

## **N.D.A.G. Letter to Kusler (Oct. 25, 1991)**

October 25, 1991

Jim Kusler  
Secretary of State  
State Capitol  
600 E Boulevard  
Bismarck, ND 58505

Dear Secretary of State Kusler:

Thank you for your September 16, 1991, letter in which you request my opinion concerning the ramifications of the failure of the City of Bismarck to give adequate notice of two elections to amend their home rule charters. Specifically you request my opinion regarding whether there is a remedy available, to whom that remedy would be available, and whether the failure to give adequate notice constitutes a criminal violation.

North Dakota Century Code (N.D.C.C.) § 40.05.1-07 provides that a home rule charter may be amended "in the same general manner provided in section 40-05.1-02 and section 40-05.1-04 for the adoption of such charter." N.D.C.C. § 40-05.1-04 requires that elections to adopt a home rule charter must be held "[n]ot earlier than sixty days nor later than six months after such publication or distribution . . ." of notice of the election. From the facts stated in your letter, it appears that notice for the November 8, 1988, election was given just fourteen days prior to the election. Also, the August 6, 1991, election was held after only twelve days notice. These notices do not conform to the requirements of the law as established in N.D.C.C. § 40-05.1-04.

The general rule of notice for special elections is that "where there has been no compliance with the statutory provisions or where the notice given was clearly not a substantial compliance . . . the statutory notice provisions are mandatory," and failure to comply with those provisions render the election a nullity. 26 Am. Jur. 2d Elections § 195, p. 23. However, "if the electors have actual notice of the time and place of holding the election, and of the questions submitted, if there has been a full, fair, and free expression of will by the great body of the electorate, and if it does not appear that there is a probability that a substantial number of citizens were deprived of their vote, or that there is a reasonable probability that the result of the election would have been changed had the statutory injunctions been strictly complied with," the election will be upheld. 26 Am. Jur. 2d Elections § 195, p. 24.

Therefore, if adequate notice was received by interested parties, despite the fact that the statutory requirements were not met, an election may still be valid. Upholding an election in which, admittedly, strict compliance with a notice provision pertaining to a special matter was lacking, the court in State ex rel. Little et al. v. Langlie et al., stated:

"[t]he rule is that if no notice of a special election, or that a special matter will be voted for at a general election, is given, and there is an inference from the vote cast that the failure to give the required notice has so operated to the prejudice of the voters that it cannot be said that there has been a fair election held with respect to the special matter, then the election to that extent is void. But, as we observed before, it is conclusively shown by the vote on the question . . . that no possible injury to the voters resulted from the failure to strictly comply with the requirements of the law."

State ex rel. v. Langlie et al., 67 N.W. 958, 960 (N.D. 1896). The court determined that the vote at the election indicated that sufficient notice had been received by interested parties, and that no injury resulted to the voters by upholding the election. Since the election accurately reflected the will of the people, it would be upheld.

The vote totals from the elections in question and several recent Bismarck city elections are available. The August 6, 1991, election was a special election in which the charter amendment was the only issue on the ballot. The records reflect that a total of 5,666 votes were cast in that election. A review of two prior special elections held under similar circumstances reflect that the August 6, 1991, voter turnout is consistent with the turnout expected in a special election. The voter turnout in the September 16, 1982, special election concerning the Bismarck Park District mill levy was 4,139. The voter turnout in the February 7, 1978, special election concerning the adoption of Bismarck's home rule charter was 3,232. The voter turnout in the special election held June 6, 1989, in conjunction with a school district election concerning the sale of fireworks and whether Bismarck should store fuel for the airport was 6,602. Had there been inadequate notice for the August 6, 1991, special election, one would expect an unusually low voter turnout. As the records indicate, that was not the case.

The November 8, 1988, special election was held in conjunction with the general election. The voter turnout for a general election is typically much larger than for a special election. This makes an analysis of voter turnout more difficult. Still, the votes cast in the November 8, 1988, special election, 21,815, are consistent with the number of votes cast in special elections held in conjunction with general elections. The number of votes cast in the November 4, 1986, special election concerning various taxes to be imposed by the city of Bismarck was 22,612. The number of votes cast in the November 6, 1990, special election concerning whether the Bismarck job development authority should be discontinued was 17,357. The number of votes cast in the November 6, 1988, special election is not unusually low, indicating that adequate notice was received by interested parties.

The application of Langlie, supra, to the elections in question requires an evaluation of both the above vote results and the notices given. The determination of whether the notices given were sufficient to waive strict compliance with the statute cannot be made by this office but must be determined by a trier of fact.

You ask what remedy is available if the notice is insufficient or improper, and to whom that remedy is available. Neither this office nor the Secretary of State's Office have statutory authority to nullify or recall an election. An interested party, however, may attempt to challenge the elections through the court system.

You further ask whether the failure to give adequate notice may constitute a violation of the criminal laws. I am not aware of any instance where failure to give such notice has resulted in a criminal prosecution, nor am I aware of any statute which provides for such prosecution.

I hope this discussion has been helpful to you.

Sincerely,

Nicholas J. Spaeth

krb