

N.D.A.G. Letter to Riha (July 16, 1986)

July 16, 1986

Mr. Richard J. Riha
Assistant State's Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, ND 58501

Dear Mr. Riha:

Thank you for your letter of June 11, 1986, asking whether write-in votes should be counted even though it is impossible to determine whether the voter engaged in prohibited crossover voting.

As explained in your letter, Burleigh County employs a punchcard system of voting. Votes for candidates appearing in the guide booklet or ballot label are recorded on the ballot card. Write-in votes are recorded on the inside flap of the ballot envelope and the ballot envelope containing the voted ballot card are deposited in the ballot box.

Pursuant to N.D.C.C. §§ 16.1-11-22 and 16.1-13-22, the inspector or judge is required to inform each individual that if the voter splits the ballot or votes for the candidates of more than one political party, the partisan portion of the ballot will be rejected and not counted. Moreover, the same warning against voting for candidates of more than one political party is contained in the guide booklet or ballot label. See N.D.C.C. §16.111-22(4).

To ensure that prohibited crossover voting had not occurred, the procedure the precinct election officials should have followed was to compare the vote cast on the ballot card to the write-in vote contained on the ballot envelope. However, the precinct election officials separated the ballot cards from the ballot envelopes without making such a determination.

Experience tells us that neither a statute, rule, nor regulation can pragmatically cover every situation that may arise, and as a result the official body required to act or make a decision or fashion a remedy must fill the interstices in accordance with those legal concepts, principles, or objectives which may apply to the situation and that are in harmony and legally compatible with the rule, regulation, or statute. State, ex rel., Olson v. Bakken, 329 N.W.2d 575, 580 (N.D. 1983). This is the situation in the instant case as the precise issue involved here is not specifically covered in N.D.C.C. Title 16.1.

Clearly, the law and equity does not favor disenfranchising voters who have complied with the law when the disenfranchisement occurs merely because of mistake, error, negligence, or misconduct on the part of election officials. State, ex rel., Olson v. Bakken, 329 N.W.2d at 580.

In the instant case, there is no evidence to suggest that the voters engaged in prohibited crossover voting. Moreover, with both the verbal and written notice advising voters of the crossover voting prohibition, there is a strong presumption in favor of the voters that they cast their ballots correctly.

To preserve the right to vote in our representative form of government, each branch of government in its respective role must affirmatively act or react within the laws and vigilantly guard against any action or lack of action by any official which will prevent eligible votes, validly cast, from being counted. State, ex rel., Olson v. Bakken, at 579. Therefore, it is my opinion that where ballot cards are separated from ballot envelopes without a determination being made as to whether prohibited crossover voting occurred, the write-in votes should be counted.

Sincerely,

Nicholas J. Spaeth

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