

## **N.D.A.G. Letter to White Eagle (May 7, 1986)**

May 7, 1986

Ms. Maureen White Eagle  
Devils Lake City Attorney  
P.O. Box 1048  
Devils Lake, ND 58301

Dear Ms. White Eagle:

Thank you for your letter of April 7, 1986, requesting an opinion as to the question of whether a non-attorney may serve as municipal judge in a city of a population of more than 3,000.

North Dakota law, as found at N.D.C.C. § 40-18-01, provides that the municipal judge in a city having a population of 3,000 or more shall be an attorney licensed to practice law "unless no person so licensed is available in the city. . . ." The term "available" is not specifically defined by the statute. The applicable rule of statutory interpretation requires such a word to be understood in its ordinary sense. N.D.C.C. §1-02-02. A previous opinion of this office has construed the ordinary sense meaning of "available" as referring to "ready, willing, and able." 1964-1966 N.D. Op. Atty. Gen. 36.

When the term "available" is interpreted to mean "ready, willing, and able," it is obvious that the reference in the first sentence of N.D.C.C. §40-18-01 is directed to an individual who wishes to serve as a municipal judge as opposed to one who wishes to run for the office. I believe we must make a distinction between the ability of a person to run for the office of municipal judge and his ability to serve as municipal judge following the election. I find nothing in N.D.C.C. §40-18-01 which prevents a person, although he may be unlicensed to practice law in the state and the city in which he wishes to run as municipal judge has a population of more than 3,000, from filing the necessary papers and actively campaigning for the position of municipal judge. It must be recalled that the time at which we determine whether a person possesses the necessary qualifications to serve in an office (as opposed to running for the office) is the time the person seeks to qualify for the office following his election. One is not required to satisfy the qualifications for a particular office at the time he files for a particular office or at the time of the election of that office. Nielsen v. Neuharth, 331 N.W.2d 58 (N.D. 1983).

With these conclusions in mind, it is my opinion that the first sentence of N.D.C.C. § 40-18-01 provides that, in a city having a population of 3,000 or more, a non-attorney may serve as the municipal judge of such a city so long as there is no attorney (regardless of residency) ready, willing, or able to serve as the municipal judge of that city. In the situation where a non-attorney does indeed assume the office of municipal judge in a city with a population of over 3,000 due to the non-availability of a licensed attorney, his term of office is for a period of four years or until an attorney (regardless of residency)

presents himself as being ready, willing, and able to serve as municipal judge. Thus, in the situation where a non-attorney assumes the office of municipal judge due to the non-availability of a licensed attorney, and where subsequently a licensed attorney presents himself as ready, willing, and able to serve that particular office, the term of office of the non-attorney will end and the licensed attorney shall then be appointed as municipal judge for the unexpired term of that office.

Obviously, the statute in question is far from clear in dealing with the factual situation described in your letter. I believe that appropriate legislation is needed to resolve this unclear area of the law. For this reason, I have referred a copy of my response and your letter to the attention of the North Dakota League of Cities and the North Dakota State Court Administrator's Office for their review and consideration.

Sincerely,

Nicholas J. Spaeth

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cc: North Dakota League of Cities  
North Dakota State Court Administrator