question is whether the official ballot was clear enough to adequately advise the electors that they were to vote for two candidates for the one-year term and two candidates for the three-year term. The official ballot you enclosed lists the candidates for the one-year term including spaces to insert write-in candidates, and below that lists the candidates running for the three-year term including spaces to insert write-in candidates. The directions at the top of the ballot provide: "[v]ote for four names only."

State law requires the ballot to contain "[t]he number of persons to be elected to each office." (N.D.C.C. ? 15-28-09(1)). It is not initially clear whether the voters understood the direction "vote for four names only" to mean that they should vote for two candidates for the one-year term and two candidates for the three-year term. Thus, it is necessary to look to factual matters surrounding the election to discern the voters' understanding. The tally list you enclosed with your request letter indicates that the candidates for the one-year term received a total of 213 votes and the candidates for the three-year term received a total of 214 votes. This provides some indication that the voters understood that they were

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to vote for two candidates for the one-year term and two candidates for the three-year term. The clearest indication of the voters' understanding necessarily would come from the ballots themselves. Ultimately, however, whether the official ballot was clear enough to indicate to the voters that they were to vote for two candidates for the one-year term and two candidates for the three-year term is a question of fact about which I am unable to provide an opinion.

Sincerely,

Heidi Heitkamp
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