

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION

92-16

Date issued: October 12, 1992

Requested by: Jim Kusler, Secretary of State

- QUESTION PRESENTED -

Whether a candidate for an elective office may decline a nomination less than sixty days prior to the election.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a candidate for elective office may not decline the nomination less than sixty days prior to the election.

- ANALYSIS -

The question presented arises in the context of a certificate of nomination being tendered to the Secretary of State in an attempt to fill a vacancy caused by the withdrawal of a nominee for the North Dakota House of Representatives. The certificate nominating a new candidate for the position was tendered pursuant to N.D.C.C. " 16.1-12-08 and 16.1-11-18.

N.D.C.C. ' 16.1-12-08 provides in pertinent part:

If a vacancy occurs before election day and after the printing of the ballots, and any person is nominated according to the provisions of this title to fill the vacancy, the officer whose duty it is to have the ballots printed and distributed shall have printed on a requisite number of stickers the name of the substitute candidate and no other name.

The provisions of title 16.1 for filling a vacancy in a party office are contained in N.D.C.C. ' 16.1-11-18. Subsection 4 provides that the proper state or district executive committee may fill any vacancy by filing a certificate of nomination with the secretary of state when the vacancy occurs "in a

October 12, 1992

Page

slate of candidates after the candidates have been nominated at the primary election." The certificate filed by the chairman and secretary of the committee must set forth "the cause of the vacancy, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and any further information as may be required to be given in an original certificate of nomination." N.D.C.C. ' 16.1-11-18 further provides "[w]ith the exception of vacancies filled pursuant to section 16.1-12-08, . . . vacancies to be filled according to the provisions of subsection 4 may be filled not later than fifty-five days prior to the election." (Emphasis added.)

The primary question therefore is whether a vacancy is created under N.D.C.C. ' 16.1-12-08 when a nominee for a party office attempts to decline the nomination or withdraw his name from the ballot after the ballots are printed. If a vacancy exists, the party executive committee would then be entitled to fill the vacancy by filing a certificate of nomination with the Secretary of State. N.D.C.C. ' 16.1-11-18. In that situation the officer who's duty it is to have the ballots printed and distributed would be required to have the name of the substitute candidate printed on "a requisite number of stickers" and distribute the stickers to the judges of election. N.D.C.C. ' 16.1-12-08.

The procedure required to create a vacancy when a nominee decides to decline a nomination is set forth in N.D.C.C. ' 16.1-12-07.

Any person intending to decline a nomination shall do so by filing written notice of that intention with the officer with whom the certificate nominating him is filed. If the written notice is filed with the appropriate officer at least sixty days, and before four p.m. on the sixtieth day before the election, the nomination is void. If written notice is mailed, it must be in the physical possession of the appropriate officer before four p.m. on the sixtieth day before the election.

N.D.C.C. ' 16.1-12-07 (emphasis added.)

A similar situation was before the North Dakota Supreme Court

October 12, 1992

Page

in State ex rel. Burtness v. Hall, 163 N.W. 1055 (N.D. 1917).

In that case, a writ of mandamus was sought directing the Secretary of State to insert the name of Burtness in the Republican column on the ballot to fill a vacancy in a special election and to restrain the Secretary of State from placing on the ballot the names of three other individuals. All three of the other individuals had notified the Secretary of State of the withdrawal of their names as candidates for the office and requested that their names not be certified or printed on the election ballot. This notification and request, however, occurred only nineteen days prior to the day of the election, while the applicable statute provided that any person declining a nomination must give written notice to the Secretary of State twenty-five days before the election. The court held that the duty of the Secretary of State "to receive certificates of nomination and to abide by requests of nominees as to the appearance or nonappearance of the names upon the ballots" was a ministerial duty equally applicable to special and general elections. The court further held "the provisions as to the time for doing the various acts required are a proper exercise of legislative control, binding upon this court, as well as upon the secretary of state." 163 N.W. at 1059-1060. More recently, the court stated "[i]t is universally held that statutes setting the time for filing a certificate of nomination are mandatory and not directory." State ex rel. Kusler v. Sinner, No. 920270, slip op. at 7 (N.D. September 16, 1992).

When presented with a tendered written withdrawal by a nominee and a properly-made-out certificate of endorsement for a replacement nominee, the South Dakota Supreme Court held the elections officer was without authority to act upon the withdrawal because it was tendered after the last date allowed by the statute. Burtch v. Medin, 210 N.W. 187 (S.D. 1926). South Dakota had a statute similar to ours which specified how a candidate could withdraw from the ballot. The statute stated the written withdrawal must be filed at least seventy days prior to the election. A separate statute provided "'if for any reason, after a nomination of a party candidate to a public office . . . has been made, a vacancy shall occur in time to certify a new nominee to be printed upon the official ballot,' such vacancy shall be filled by the party central committee." 210 N.W. at 188. Construing the statutes together, the court held that in order to create a vacancy by

ATTORNEY GENERAL'S OPINION 92-16

October 12, 1992

Page

withdrawal, the withdrawal must be filed at least seventy days prior to the election. Therefore, the election official was without authority to receive and file the tendered certificate of nomination for the substitute nominee.

In my opinion, the North Dakota Supreme Court would interpret N.D.C.C. ' 16.1-12-07 as containing mandatory time limits after which a nominee may not decline the nomination. Consequently, in my opinion, any attempt by a candidate to decline the nomination less than sixty days prior to the election is ineffective and no vacancy exists under N.D.C.C. ' 16.1-12-08.

- EFFECT -

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.

Nicholas J. Spaeth
Attorney General

Assisted by: Beth Angus Baumstark

jfl