

**OPINION
70-207**

March 4, 1970 (OPINION)

Honorable Donald C. Holand
Senator, Twenty-seventh District
Fargo, North Dakota

RE: Legislature - Qualification - Residence

This is in response to your letter in which you state as follows:

"Since there is a possibility that I may be interested in a North Dakota Senate seat from the Twenty-first District I thought that it would be well for me to obtain an opinion relative to the residence question.

"I opened a law office in Fargo on January 19th, but have not reestablished my legal residence which continues to remain in Lisbon (Twenty-seventh District). My question is what would be the last date this year that I could resign my present Senate seat for the purpose of establishing residence in the Twenty-first District?"

Section 28 of the North Dakota Constitution sets forth the qualifications and eligibility requirements for a senator. It provides as follows:

No person shall be a senator who is not a qualified elector in the district in which he may be chosen and who shall not have attained the age of twenty-five years, and have been a resident of the state or territory for two years next preceding his election."

Section 121 of the North Dakota Constitution sets forth the requirements of an elector. It provides as follows:

SECTION 121. Every person of the age of twenty-one or upwards who is a citizen of the United States and who shall have resided in the state one year and in the county ninety days and in the precinct thirty days next preceding any election shall be a qualified elector at such election. Provided that where a qualified elector moves from one precinct to another within the state he shall be entitled to vote in the precinct from which he moves until he establishes his residence in the precinct to which he moves."

Nowhere in the Code do we find any statutory provision which further amplifies the eligibility requirements or qualifications of a senator. For that matter we have doubt that the qualifications or eligibility requirements could be changed by statute. However, neither statutory provisions nor constitutional provisions specifically state at what precise moment a person must meet the qualifications.

The constitutional provision also states that a person must have attained the age of twenty-five years of age to be a senator. No

mention is made that the person must be of such age to be elected or be of such age at the time of election. It would seem that if the person is twenty-five years of age at the time he takes office, the age requirement would have been fulfilled. The same observations can be made with reference to the two-year resident requirement.

The opening phrase in Section 28 of the North Dakota Constitution, "No person shall be a senator", implies that the qualifications must be met to be a senator but not necessarily to be elected, which suggests the conclusion that if the person meets and has the eligibility requirements at the time he is required to "qualify" for the office, he is eligible for such office even though he did not possess the requirements at the time of election. Section 44-01-03 of the North Dakota Century Code states as follows:

WHEN STATE AND DISTRICT OFFICERS SHALL QUALIFY. Except when otherwise specifically provided, all state and district officers shall qualify on or before the first Monday of January next succeeding their election, or within ten days thereafter, and on said first Monday of January or within ten days thereafter, shall enter upon the discharge of the duties of their respective offices."

It is noted that district officers shall qualify on or before the first Monday in January next succeeding their election. Section 41 of the North Dakota Constitution, as amended, provides as follows:

The term of service of the members of the legislative assembly shall begin on the first day of December following their election, or at such other time as may be prescribed by law."

This constitutional provision can be reconciled with section 44-01-03 of the North Dakota Century Code because the statutory provision recognizes and permits qualification for office before the first Monday in January. This implies that the members of the legislative assembly, except for good cause, must qualify on or before the first day of December following the election.

42 Am. Jur., page 910, in substance states that the time when eligibility is determined must be resolved from the statutory or constitutional provisions. It also states that if the statutory or constitutional provisions require that a candidate must possess the qualifications at the time of the election, such provision would be controlling. On page 911, we find the following statement:

* * * Some of them, perhaps the majority, take the view that the word 'eligible' as used in Constitutions and statutes has reference to the capacity not of being elected to office, but of holding office, and that, therefore, if qualified at the time of commencement of the term or induction into office, disqualification of the candidate at the time of election or appointment is immaterial * * * ."

Neither the North Dakota Constitution or statutory provisions specifically indicate that the eligibility or qualifications must be possessed at the time of election. There is, however, a question as to having a name placed on the ballot because of section 16-04-03 and

section 16-04-05 of the North Dakota Century Code.

On June 26, 1946, this office is an opinion stated as follows:

If this party is elected at the November election, he may qualify for the office if he has the necessary qualifications at the time when he is required to qualify for same."

The above statement was in response to a question whether a person had to meet the eligibility requirements upon election time or upon assuming the duties of the office.

It is, therefore, our opinion that the qualifications of a senator and eligibility to hold such office must be met upon assuming or upon being inducted into the office of senator, but need not be met at the time of election. However, we would like to note that a person seeking such office should know with reasonable certainty at the time of election that he will be able to meet the qualifications and be eligible for the office when the time comes to qualify for such office. There are some other procedures which need to be examined which relate to the election process.

Thus far we have discussed the eligibility requirements to qualify for the office and to assume the duties of the office. However, the means or method by which the office is acquired raises another question. Normally the office is acquired by being elected to such position. The election process raises additional items which must be considered.

Section 16-04-05 of the 1969 Supplement to the North Dakota Century Code provides that upon receipt of a petition or certificate when accompanied by an affidavit as provided in section 16-04-03, the name of the individual shall be placed on the primary election ballot in the appropriate column. Section 16-04-03 sets forth the affidavit. It contains the following language:

16-04-03. APPLICANT'S NAME PLACED UPON BALLOT - AFFIDAVIT TO ACCOMPANY PETITION. Upon receipt by the secretary of state of the petition or certificate of endorsement provided for in section 16-04-02 accompanied by the following affidavit, he shall place the applicant's name upon the primary election ballot in the columns of his party as hereinafter provided. Said affidavit may be substantially as follows:

State of North Dakota)

)

County of-----)

I, -----, being duly sworn, depose and say that I reside in the county of ----- and state of North Dakota; that I am a qualified voter therein that I am a candidate for nomination to the office of -----

to be chosen at the primary election to be held on the
-----, 19----, and I do hereby request that
my name be printed upon the primary election ballot as pro-
vided by law, as a candidate of the -----
party for said office.

Subscribed and sworn to before me, this -----
day of -----, 19----.

Notary Public
North Dakota."

(Emphasis supplied.)

The affidavit, in effect, requires that the individual must be able to say that he is a qualified voter therein, meaning the county and district. To truthfully file such an affidavit a person must be a qualified elector at the time such affidavit is submitted to the county auditor. Section 16-04-04 provides that the candidate must file the certificate or petition, together with the affidavit, on or before four o'clock p.m., forty days prior to the primary election. If mailed, the certificate or endorsement must be in the possession of the county auditor before four o'clock p.m. on the fortieth day. It also contains a limitation that it shall not be filed prior to sixty days. This necessarily requires that the affiant (person seeking the office) must be an elector at such time.

The primary election this year is on September 1st. This would mean that on the very minimum a person must have been an elector on July 23rd. In order to qualify as an elector a person must have been a resident of the county for at least ninety days. This means that a person must have been a resident at least ninety days prior to July 23rd. The span of time involved would be the forty days before election and the ninety days to qualify as an elector, making a total of one-hundred-thirty days, (130).

Meeting the requirements to have a name placed on the ballot are not the same as requirements for the office. These are two separate items. A person would not have to meet the statutory requirements if he were to run on stickers or on a write-in campaign. The requirements to have the name placed on the ballot do not touch upon the qualifications and requirements to hold the office. In this respect the situation here is somewhat similar to the discussions in State ex rel. Sundfor v. Thorson, 6 N.W.2d., 143, and State ex rel. Graham v. Hall, 15 N.W.2d. 736.

If the placing of your name on the ballot were not involved you could qualify for the office of State Senator by becoming a resident of the county or district ninety days before December 1, 1970.

A change of residence would actually amount to abandonment of the office and a creation of a vacancy in such office, but if an actual resignation is made the intentions would be clear and specific and thus eliminate any difficulty which may be encountered at a later date.

HELGI JOHANNESON

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