

LETTER OPINION
2007-L-05

February 13, 2007

The Honorable Duane L. DeKrey
State Representative
House Chambers
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Representative DeKrey:

Thank you for your letter asking whether the Legislature may impose statutory qualifications upon the office of Superintendent of Public Instruction over and above those established by the North Dakota Constitution. For the reasons set forth below, it is my opinion that a court faced with the issue would determine that the Legislature may not impose statutory qualifications upon the office of Superintendent of Public Instruction over and above those established by the North Dakota Constitution.

ANALYSIS

Article V of the North Dakota Constitution establishes the Superintendent of Public Instruction as an elected official.¹ Article V, § 4, N.D. Const., prescribes the qualifications of elected officials established by article V. It provides:

Section 4. To be eligible to hold an elective office established by this article, a person must be a qualified elector of this state, must be at least twenty-five years of age on the day of the election, and must have been a resident of this state for the five years preceding election to office. To be eligible to hold the office of governor or lieutenant governor, a person must be at least thirty years old on the day of the election. The attorney general must be licensed to practice law in this state.²

The North Dakota Supreme Court addressed a similar provision in State ex rel. Graham v Hall.³ In that case, the Legislature had enacted a law providing that any person who was a candidate for nomination for office at any primary election and who was defeated for the office was not eligible to be a candidate for the same office at the ensuing general

¹ N.D. Const. art. V, § 2.

² N.D. Const. art. V, § 4.

³ 15 N.W.2d 736 (N.D. 1944).

election.⁴ The court held that the statute was unconstitutional as applied to the office of Governor because it had the effect of adding to the qualifications for that office over and above those prescribed by the constitution.⁵

The constitutional provision addressed in Graham is similar to N.D. Const. art V, § 4. It provided that to be eligible for the office of Governor, the person must be a “citizen of the United States, and a qualified elector of the state, who shall have attained the age of thirty years, and who shall have resided five years next preceding the election within the state or territory”⁶ In finding the statute unconstitutional, the court stated, “[i]n principle there is no difference between a legislative enactment which seeks to add qualifications to those specified in the Constitution and a legislative enactment which seeks to create a disqualification. The ‘legislature cannot enlarge nor diminish constitutional provisions prescribing eligibility and qualifications to hold office created by Constitution.’”⁷ In an earlier case, the North Dakota Supreme Court also held the same statute unconstitutional as applied to a candidate for congressional office because it imposed a qualification for holding the office in addition to those fixed by the United States Constitution.⁸

Section 15.1-02-01, N.D.C.C., requires, in addition to the qualifications prescribed in the constitution, that the superintendent also hold a valid North Dakota professional teaching license on the day of the election and at all times during the superintendent’s term of office. This statute seeks to do what the North Dakota Supreme Court has said is unconstitutional – it imposes a qualification in addition to the qualifications prescribed by the constitution for the office of Superintendent of Public Instruction.

Normally, this office is reluctant to rule on the constitutionality of a statutory enactment unless there is substantial controlling case law, as there is in the present case.⁹ Once

⁴ Id. at 738.

⁵ Id. at 741.

⁶ Id. at 738.

⁷ Id. at 741 (citing State ex rel. Stain v. Christensen, 35 P.2d 775, 776 (Utah 1934)).

⁸ State ex rel. Sundfor v. Thorson, 6 N.W.2d 89 (N.D. 1942). See also Spatgen v. O’Neil, 169 N.W. 491, 494 (N.D. 1918) (“we recognize the force of the principle, which, so far as our observation goes, is universally adhered to, that where the Constitution prescribes the qualifications of electors the Legislature is powerless to add to or subtract from those qualifications”); see also C. T. Foster, Annotation, Legislative Power to Prescribe Qualifications for or Conditions of Eligibility to Constitutional Office, 34 A.L.R.2d 155 (1954) (“It is quite generally considered that where the constitution lays down specific eligibility requirements for a particular constitutional office, the constitutional specification in that regard is exclusive and the legislature (except where expressly authorized to do so) has no power to require additional or different qualifications for such constitutional office.”).

⁹ See, e.g., N.D.A.G. 2003-L-18.

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enacted, “[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution.”¹⁰ Because it is the Attorney General’s role to defend statutory enactments from constitutional attacks, this office has been reluctant to issue an opinion questioning the constitutionality of a statutory enactment.¹¹ Given the controlling case law on this question, however, it is my opinion that a court faced with the issue would determine the requirement that the superintendent hold a valid teaching license to be unconstitutional.

Sincerely,

Wayne Stenehjem
Attorney General

jak/pg

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.¹²

¹⁰ Traynor v. Leclerc, 561 N.W.2d 644, 647 (N.D. 1997) (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)).

¹¹ N.D.A.G. 2003-L-18.

¹² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).