

N.D.A.G. Letter to McIntee (March 9, 1990)

March 9, 1990

Mr. Michael S. McIntee
Upham City Attorney
207 Main Street South
Box 90
Towner, ND 58788-0090

Dear Mr. McIntee:

Thank you for your March 2, 1990, letter concerning an individual who seeks the office of mayor for the city of Upham. From your letter, it appears the individual is a member of a Board of Township Supervisors which raises questions concerning his eligibility for the position of mayor pursuant to N.D.C.C. § 40-13-01. The latter statute requires an elective municipal officeholder to be a qualified elector of that city and a resident thereof for at least nine months preceding the election. Your letter suggests the individual may not be able to satisfy the requirements of N.D.C.C. § 40-13-01.

Questions surrounding one's residency as well as their legal residence are questions of fact which are heavily influenced by a person's declaration of intent. Dietz v. City of Medora, 333 N.W.2d 702, 705 (N.D. 1983). Because I cannot provide opinions concerning questions of fact, I am unable to respond with a determination of whether the individual in question is a qualified elector or a resident of the city. However, I can highlight N.D.C.C. § 54-01-26(2). This statute provides there can only be one residence at a time. Subsection 3 of the same statute states that a residence cannot be lost until another is gained. Both of these rules of residency may be applicable if the individual in question attempts to claim multiple residences at a similar time.

However, this discussion may be irrelevant. In Nielsen v. Neuharth, 331 N.W.2d 58 (N.D. 1983), the North Dakota Supreme Court stated that one's eligibility to hold a public office refers to the time at which the individual assumes the office rather than the time at which the person decides to seek the office. Thus, the court determined that persons seeking offices for which they were currently unqualified were able to do so as long as they satisfied the qualifications of that office by the time they assumed that office. "If it is advisable to prohibit candidates from seeking office until they are qualified to be candidates, the Legislature may do so by specific language." Id. at 61.

In reviewing the municipal election laws, I find no requirement that a person seeking office must be qualified as a candidate. Thus, applying the rule in Nielsen v. Neuharth, it is the time the person assumes office that is critical rather than the time the person seeks that office in determining his eligibility for that office. After the person assumes the office, he is subject to challenge if he has failed to qualify for that office as required by law. The situation in Dietz v. City of Medora is an example of such an incident where a taxpayer

challenged the eligibility of officeholders following their assumption of office.

In summary, whether the individual is qualified for the office of mayor pursuant to N.D.C.C. § 40-13-01 must be determined at the time he assumes office. There is no authority for any election official to prevent a person from seeking a public office for which he may be unqualified based on residency at the time he seeks the office in the absence of specific legislative authority. If a person assumes office and if there are other persons who believe he is unqualified to do so, a legal challenge must result.

I hope this information and discussion is helpful.

Sincerely,

Nicholas J. Spaeth

jfl