

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

**FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT**

MAR 15 2002

Jerome Kelsh,)	ORIGINAL PROCEEDING
)	
Petitioner and)	
Relator,)	
)	Supreme Court No. 20020060
vs.)	
)	
Alvin A. Jaeger, in his capacity)	
as Secretary of State, State of)	
North Dakota,)	
)	
Respondent.)	

STATE OF NORTH DAKOTA

**BRIEF OF THE
NORTH DAKOTA REPUBLICAN PARTY**

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STATEMENT OF ISSUES

- I. Whether Senator Kelsh has a constitutionally vested right to elective office for a four year term?
- II. Whether the people of the newly created Legislative District 26 have the right to hold an election in 2002 to determine who should be their elected State Senator?

NATURE OF CASE AND STATEMENT OF FACTS

North Dakota's Fifty-Seventh Legislative Assembly passed Senate Bill No. 2456, a legislation redistricting bill, which reduced the number of legislative districts in North Dakota from 49 to 47, N.D.C.C. § 54-03-01.11. Both, as a result of this decrease in the number of districts and the general population shift from rural to urban centers in North Dakota, the boundaries of the existing legislative districts were required to be changed.

District 27 previously consisted of all of Ransom County, all of Richland County except those portions contained in District 25, and portions of Sargent County, N.D.C.C. § 54-03-01.9. District 27 has now become a Fargo/Cass County District N.D.C.C. § 54-03-01.11.

In the redistricting process, District 26 gained portions of Sargent County, Richland County, and LaMoure County and lost portions of Dickey County. N.D.C.C. § 54-03-01.11.

The Petitioner Jerome Kelsh is the Democrat State Senator from former Legislative District 26 and was elected to serve former Legislative District 26 as Senator for a four year term in 2000.

Joel Heitkamp is the Democrat State Senator from former Legislative District 27, and was elected in 1998. N.D.C.C. § 54-03-01.11 placed both Senator Heitkamp and Senator Kelsh in the new District 26.

N.D.C.C. § 54-03-01.8. Staggering of the terms of senators. provides that:

"...However, if as a result of legislative redistricting a senator elected in 1998 is placed in an even-numbered district there must be an election in 2002 for a term of two years unless the senator elected in 1998 files by February 15, 2002, a written statement with the secretary of state stating that the senator elected in 1998 agrees that there need not be an election for a senator in 2002 and that the senator elected in 2000 may continue that senator's term; based on this requirement, districts twenty and twenty-six may be required to elect senators in 2002..."

Senator Heitkamp did not notify the Secretary of State that he would not seek an election by February 15, 2002. Pursuant to N.D.C.C. §54-03-01.8, the new District 26 is required to elect a Senator in 2002 for a two year term. Senator Kelsh filed a Petition for Writ of Prohibition or Other Appropriate Writ which prohibits or enjoins the Secretary of State from administering an election for senator in the new Legislative District 26 for the 2002 primary and general election.

This Court accepted original jurisdiction of this matter and ordered both Republican and Democrat State and District 26 parties be served.

LAW AND ARGUMENT

I. Senator Kelsh does not have a constitutionally vested right to elective office for a four year term.

N.D. Const. art. IV, § 4, provides that "senator and representatives must be elected for terms of four years."

Senator Kelsh's whole argument is that the plain meaning of this Constitutional provision requires that he has a constitutional vested right to serve out his four year term as Senator for Legislative District 26, notwithstanding the redistricting process and N.D.C.C. § 54-03-01.8.

The North Dakota Constitution has numerous provisions which under certain circumstances are apparently in conflict with art. IV, § 4, if the argument that Senator Kelsh has a constitutionally vested right to serve out his four year term is valid.

Some of the provisions are as follows:

The legislation is required by the North Dakota Constitution to enact laws relating to senators and representatives.

It shall fix the number of senators. N.D. Const. art. IV, § 2.

It shall guarantee, as nearly practicable, that any elector is equal to every other elector in the state in the power to cast ballots for legislation candidates. N.D. Const. art. IV, § 2.

It shall establish by law a procedure whereby one half of the members of the senate; as nearly practicable are elected biennially. N.D. Const. art. IV, § 3.

It shall judge the qualification of its members. N.D. Const. art. IV, § 12.

It shall enact all laws necessary to carry into effect the provisions of the Constitution. N.D. Const. art. IV, § 12.

The North Dakota Constitution also puts restrictions on legislators.

No legislative member may hold any full time appointed state office. N.D. Const. art. IV, § 6.

Any legislative member who is guilty of bribery in regard to legislative measures shall be expelled from legislative assembly. N.D. Const. art. IV, § 9.

Legislative members may be expelled from the legislative assembly for corruption, bribery or perjury, or other infamous crimes. N.D. Const. art. IV, § 10.

With the concurrence of two-thirds of its elected members, either house may expel a member. N.D. Const. art. IV, § 12.

In addition to these other Constitutional mandates, the equal protection clause of the United States Constitution requires States to establish legislative districts substantially equal in population. States are required to make an honest and good faith effort to construct districts as nearly equal as practicable. The overriding objective must be substantial equality of districts.

N.D. Const. art. IV, § 2 provides that the senatorial districts ascertained after the 1990 federal decennial census shall continue until the adjournment of the first regular session after each federal decennial census or until changed by law.

This type of constitutional provision has been held to put senators on notice that after a federal decennial census the prior reapportionment plan is no longer effective and the new districts may be drawn in a manner which separates the senators' districts from their residences. In re 1991 Pennsylvania Legislation Reapportionment Commission, 530 PA 335, 600 A.2d 132 (Pennsylvania 1992).

An elected official's interest in their offices does not merit constitutional protection. *Id.* at 141.

If the voters of the newly apportioned District 26 value Senator Kelsh's experience and choose to re-elect him for the two year term, he will in effect represent them for four years. If the voters of the newly appointed district choose another person to be their senator than that is their constitutional right.

An elected office is a public trust, not the private domain of the office holder. A member of the legislature has a profound duty to represent his constituents in the formation of public policy in the State. He holds office for the benefits of his constituents and is periodically accountable to his constituents through the electoral process. A member of the legislature is subject to the political process at all times. This is the way it should be because the public interest in the offices far outweighs the private interest of the office holder. In re Pennsylvania Legislation Reapportionment Commission, 530 Pa 335, 609 A.2d 132, 141.

Senator Kelsh was not in fact elected from the newly apportioned legislative senatorial District 26. He was elected to the legislative District 26 as apportioned under N.D.C.C. § 54-03-01.9.

When Senator Kelsh was elected in District 26 in 2000 he knew that his district was only to continue until the adjournment of the 2001 session, or until changed by law. N.D. Const. art. IV, § 2. His previous district has been reapportioned and no longer exists. His four term years in representing the old District 26 was subject to the reapportionment process required by both state and federal constitutions. The North Dakota Legislature did its job and changed District 26. As a result of this reapportionment Senator Kelsh's senatorial term was shortened.

II. The people of the newly created Legislative District 26 have the legal right to have an election to determine who should be their elected state senator.

Senator Kelsh argues that because he was elected to a four year term in the old Legislative District 26 in 2000, he is constitutionally entitled to continue in that office for two more years, representing the newly drawn Legislative District 26.

Senator Kelsh argues that he is one of the more experienced Senators in the legislator and that requiring him to run for re-election for a two year term in the middle of his four year term serves neither constitutional mandates, nor the voters of North Dakota.

Requiring Senator Kelsh to run serves the constitutional mandates of reapportionment and is authorized by N.D. Const. art. IV, § 2.

It is also hard to imagine how requiring an election in a legislative district that has had its boundaries changed considerably fails to serve the voters. The voters in that newly formed district should be able to determine who they want to represent them. The voters of the new District 26 know what is best for themselves and will make the right decision.

N.D.C.C. § 54-03-01.8 places then the rights of the constituents of the newly apportioned legislative district above the right of Senator Kelsh to serve out his four year term. N.D. Const. art. IV, § 2 requires that a senator must be apportioned to each senatorial district and be elected at large from that district.

N.D.C.C. § 54-03-01.8 follows the requirements of this section and requires that an election be held for the newly apportioned Legislative District 26.

The North Dakota Republican Party respectfully urges to this Court to let the people of the newly apportioned Legislative District 26 decide for themselves who they want to represent their interests in the North Dakota Senate.

That decision belongs to the voters of the newly apportioned legislative District 26, not the voters of the old District 26 which no longer exists, and not to the Petitioner, Senator Kelsh.

CONCLUSION

It is the position of the North Dakota Republican Party that Senator Kelsh's interest in serving out his four year Senatorial term is not constitutionally protected. The public interest in the office of Senator far outweighs any private interest of the office holder.

To hold otherwise would seriously limit future legislatures in performing their reapportionment duty and the necessity of preserving the concept of one man one vote upon which our democracy was founded.

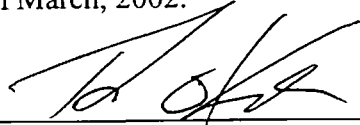
The legislature gave the decision of who should be the senator from the newly apportioned legislative District 26 to the people of that district. That is the way it should be. The people of District 26 should decide who should be their senator.

The North Dakota Republican Party respectfully requests this Court to deny the Writ of Prohibition or Other Writ Requested by the Petitioner and to allow the Secretary of State to administer an election for District 26 in 2002 pursuant to statute.

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the petitioner in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and that the total number of words, excluding words in the table of contents and table of authorities, does not exceed 10,500 words.

Respectfully submitted this 5 day of March, 2002.



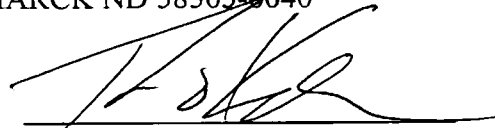
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