

**LETTER OPINION
2019-L-07**

September 3, 2019

The Honorable Lawrence Klemin
Speaker of the House
State Representative
District 47, 3929 Valley Drive
Bismarck, ND 58503-1729

Dear Speaker Klemin:

Thank you for your letter asking for clarification of the five-year residency requirement for nominees to the North Dakota State Board of Higher Education. You ask whether the five-year period must be satisfied by five “consecutive” years immediately preceding appointment, or whether any cumulative five years of residency are sufficient so long as an applicant is a resident of North Dakota at the time of application. You also ask whether applicants must meet the five-year residency requirement at the time they apply, or whether the five-year minimum may be calculated based on the potential effective date of appointment. It is my opinion that the five years of residency required by the North Dakota Constitution must run consecutively and “immediately preced[e]” the appointment. It is my further opinion that the five-year minimum residency period must be met on the date an appointment becomes effective.

ANALYSIS

Article VIII, § 6 of the North Dakota Constitution creates the eight-member State Board of Higher Education:

The governor shall appoint seven members who are qualified electors and taxpayers of the state, and who have resided in this state for not less than five years *immediately preceding their appointments*. These seven appointments are subject to confirmation by the senate.¹

¹ N.D. Const. art. VIII, § 6(2)(a) (emphasis added).

These seven members² of the State Board of Higher Education are appointed by the Governor from a list of three names for each position, selected by four members of a committee composed of the following individuals: the president of the North Dakota Education Association, the Chief Justice of the Supreme Court, the Superintendent of Public Instruction, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives.³

In interpreting clauses in a constitution, it must be presumed that the words have been employed in their natural and ordinary meaning.⁴ As ordinarily understood, if an event “precedes” another event, it comes before the second event in time.⁵ Similarly, “immediate” ordinarily means without delay and not separated by other things.⁶ Taken together, something only immediately precedes something else if it comes before the second without delay or separation.

The North Dakota Supreme Court addressed a similar question in the case of former Governor Thomas Moodie, who was elected to the office in 1934.⁷ However, after he was elected, a record of Moodie living and voting in Minnesota within the prior five years surfaced.⁸ The qualifications for Governor at the time included that a person must have “resided five years next preceding the election within the state.”⁹ The Supreme Court determined that Moodie was not qualified to be governor because he had not resided in North Dakota for the five years “next preceding” the election in 1934, effectively holding that the phrase “next preceding” required North Dakota residence for the five consecutive years directly prior to the election.¹⁰ While the phrases at issue in *Moodie* and your question are somewhat different, the decision in *Moodie* is persuasive to my interpretation of the phrase “immediately preceding” in Article VIII, § 6, N.D. Const., which was written into the constitution three years later, in 1938.¹¹

Accordingly, based upon the foregoing and the language of Article VIII, § 6, N.D. Const., it is my opinion that the required five-year residency period must consist of the five consecutive years directly before the time of appointment.

² The eighth member of the State Board of Higher Education is a student, and is appointed using a separate process. N.D. Const. art. VIII, § 6(2)(a).

³ N.D. Const. art. VIII, § 6(2)(a).

⁴ *Cardiff v. Bismarck Pub. Sch. Dist.*, 263 N.W.2d 105, 107 (N.D. 1978).

⁵ See *The American Heritage Dictionary* 974 (2d coll. ed. 1991).

⁶ See *Black’s Law Dictionary* 764 (8th ed. 1999).

⁷ See *State ex rel. Sathre v. Moodie*, 258 N.W. 558 (1935).

⁸ *Id.* at 562.

⁹ *Id.* at 559 (quoting N.D. Const. § 73 (1934)).

¹⁰ *Moodie*, 258 N.W. at 566.

¹¹ 1939 N.D. Laws 499.

You also ask whether the five-year requirement must be met at the time an applicant submits his or her application, or whether the five-year requirement may be calculated based on the potential effective date of appointment. There are two different types of appointments discussed in the Constitution: to fill a vacancy created by the expiration of the term of a current member of the State Board of Higher Education within six months of the end of a legislative session; and to fill a term that expires or a vacancy that occurs when the Legislature is not in session.¹² Both types of appointments are made in the same way, except in the latter situation, the Senate does not confirm the appointed individual until the next legislative session.¹³

As discussed above, the North Dakota Constitution mandates that the five-year requirement must be met during the period “immediately preceding *their appointments*.”¹⁴ As ordinarily understood, this would mean that the five-year period must run prior to the date of appointment, not the date of application; the Constitution contains no support for basing the calculation on any other date. This understanding is easy to apply in the event that a term expires in the ordinary course.

However, in the event that a vacancy occurs while the Legislature is not in session and application is made for an interim appointment, it may be difficult for the committee responsible for preparing a list of applicants to determine if, or when, the Governor may take action on the list of applicants prepared by the committee in order to calculate the five-year rule.¹⁵ Nothing in the Constitution requires that the date of interim appointment and the date an interim appointment is announced be the same. Similarly, in the absence of constitutional direction, the committee retains significant discretion in determining what criteria to apply in selecting a list of applicants to provide to the Governor, and the date on which an applicant will have met the five-year requirement is a factor which may be taken into account. Finally, the Constitution does not include any requirements related to the date an interim appointment for a vacancy which occurs outside of a legislative session must be made or become effective. For these reasons, it is my opinion that the five-year requirement must be met on the date of appointment, not application, and the effective date of an interim appointment to fill a vacancy may be set to ensure a nominee’s compliance with the five-year requirement.

¹² N.D. Const. art. VIII, § 6(2)(c). The latter is referred to as an “interim appointment.”

¹³ N.D. Const. art. VIII, § 6(2)(c). The second type of appointment is discretionary (the “governor *may* appoint”), while the first is mandatory (the “governor *shall* appoint”).

¹⁴ N.D. Const. art. VIII, § 6(2)(a) (emphasis added).

¹⁵ Under N.D. Const. art. VIII, § 6(2)(c), interim appointments are discretionary (the “governor *may* appoint . . .” (emphasis added)).

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In sum, it is my opinion that the required five-year residency period must consist of the five consecutive years directly before the appointment, including with respect to interim appointments.

Sincerely,

Wayne Stenehjem
Attorney General

cc: Kirsten Baesler, Superintendent of Public Instruction

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.¹⁶

¹⁶ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).