OPINION
70-138

September 28, 1970(OPINION)

The Honorable Ben Meier
Secretary of State

RE: Elections - Ballots - Primary Loser Not On General Election Ball

This is in response to your request for an opinion whether or not under the laws of the State of North Dakota you may accept the certificate of nomination in behalf of C. Warner Litten and place his name on the general election ballot for the office of State Senator from the Twenty-first Legislative District.

The facts to be considered are that C. Warner Litten was a candidate for nomination as State Senator from the Twenty-first Legislative District, but did not receive the nomination at the Primary Election held on September 15, 1970.

Mr. Gordon S. Aamoth who had received the nomination at the Primary Election for the office of State Senator on the Republican ballot for the Twenty-first Legislative District has resigned. The Twenty-first District Republican party has now filed with you a certificate of nomination naming C. Warner Litten to fill the vacancy created by the resignation of Gordon S. Aamoth. The certificate of nomination apparently was made pursuant to the provisions of Section 16-04-21(4).

You call our attention to Section 16-06-06 which provides as follows:

> DEFEATED PRIMARY CANDIDATE INELIGIBLE TO HAVE NAME PRINTED ON GENERAL BALLOT. A person who was a candidate for nomination by any party at any primary election in any year and who was defeated for said office shall not have his or her name printed upon the official ballot at the ensuing general election for the same office."

The history of the aforementioned section discloses that the law at one time provided that such a defeated candidate would not be eligible as a candidate for the same office in the ensuing general election. However, said section was declared unconstitutional. It was the result of the Court action that the present section was enacted. In this respect, it should be noted that the title of the Act, Chapter 174 of the 1945 Session Laws provided:

> An Act to deny to defeated candidates for nomination to office at primary elections the privilege of having their names printed on the ensuing general election ballot as candidates for the same office for which they were defeated and for repeal of Section 16-06-06 of the North Dakota Revised Code of 1943."

These types of statutes have been upheld as being valid. See 28 Corpus Juris Secundum, Elections Section 133, and 143 A.L.R. 608. There appears to be no doubt that the statute is constitutional. Thus, there remains only the interpretation and construction of the statute itself. We have made reasonable search to determine whether or not other courts have had under consideration a similar statute. The Supreme Court of the State of Nebraska had a similar statute under consideration in the case of State ex rel. Driscoll v. Swanson in 256 Northwest 872. In this case the Court considered a statute which provided as follows:

> No candidate defeated at the primary election shall be permitted to file by petition in the general election next following."
>
> Under this construction, the Court held that a defeated candidate for nomination by political party for office of Secretary of State at Primary Election could not by petition become a candidate at the General Election for office of State auditor. In this case it was urged that the Court consider the various methods by which nominations can be made, and that the

> statutes relating to the manner in which nominations can be made be given preference. The Court, however, said:
>
> Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice."

The Court also stated:

> The Court will not read into a statute restrictions or exceptions not made by the legislature."

In construing a statute an imperative rule is that effect, if possible, must be given to every clause and part of the statute. The Court also adopted as its rule that:

> A statute will not be placed in antagonism with another unless they are so repugnant and inconsistent that one cannot stand unless the other falls."

It is further observed that:

> Conflicts between statutes will never be considered to exist unless such was the manifest purpose and object of the legislature forced on the court by unambiguous language."

The Court observed that there was no real conflict between the nominating statutes and the statute which prohibited a defeated candidate from filing for an office in the General Election.

We might observe that in this case the person did not seek to file for the same office but for a different office; nevertheless, the Court under the general language of the statute held that he could not do so.

The Supreme Court of the State of New Jersey in 1917 in the case of Rose v. Parker, 102 ATL 145, had under consideration a statute which provided as follows:

> Any person whose name was printed upon the official ballot of any party at the preceding primary, who failed of nomination, shall not be eligible to have his name printed on the official ballot for said general election by petition."

The facts under consideration by the Court are as follows: A Mr. Rose and a Mr. Johnson ran for the office of Sheriff as Republican party candidates. At the General Election Johnson received the higher number of votes and was nominated. Prior to the General Election, he died, whereupon Mr. Rose and Mr. Perkins filed petitions as nominees of the Republican party for the office of Sheriff in place of the deceased Mr. Johnson.

The clerk refused to certify the name of Mr. Rose as a candidate on the basis of the statute cited above. The Court held that the Clerk was right in refusing to place the name on the ballot.

The Court, in reaching this conclusion, merely observed that the statute is not ambiguous. The unsuccessful candidate had urged the Court to give emphasis to another statute which permits the filing of nominations in the event a vacancy occurs. The Court, however, gave no consideration to such proposal.

The Court reached similar conclusion in Sadloch v. Allan, 135 ATL 2d. 173, a New Jersey case in the year 1957. The statute in question there contained the following language:

> Any person whose name was printed upon the official ballot of any party, at the primary election who failed of nomination shall not be eligible to have his name printed on the official ballot for said general election by petition."

The Supreme Court of the State of Colorado in 1928 had under consideration the case of Armstrong v. Simonson, 271 Pacific 627, in which the Court construed the following provisions of law:

> No person who has been defeated as a candidate in a primary election shall be eligible as a candidate for the same office in the next ensuing general election." (underscoring ours)

The facts under consideration were as follows: A Mr. Simonson was designated as Republican candidate for State Senator. In the primary election he was defeated by a Mr. Stephen. Shortly thereafter Mr. Stephen died. The Republican Party nominated Mr. Simonson as a party candidate to fill the vacancy created by Mr. Stephen's death. The Court elected the nomination on the basis that Mr. Simonson was eligible for the office of State Senator. The statute in question made the person ineligible for the office whereas the statute under consideration here (16-06-06) prohibited the printing of the name on the official ballot. We would recognize that there is a vast difference between being eligible and having the name printed on the ballot.

While a person may not have his name printed on the ballot, he may nevertheless be a candidate and be eligible for the office by using write-in or sticker votes.

It is interesting to observe that the Supreme Court in the State of Ohio in 1942 reported in 44 N.E.2d. 263 in the case of Anderson v. Hyde held that even a person who deemed a defeated candidate and was prohibited from having his name placed on the ballot in the ensuing general election under the following provision of law:

> No person who seeks party nomination for an office or position at a primary and fails to receive such nomination, shall be permitted to become a candidate at the following election for the same office by petition."

The language of Section 16-06-06 is clear and unambiguous. The title of the act which is set out above clearly indicates the purpose of the statute and we find that there is no conflict between this section and Section 16-04-21. Any differences can be easily reconciled. For that matter, the provisions of Section 16-04-21 were contained in a different section of law prior to the amendment.

Based on the foregoing, we are compelled to conclude and it is our opinion that the certificate of nomination submitted to you by the Republican party of the Twenty-first Legislative District requesting that the name of C. Warner Litten be placed on the General Election Ballot cannot be honored, and the name of Mr. Litten cannot be placed on the ballot.

It is our further opinion that Mr. C. Warner Litten is not ineligible for the office of State Senator. Having been defeated in the primary election does not affect his eligibility as a candidate. It only prohibits his name from being placed on the ballot for the same office. It is our further opinion that write-in or stickers may be used by the voters and in this manner C. Warner Litten may be elected to the office of State Senator.

HELGI JOHANNESON
Attorney General