LETTER OPINION
2002-L-45

July 22, 2002

Mr. Neil W. Fleming
Pembina City Attorney
PO Box 633
Cavalier, ND 58220-0633

Dear Mr. Fleming:

Thank you for your letter requesting my opinion on whether there is a minimum number of votes required for a write-in candidate to be elected to the city council. You enclosed copies of three opinions issued by this office which, as you note, appear to be inconsistent. I will briefly discuss each opinion.

The 1960-62 N.D. Op. Att'y Gen. 33 (discussing how many write-in votes a candidate for the city council must receive in order to be declared elected), addressed N.D.C.C. § 40-21-17 and former N.D.C.C. § 16-01-06. These state laws indicated that unless otherwise provided by law, the person receiving the highest number of votes is deemed to be elected. The opinion reasoned, however, that a person should not be elected with fewer votes than names required for a nominating petition (which in that case was 10% of the qualified electors residing within the relevant ward or precinct). The opinion cites no authority for this proposition other than to deem it "logical."

The second opinion you attached, 1970-72 N.D. Op. Att'y Gen. 100, is not applicable to the question you raise since it deals with offices required to be on the primary election ballot. It cites to former N.D.C.C. § 16-08-05, which provided that a person who is not a candidate on the primary election ballot could not be elected to a no-party office as a write-in candidate unless the person received the number of votes required to have had the candidate's name placed on the primary election ballot. The closest current counterparts to that statute are now contained in N.D.C.C. §§ 16.1-11-36 and 16.1-11-37. However, the two statutes and opinion deal with candidates for offices who are nominated through the primary election process, not with candidates for elective municipal officers who are not nominated in primary elections. Consequently, the opinion is not applicable to your question.

You also attached a copy of a Letter from Attorney General Nicholas Spaeth to Steven Vogelpohl (June 18, 1986). The letter cited to N.D.C.C. § 40-21-13, stating that, except as otherwise provided in N.D.C.C. ch. 40-21, general election laws regarding "conducting, voting at, keeping poll lists, and canvassing votes" applicable to county elections are also applicable to municipal elections. The opinion also cited to N.D.C.C. § 40-21-17 as just such an exception. Section 17 provides that the person having the highest number of votes for any municipal office shall be declared elected. The 1986 letter concluded "there is no minimum number of votes that a write-in alderman candidate must have in order to be elected to municipal office." These two statutes, although amended since 1986, are not materially different today.

The position taken in the 1986 letter is also the long-time position of the Secretary of State's office, according to information supplied to a member of my staff by Deputy Secretary of State Cory Fong. The Secretary of State is the chief elections officer of the state and the administrative construction of election statutes by the chief elections officer is entitled to some deference. See N.D.C.C. § 16.1-01-01; see also Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999) (construction of statute by administrative agency charged with its execution is entitled to weight and court will defer to its reasonable interpretation unless it contradicts clear and unambiguous statutory language).

In addition, I find the 1986 letter to be more persuasive on the issue. The legislature has not seen fit to include municipal elected officers within N.D.C.C. §§ 16.1-11-36 or 16.1-11-37, or to include similar provisions in municipal election statutes. The only expression of legislative intent applicable to write-in municipal officers, N.D.C.C. § 40-21-17, merely provides that the candidate with the highest number of votes wins. See § 40-21-17.

Consequently, the Letter from Attorney General Nicholas Spaeth to Steven Vogelpohl (June 18, 1986) continues to be the opinion of this office. To the extent that 1960-62 N.D. Op. Att'y Gen. 33 is inconsistent therewith, it is overruled.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk