

**LETTER OPINION  
2012-L-07**

July 5, 2012

The Honorable Alvin A. Jaeger  
Secretary of State  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Secretary of State Jaeger:

Thank you for your letter, on behalf of the State Canvassing Board, requesting my opinion on whether the gubernatorial candidate for the Libertarian Party was nominated in accordance with state law at the June 12, 2012, primary election and is eligible for certification and advancement to the general election ballot. Based on the following, it is my opinion that the gubernatorial candidate for the Libertarian Party was not nominated in accordance with North Dakota law at the June 12, 2012, primary election and consequently, the State Canvassing Board should not certify that nomination nor should you, as Secretary of State, issue a notice of nomination or otherwise permit this solitary candidate's name to be placed on the general election ballot.

**ANALYSIS**

In your letter, you indicate that prior to the 60-day candidate filing deadline for the June 12, 2012, primary election, an individual filed the required documents with your office to have his name placed on the ballot as a candidate for Governor in the Libertarian Party column and that his name was placed on the primary election ballot. You also indicate, however, that your office did not receive completed documents prior to the deadline for the position of Lieutenant Governor in the Libertarian Party column, to appear jointly on the ballot with the gubernatorial candidate. You further state that the State Canvassing Board met on June 25, 2012, and verified that the Libertarian Party's candidate for Governor did receive more than the 300 votes normally required to advance to the November general election.

Based on these circumstances, you question whether the gubernatorial candidate was properly nominated in accordance with North Dakota law and whether these results of the

primary election should be certified by the State Canvassing Board<sup>1</sup> and the candidate notified by your office<sup>2</sup> of his nomination and placement on the general election ballot.

State law provides as follows:

**State candidate's petition or political party certificate of endorsement required to get name on ballot - Contents - Filing.**

1. Every candidate for United States senator, United States representative, a state office except the office of state senator or state representative, and judges of the supreme and district courts shall present to the secretary of state, between the first date candidates may begin circulating nominating petitions according to this chapter and before four p.m. of the sixtieth day before any primary election, either:
  - a. The certificate of endorsement signed by the state chairman of any legally recognized political party containing the candidate's name, post-office address, and telephone number, the title of the office to which the candidate aspires, and the party which the candidate represents; or
  - b. The nominating petition containing the following:
    - (1) The candidate's name, post-office address, and telephone number, and the title of the office to which the candidate aspires, the appropriate district judgeship number if applicable, and whether the petition is intended for nomination for an unexpired term of office if applicable.
    - (2) The name of the party the candidate represents if the petition is for an office under party designation.

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<sup>1</sup> See N.D.C.C. §§ 16.1-15-40 and 16.1-15-21(1) and (2).

<sup>2</sup> See N.D.C.C. § 16.1-15-40.

- (3) The signatures of qualified electors, the number of which must be determined as follows:
    - (a) If the office is under party designation, the signatures of three percent of the total vote cast for the candidates of the party with which the candidate affiliates for the same position at the last general election. However, no more than three hundred signatures may be required.
    - (b) If there was no candidate of a party for a position at the preceding general election, at least three hundred signatures.
    - (c) If the office is under the no-party designation, at least three hundred signatures.
  - (4) The mailing address and the date of signing for each signer.
2. If the petition or certificate of endorsement is for the office of governor or lieutenant governor, the petition or certificate must contain the names and other information required of candidates for both those offices. If the petition or certificate of endorsement is mailed, it must be in the possession of the secretary of state before four p.m. of the sixtieth day before the primary election.<sup>3</sup>

As you indicate, your office did not receive completed documents prior to the statutory 60-day deadline from a candidate for the position of Lieutenant Governor in the Libertarian Party column, to appear jointly with the gubernatorial candidate. However, a

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<sup>3</sup> N.D.C.C. § 16.1-11-06 (emphasis added). The use of the words “shall” and “must” in this statute indicates that the provisions are meant to be mandatory. See, e.g., James Valley Grain, LLC v. David, 802 N.W.2d 158, 162 (N.D. 2011). See also N.D.C.C. § 16.1-12-02 which provides, in part, that “[i]f the petition is for the office of governor or lieutenant governor, it must contain the names and other required information of candidates for both those offices.” N.D.C.C. § 16.1-12-02(4).

plain reading<sup>4</sup> of N.D.C.C. § 16.1-11-06(2) clearly reveals that “the petition or certificate must contain the names and other information required of candidates for both those offices.”

This language requires two things. First, the gubernatorial candidate’s certificate of endorsement or nominating petition should have mentioned the name of a candidate for Lieutenant Governor together with the ancillary information such as the appropriate address, telephone number, title of office, and party (which it did not). Second, a candidate for Lieutenant Governor would have had to file a certificate of endorsement or nominating petition together with all the required information including certain information regarding the candidate for Governor. This provision of the law was likewise not followed. Because, in this instance, there was no candidate for Lieutenant Governor on the primary election ballot and because the gubernatorial candidate for the Libertarian Party (who did appear on the primary election ballot) did not name a running mate and other pertinent information required of candidates for both those offices in the nominating petition or certificate of endorsement, the Libertarian Party candidate for Governor was not nominated in accordance with North Dakota law.

“North Dakota law generally differentiates between a primary election and a general election.”<sup>5</sup> Persons properly nominated at a primary election in accordance with the provisions of N.D.C.C. ch. 16.1-11 are eligible as candidates to be voted for at the ensuing general election.<sup>6</sup> However, because the gubernatorial candidate for this party was not nominated in accordance with N.D.C.C. § 16.1-11-06(2), he was not properly nominated and thus not eligible as a candidate for the ensuing November general election.<sup>7</sup>

Moreover, the North Dakota Constitution requires that candidates for Governor and Lieutenant Governor must run together and be elected on a joint ballot. N.D. Const. art. V, § 3 provides as follows:

The governor and the lieutenant governor must be elected on a joint ballot. Each vote cast for a candidate for governor is deemed cast also for the candidate for lieutenant governor running jointly with the candidate for governor. The joint candidates having the highest number of votes must be declared elected. If two or more joint candidates have an equal and highest number of votes for governor and lieutenant governor, the

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<sup>4</sup> See N.D.C.C. § 1-02-02 (words used in a statute are to be understood in their ordinary sense).

<sup>5</sup> Bolinske v. Jaeger, 756 N.W.2d 336, 339 (N.D. 2008).

<sup>6</sup> Id. at 339, 340.

<sup>7</sup> Id.

legislative assembly in joint session at its next regular session shall choose one pair of joint candidates for the offices. The returns of the election for governor and lieutenant governor must be made in the manner prescribed by law.<sup>8</sup>

Because no candidate for Lieutenant Governor for the Libertarian Party appeared on the primary election ballot, likewise there would be no Lieutenant Governor candidate advancing to the general election ballot. Thus, even if it were assumed for the sake of argument that the gubernatorial candidate was lawfully nominated in the June primary election, the constitutional requirement of having joint candidates subject to election on a joint ballot in the November general election would not be met.<sup>9</sup> As noted in a prior opinion issued by this office construing the substantially similar predecessor provision to N.D. Const. art. V, § 3:

It is, however, our further opinion that Section 74 of the Constitution requires that the general election ballot contain the names of joint candidates for the offices of governor and lieutenant governor. . . . In the case of independent candidates, the Secretary of State shall refuse to place the name of any candidate for either of these offices on the general election ballot unless the petitions also contain the name of a joint candidate for the other office.<sup>10</sup>

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<sup>8</sup> N.D. Const. art. V, § 3 (emphasis added). The multiple use of the word “must” in these provisions indicates the provisions are meant to be mandatory. James Valley Grain, LLC v. David, 802 N.W.2d at 162. It could be suggested that this constitutional deficiency of a lack of a Lieutenant Governor candidate could be remedied if the gubernatorial candidate is elected, deems there to be a vacancy in the office of Lieutenant Governor, and appoints someone to fill that office. While a Governor has the power to fill a vacancy in state office under N.D.C.C. § 44-02-03, the situation here does not involve a vacancy within the meaning of N.D.C.C. § 44-02-01. That law requires an actual officeholder who is an incumbent who is subject to one of the ten enumerated causes of vacancies set out in this statute. Those specific vacancy triggers are that the officeholder has died in office; been adjudged mentally ill; resigned from office; been removed from office; failed to discharge the duties of office; failed to qualify for office (by failing to take the oath); ceased to be a state resident; been convicted of certain felonies; ceased to possess a qualification of office; or had the incumbent’s election declared void by a court. Id. Not only would there be no incumbent Lieutenant Governor, none of the enumerated vacancy triggers would be present here.

<sup>9</sup> N.D. Const. art. V, § 3.

<sup>10</sup> N.D.A.G. 76-86. This opinion only construed the language from the constitutional provision. N.D.C.C. § 16.1-11-06 was not enacted until 1981, some five years after this opinion was issued. To the extent part of N.D.A.G. 76-86 is inconsistent with this letter, it is hereby overruled.

Based on the foregoing, it is my opinion that the gubernatorial candidate for the Libertarian Party was not nominated in accordance with North Dakota law at the June 12, 2012, primary election. Because of this, it is my opinion that the State Canvassing Board may not certify that the candidate has been nominated as provided by law.<sup>11</sup> Nor may the Secretary of State mail a notice of nomination to such a solitary candidate (stating that the candidate's name will be placed on the official ballot to be voted for at the ensuing general election) since this candidate has not been nominated in accordance with state law<sup>12</sup> or

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<sup>11</sup> See N.D.C.C. §§ 16.1-15-40 and 16.1-15-21.

<sup>12</sup> See N.D.C.C. § 16.1-15-40. It should be noted that there is a general rule of construction regarding election law:

All provisions of election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election 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 . . . .

Kiner v. Well, 71 N.W.2d 743, 744 (Syllabus by the Court 2) (N.D. 1955) (emphasis added). It might be argued that the first part of this rule of construction would apply here and that the requirements of N.D.C.C. § 16.1-11-06 and N.D. Const. art. V, § 3 would not be mandatory after the primary election. However, I do not believe this rule is applicable here. First, the primary election is only an election in a very limited sense:

Insofar as the primary election deals with the selection of public officers it is a nominating election only at which the people choose candidates for party and no-party offices. The final choice of offices is left entirely to the general election. At the primary no one is elected. The election procedure relative to notice, form of ballot, canvas of votes, and certification of the result deal with nominations and not final election to office.

State ex rel. Lanier v. Hall, 23 N.W.2d 44, 47 (N.D. 1946). Second, even if this rule of construction would be deemed to apply to a primary election, it provides an exception that keeps post-primary election provisions mandatory if they affect an essential element of the election. Kiner v. Well, 71 N.W.2d at 744. The mandatory provisions in N.D.C.C. § 16.1-11-06 requiring the naming of a gubernatorial running mate and N.D. Const. art. V, § 3 requiring joint ballots and joint candidacies for Governor and Lieutenant Governor are essential elements of the primary and general elections since these offices are meant to be campaigned for jointly and elected jointly. Consequently, it is necessary that these statutory and constitutional requirements be considered as mandatory at all times.

LETTER OPINION 2012-L-07  
July 5, 2012  
Page 7

otherwise met the constitutional requirements for placement of his name on the general election ballot.

Sincerely,

Wayne Stenehjem  
Attorney General

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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.<sup>13</sup>

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<sup>13</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).