

N.D.A.G. Letter to Berg (April 8, 1992)

April 8, 1992

Honorable Rick Berg
District 45
112 North University, #101
Fargo, ND 58102

Dear Representative Berg:

Thank you for your March 24, 1992, letter in which you inquire when a legislative candidate must reside in the district in which the individual is seeking election to the Legislature. North Dakota Constitution art. IV, § 5 provides "[e]ach person elected to the legislative assembly must be, on the day of the election, a qualified elector in the district from which the member was chosen and must have been a resident of the state for one year immediately prior to that election." N.D.C.C. § 16.1-01-04(1) provides "[e]very citizen of the United States who is: eighteen years or older; a resident of this state; and has resided in the precinct at least thirty days next proceeding any election, . . . is a qualified elector."

You inquire whether an individual seeking election to the Legislature must be a qualified elector, that is, live within the district from which the individual is seeking election, for thirty days immediately proceeding the primary or the general election.

It is my opinion that an individual seeking election to the Legislature does not have to qualify as a qualified elector until the general election. The qualification for holding office in the Legislative Assembly is that the individual be a qualified elector at the time of election to the office. North Dakota Constitution art. IV, § 5. This conclusion is supported by the wording of the constitutional provision. The provision deals "with each person elected to the legislative assembly", not each person seeking election to the Legislative Assembly. An individual cannot be elected to the Legislative Assembly until the date of the general election. The individual running in a primary election is seeking merely to have the individual's name placed on the ballot in the general election not to be elected to the Legislative Assembly.

The North Dakota Supreme Court in Nielsen v. Neuharth, 331 N.W.2d 58 (N.D. 1983) addressed the issue of whether a candidate for the office of county judge must have established residence and become an elector prior to taking office or prior to becoming a candidate. In that case, the defendant, a resident and elector of Morton County, filed a nominating petition for the office of county judge in both LaMoure and Dickey Counties. The plaintiff and defendant were both nominated in the primary election. At the general election, the defendant, the resident of Morton County, received more of the total votes cast. The defendant did not establish residency or become an elector in the county to which he was elected until shortly prior to taking office. Id. at 59. The court held that the

candidate who received more of the total votes cast in the general election did not have to become qualified for office, that is, acquire residency and become an elector, prior to taking office. *Id.* at 60. The statute in Nielson did not designate the time of qualification.

Qualifying for office is not the same as qualifying to have an individual name placed on the ballot. Letter from North Dakota Attorney General Johanneson to Don Holand (March 4, 1971). Prior to 1981, an individual was required to sign an affidavit that the individual was a qualified elector of the county or district in which the individual was running for office. N.D.C.C. § 16-04-03 (1971) Therefore, the individual was required to reside in the district 90 days prior to the primary in order to have the individual's name placed in the primary ballot. The "qualified elector" requirement was removed when the election laws were reformed. 1981 N.D. Sess. Laws ch. 241 (repealing N.D.C.C. § 16-04-03). Now an individual seeking election to the legislative assembly must sign an affidavit as to the county of residence and file it with the auditor in the county of residence. N.D.C.C. § 16.1-11-11. If the legislative district is composed of more than one county, the auditor must certify the petition to the auditors of the other counties in the district. N.D.C.C. § 16.1-11-13.

You also inquire as to the definition of residency. North Dakota Century Code § 54-01-26 states:

54-01-26. Residence -- Rules for determining. Every person has in law a residence. In determining the place of residence, the following rules must be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.
2. There can be only one residence.
3. A residence cannot be lost until another is gained.
4. The residence of the supporting parent during his or her life, and after the supporting parent's death, the residence of the other parent is the residence of the unmarried minor children.
5. An individual's residence does not automatically change upon marriage, but changes in accordance with subsection 7. The residence of either party to a marriage is not presumptive evidence of the other party's residence.
6. The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

7. The residence can be changed only by the union of act and intent.

The North Dakota Supreme Court has provided guidance in determining one's place of residence. Residence is a question of fact in which the intention of the party is an important element. Wehrung v. Ideal School District No. 10, 78 N.W.2d 68 (N.D. 1956). In Schillerstrom v. Schillerstrom, 32 N.W.2d 106, 114-116 (N.D. 1948), the North Dakota Supreme Court stated:

. . . [North Dakota Century Code § 54-01-26], providing rules for the determining residence, uses the term [residence] as equivalent to domicile [or domicile]

. . . .

Any act, event, or circumstance in the life of an individual may be evidence from which the state of mind [or intent] may be inferred with more or less precision; and it is impossible to formulate any general rule by which the weight due to any particular point of evidence may be determined

. . . .

"The moving from one place of residence to another place with the intent to abandon the old residence and establish a residence at the new place, is in law a change of residence, which may be accomplished in one day." [citation omitted].

Residence, for purposes of becoming a qualified elector, is where an individual has an established home, the place where the individual is habitually present, and to which when the individual departs, the individual intends to return. Nelson v. Gass, 146 N.W. 537 (N.D. 1914).

I trust this responds to your inquiry.

Sincerely,

Nicholas J. Spaeth

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