

**OPINION
70-61**

September 16, 1970(OPINION)

The Honorable Ben Meier
Secretary of State
Bismarck, ND

RE: Constitution - Convention - Election of Delegates

This is in response to your request for an opinion on the following matter:

"Chapter 462 of the 1969 Session Laws relating to the State Constitutional Convention provides in part that a person who desires to be a delegate to the Constitutional Convention may file a nominating petition with the Secretary of State not less than thirty days before the next general election to have their name placed on the ballot. Thirty days before the general election is October 4, 1970 and it is a Sunday.

I respectfully request your opinion on the following questions:

1. When is the last day and hour for the filing of the petitions as we are not open on Saturday or Sunday?
2. Would it be necessary for my office to remain open Saturday and Sunday, if in your opinion the last day for filing is October fourth?
3. If petitions are mailed to my office, what time must they be mailed or received in my office to be valid?"

To resolve the legal questions submitted, it is necessary to review some of the applicable statutes and case law. Section 1-02-15 relates to the computation of time and provides as follows:

"COMPUTATION OF TIME. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded."

This statute has been construed by the North Dakota Supreme Court as same may pertain to redemption of property on foreclosure sales. However, as we will point out later herein, the North Dakota Supreme Court has held that this statute is not applicable in certain instances.

The North Dakota Supreme Court had under consideration in the case of State v. Falley 9 N.D. 464, 82 N.W. 913, Section 503 of the North Dakota revised code in the year 1900. The law at that time required that certificates of nominations be filed with the Secretary of State not less than 30 days before the election. Said section is now Section 16-05-03. The date of election was November 6, 1900, and the thirtieth day preceding the day of election was Sunday. The Court observed that by excluding the date of October 8, 1900, when the certificate was placed in the mail and including the day of the election, the certificate was mailed 29 days before election. The Court continued by saying that under a mandatory statute a default of one day is as fatal as a default of 20 days.

In this respect, we must note the specific language under consideration as contained in Chapter 462 Section 5, " * * * The petitions shall be filed with the Secretary of State not less than thirty days before the next general election, * * * " This language is almost identical with the language considered by the Court in the Falley case, *supra*.

The Court then took into consideration the provisions of Section 1-02-15 cited above, but concluded that said section had no application to the performance of the act under consideration; namely, the date within which a petition must be filed. The Court also observed that the general election always falls on Tuesday, and that it would follow that the thirtieth day preceding always falls on a Sunday, that it is not a situation where the date may, in some instances, not fall on Sunday. We would also observe that the Legislature must have known that the thirtieth day would fall on a Sunday. We must further assume that the Legislature did not mean to say indirectly that the petition may be filed in not less than 29 days. The Legislature, having knowledge that the thirtieth day would fall on Sunday, must have concluded that the act must be performed before that date.

It would be absurd for the Legislature to say 30 days, but really meaning 29 days.

We would also like to point out that Section 1-02-15 relates to a situation where an act is to be done on a specific date. Here the act must be done within not less than 30 days. This does not require that the act be done on any one specific day. It may be done any time before 30 days before the election. The court held that the language was mandatory and must be complied with to make the act of filing valid.

The California Supreme Court in *Griffin v. Dingley* 46 Pacific 457, reached a similar conclusion as follows:

"In the present case, however, the statute does not fix the day upon which or the time within which the certificate is to be filed, but declares that it shall be filed 'not less' than 30 days before the day of election. To hold that it could be filed 28 days before the day of election would be in manifest disregard of the provisions of the statute."

We must therefore conclude that the language of Section 5 of Chapter 468 of the 1969 Session Laws is mandatory.

We would also note that the Legislature has enacted a law which relates to petitions generally and as to the time of filing. This provision is found in Section 1-01-50, as is material to the question at hand, provides among other things as follows:

"* * *If a petition is required by law to be filed or presented on or before a specific or certain date, the petition shall be filed or presented, and physically be in the possession of the person or office designated to receive such petition before four o'clock p.m. on such date."

Neither Chapter 469 nor Section 5 thereof specifies the time of the day in which such petition must be filed or be in the physical possession of the Secretary of State. In the absence of any such provision, Section 1-05-50 would apply.

Thus, in response to your first question, it is our opinion that the nominating petitions of delegates to the Constitutional Convention must be in the physical possession of the Secretary of State not later than October 4 at 4 o'clock p.m. It is our further opinion that Sunday, being a holiday, the Secretary of State is not required to keep his office open, but he could if he so desired. He may not accept any petition which came into his office after said date and hour. The law is silent as to Saturdays, and even though it has become customary not to have the Capitol Building open for business on Saturdays, the Secretary of State, to permit certain acts to be performed which by law may be performed on Saturday, must make his office available for such purposes. If the Secretary of State decided not to make his office available or have it open on Sunday for purposes of receiving petitions, a petition would have to be submitted and be in his possession not later than midnight Saturday.

In response to your question No. 2, it is our opinion that the Secretary of State is not required by law to keep his office open for purposes of receiving petitions on Sunday, October 4. He, however, may elect to do so. It is our further opinion that the Secretary of State would be required by law to keep his office open on Saturday for purposes of receiving nominating petitions for delegates to the Constitutional Convention. If the Secretary of State were to decide that he is going to keep his office open on Sunday for purposes of receiving petitions up until 4 o'clock p.m., he should so notify the public. In any event, the Secretary of State should notify the

public so the individuals concerned may know whether or not they can file petitions with the Secretary of State on Saturday or Sunday.

As to question No. 3, it is our opinion that any petitions mailed to the Secretary of State must be in the physical possession of the Secretary of State not later than 4 o'clock p.m. on Sunday, October 4. In arriving at this conclusion, we are aware that mail is not delivered on Sunday, which actually means that the petitions would have to be in the mail and in possession of the Secretary of State prior to Sunday.

The Secretary of State has an option to have his office open or closed on Sunday, and in this regard he should notify the public as to his decision in order to permit the individuals concerned to act accordingly.

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