

OPINION
78-58

September 14, 1978 (OPINION)

Mr. Ronald G. Splitt
LaMoure County State's Attorney
19 1st Ave. N.
LaMoure, ND 58458

Dear Mr. Splitt:

This is in response to your letter of September 7, wherein you state:

I would appreciate an opinion regarding an election question which presented itself at the primary election recently held on September 5th.

The sheriff of LaMoure County did not file for reelection and two candidates for the office circulated their petitions for this office and both secured enough signatures to have their names placed upon the ballot at the primary election. A write in campaign was conducted for another party prior to the primary election with the result that one of the candidates on the ballot plus the write in candidate were the top two vote getters and normally would be the two individuals whose names would appear on the runoff in the General Election to be held in November of this year. However, the write in candidate was not and now is not a resident of LaMoure County and is not an elector thereof. Thus, the question has arisen as to his right to one of the two spots on the November election ballot. The write in candidate has expressed his intent to move into the County at once and establish a residency by residing herein for the required 30 days which would make him an elector at the time of the General Election and also prior to the time he would take office in January of 1979 if he were the successful candidate at the General Election.

Thus the question presents itself, does the write in candidate have a right to have his name placed on the ballot at the General Election in November even though he was not an elector of LaMoure County when he received the nomination as a write-in at the primary election.

There are several relevant statutes that require review in order to adequately respond to your inquiry. These are as follows:

11-10-04. OFFICER MUST BE QUALIFIED ELECTOR - EXCEPTIONS. Except as otherwise specifically provided by the laws of this state, a county officer must be a qualified elector in the county in which he is chosen or appointed, and a county commissioner must be a qualified elector in the district from which he is chosen.

11-10-05. WHEN TERMS OF COUNTY OFFICERS COMMENCE - WHEN OFFICERS QUALIFY. Except as otherwise specifically provided by the laws of this state, the regular term of office of each

county officer, when he is elected for a full term, shall commence on the first Monday in January next succeeding his election and each such officer shall qualify and enter upon the discharge of his duties on or before the first Monday in January next succeeding the date of his election or within ten days thereafter. If the office to which an officer is elected was vacant at the time of his election or becomes vacant prior to the date fixed for the commencement of his term, he may qualify and enter upon the duties of his office forthwith even though he was not elected to fill such vacancy. If an officer is elected to fill an unexpired term in an office then held by an appointee, such officer may qualify and enter upon the discharge of the duties of such office at any time after receiving a certificate of election to that office but not later than the first Monday in January next succeeding the date of his election to the unexpired term of office. (Emphasis supplied)

11-15-01.1. SHERIFF SHALL BE QUALIFIED ELECTOR AND SHALL RECEIVE REQUIRED TRAINING - EXCEPTION. Except as otherwise specifically provided by state law, the sheriff shall be a qualified elector in the county in which the sheriff is elected or appointed. Within one year after taking office, the sheriff shall attend the sheriffs' school on civil process for one week, the complete police and sheriff's basic training course, and the police supervision course for two weeks if such schools are available within the state, unless equivalent training has already been attained. The police and sheriff's basic training course requirement does not apply to any sheriff who has at least five years experience in the law enforcement field.

16-01-03. QUALIFICATIONS OF ELECTORS. Any person of the age of eighteen years or upwards, who has resided in the precinct thirty days next preceding any election, except as otherwise provided in regard to residency in chapter 16-16, shall be a qualified elector at such election if he is a citizen of the United States.

16-04-04. COUNTY AND LEGISLATIVE DISTRICT CANDIDATES' PETITIONS - FILING - CONTENTS. Every candidate for a county or district office shall, not more than sixty-six days nor less than forty-six days and before four o'clock p.m. of the forty-sixth day prior to any primary election, present to the county auditor of the county in which he resides a certificate of endorsement signed by the district chairman of any legally recognized political party giving his name, post-office address, the title of the office to which he aspires, and the party which he represents, or a petition giving his name, post-office address, and the title of the office to which he aspires. A petition for an office which is under party designation, shall state the party represented by the candidate. If the petition or certificate of endorsement is mailed it shall be in the possession of the county auditor before four o'clock p.m. on the forty-sixth day prior to the primary election. Such petition shall contain the names of not less than two percent and not more than five percent of the total vote cast for said office at the most recent general

election at which such office was voted upon if the office be under no-party designation, and if under party designation, then the same percentage shall be applied to the total vote cast for the candidate of the party represented for the same position at the most recent general election at which such office was voted upon, and if there were more than one party candidate, then such percentage shall be applied to the total number of votes for all party candidates divided by the number of party candidates. If no candidate was elected or votes cast for an office at any general election, a petition shall be deemed sufficient if it has the number of signers equal to the number of the foregoing percentage requirements applied to the total average vote cast for the offices of sheriff and county auditor at the most recent general election at which such officers were elected in such county or district as the case may be where the petitioner resides, such average to be arrived at by dividing the total vote cast for said offices in such county or district as the case may be by two. Each name on a petition shall be that of a qualified voter and if the office is under party designation, then such name shall be subscribed under the proper party heading. Each signer of a nomination paper shall add his mailing address and date of signing.

44-01-01. ELIGIBILITY TO OFFICE. Every elector is eligible to the office for which he is an elector, except when otherwise specially provided. No person is eligible who is not such an elector.

44-01-03. WHEN STATE AND DISTRICT OFFICER SHALL QUALIFY. Except when otherwise specially provided, all state and district officers shall qualify on or before the first day of January next succeeding their election, or within ten days thereafter, and on said first day of January or within ten days thereafter, shall enter upon the discharge of the duties of their respective offices, provided that when a person is elected to fill an unexpired term in a district office then vacant or then held by an appointee, such person may qualify and enter upon the discharge of the duties of such office at any time after receiving a certificate of election to that office but not later than the tenth day of January next succeeding the date of his election to the unexpired term of office.

Section 173 of the North Dakota Constitution is also relevant to your inquiry. It provides as follows:

ARTICLE X - COUNTY AND TOWNSHIP ORGANIZATION

Section 173. There shall be elected in each county, organized under the provisions of Section 172 of the Constitution of the State of North Dakota, a register of deeds, county auditor, treasurer, sheriff, state's attorney, county judge and a clerk of the district court, who shall be electors in the county in which they are elected and who shall hold their office for a term of four years and until their successors are elected and qualified; provided in counties having fifteen thousand population or less, the county judge

shall also be clerk of the district court; provided further that in counties having population of six thousand or less the register of deeds shall also be clerk of the district court and county judge. This amendment shall be construed as applying to the officers elected at the general election in 1962. This amendment shall be self-executing, but legislation may be enacted to facilitate its operation.

Section 173 provides for the election of county officials. It further provides that such county officials (including the sheriff) "shall be electors in the county in which they are elected." This section further provides that such officials "shall hold their office for a term of four years and until their successors are elected and qualified." A narrow interpretation of this language would require a county officer to be a voting resident of the county in which he is a candidate but that he may meet all other qualifications at some later date since the then current officer must remain in office until his successor is duly "elected and qualified" (emphasis supplied). A broader interpretation would imply that a county official must be a voting resident at the time he takes office. In any event, the language of the Constitution clearly implies that being elected and being qualified are two separate steps which could presumably take place at different times. Furthermore, this section and all previous amendments refer to the election of such officers at the general election, not the primary election.

N.D.C.C. Section 11-10-04 provides that a county officer "must be a qualified elector in the county in which he is chosen or appointed . . ." N.D.C.C. Section 11-15-01.1 provides that a "sheriff shall be a qualified elector in the county in which the sheriff is elected or appointed." We note that the law does not refer to candidates for sheriff but refers to the sheriff. The language of N.D.C.C. Section 11-10-05 provides that county officers "shall qualify . . . on or before the first Monday in January next succeeding the date of his election or within ten days thereafter." These three sections when read together indicate that "being elected" and "being qualified" are viewed by the legislative assembly as two different steps to be accomplished at different times. We further note that the only qualification for most county offices is that the officer be an elector in the county in which he serves. The elements of being a qualified elector are set forth in N.D.C.C. Section 16-01-03. Presumably, a person could qualify for most county offices within the time frame set forth in N.D.C.C. Section 11-10-05 by establishing residence in the county in which he was elected thirty days prior to the date in January that he must qualify.

N.D.C.C. Section 44-01-01 is another statute that provides that the basic qualification for an officer is that he be an elector for such office. N.D.C.C. Section 44-01-03, a companion statute, is the counterpart to Section 11-10-05 and applies to state and district officers.

N.D.C.C. Section 16-04-04 appears to conflict with our interpretation of the previously discussed statutes. This section provides that a "candidate for a county or district office shall . . . present to the county auditor of the county in which he resides . . . a petition giving his name, post-office address, and the title of the office to

which he aspires" (emphasis ours). This section in its entirety provides the procedure that must be followed for placing one's name on a primary ballot. We note that the procedure outlined therein is not relevant to the fact situation at hand since the nonresident candidate was nominated through write-in votes. Nonetheless the above underlined language does state that a candidate shall file his petition in the county in which he resides. It is our opinion, however, that this statute is procedural only and does not substantively speak to a candidate's qualifications for office.

We also note that election officers such as the secretary of state, the county auditor, and the canvassing board are ministerial officers having well defined designated duties and powers. Such officers do not have statutory authority to determine the qualifications of candidates once an election has been held; the county auditor's and secretary of state's authority prior to an election is limited to determining the sufficiency and timeliness of petitions and nominations. See generally, *Larkin v. Gronna*, 285 N.W. 59; *Schmidt v. Gronna*, 281 N.W. 57; *Preckel v. Byrne*, 244 N.W. 781, regarding initiative and referendum petitions.

There are a few previous opinions of the Attorney general that are related to this matter. In an opinion dated February 23, 1950, this office ruled that the eligibility of a candidate for office is determined as the date of election or as of the date of entrance upon the duties of the office. The opinion, citing the case of *Enge v. Cass*, see *infra*, concluded that a person who resided in the county for the requisite time prior to the general election was qualified. The facts presented were such that it was unnecessary for the Attorney General to rule on the question of residency being established for the requisite period after the general election but before the day of taking office.

In an opinion dated March 3, 1952, this office ruled that second term incumbent sheriffs could run in the primary even though they were limited by the Constitution to two terms. Since an amendment to repeal the limitation was to be on the primary ballot, the Attorney General ruled that a candidate for office need not be qualified until the time of assuming his duties of the office to which he was elected.

In an opinion dated October 27, 1967, this office ruled that a county commission could not fill a vacancy for sheriff by appointing a nonresident. In that case, however, the appointee would have taken office immediately.

Court opinions are equally sparse and not precisely in point. In *Enge v. Cass*, 148 N.W. 608, the North Dakota Supreme Court ruled that a state's attorney must be an attorney duly licensed and admitted to practice but that such qualification could be met at the time he takes office, not at the time of election. The court recognized a distinction between the capacity to be elected and the capacity to afterwards hold such office. The court, in dictum, did state that if the candidate at the date of his election "was an elector of the county, he possessed sufficient qualification to render him eligible as a candidate at the election." Since, however, this was not essential to the holding in this case, we do not feel compelled to

afford it great weight.

A contrary opinion was reached in *Petition of Teigen*, 221 N.W.2d. 94, wherein the North Dakota supreme Court held that a person must be admitted to the bar or to the practice of law before he may place his name on the ballot for the office of judge of that court. This decision was made without reference to the ruling in *Enge v. Cass* (see supra). The facts of the case indicate that the candidate was not "learned in the law" as provided by Section 94 of the North Dakota Constitution, and could not possibly have become "learned in the law" in time to qualify for the office of Justice of the Supreme Court. Consequently, we are reluctant to cite this decision as controlling this matter.

The landmark case of *State ex rel. Sathre v. Moodie*, 258 N.W. 558, dealt with the residency requirements of an elected governor. In this case, however, the elected governor did not meet the residency requirements of the state event at the time he took office.

Case law in other jurisdictions generally holds that a person must be an elector of the county, district, or state wherein he is seeking election. See generally, 29 C.J.S. Elections 130, and 25 Am. Jur.2d. Elections 177. These decisions, however, interpret statutory language not identical to those North Dakota statutes discussed above and none of the cases address the breadth of a statute similar to N.D.C.C. 11-10-05 or 44-01-03.

Based on the foregoing discussion and observations, it is our opinion that the county auditor, county canvassing board, and state's attorney do not have authority to withhold a certificate of nomination from a winning candidate in a primary election for county sheriff on the grounds that such candidate was not an elector of said county; conversely based on such election results it is the duty of the county auditor to place the name of such candidate on the general election ballot.

In so concluding we take notice of the fact that it is sometimes difficult to obtain candidates for county office. It is important that limitations on the right to be a candidate for a county office be construed so as to encourage candidacies. In this instance the voters have chosen through write-in votes a candidate for the office of sheriff. The Supreme Court in *Enge v. Cass*, supra, p. 609, quoting from a Wisconsin court, stated:

We give force and effect to another fundamental principle of free government, equally as important as that which we have discussed, which is that the will of the majority constitutionally expressed must be obeyed.

Persons aggrieved by the results of an election or by the acts or opinions of public officials on election matters are provided remedies.

N.D.C.C. Section 16-04-30 provides as follows:

16-04-30. CONTESTING NOMINATION OF CANDIDATE - AFFIDAVIT REQUIRED - RECOUNTING BALLOTS. Within ten days after the

completion of the canvass of a primary election, any candidate at such election may contest the nomination of another candidate or candidates for the same office by filing an affidavit with the district court. If the contestant shall set forth in his affidavit, upon information and belief, that the ballots in any precinct have not been counted correctly and that he has been prejudiced thereby, the judge shall make an order requiring the custodian of such ballots to appear before him at such time and place as the court shall fix. At the time and place stated, the ballot boxes shall be opened and the ballots recounted in the presence of the court. If it is found that a mistake has been made in counting such ballots, then the contestant, upon application, shall be permitted to amend his affidavit of contest by including such additional facts therein.

This section deals with recounts where a possible error or mistake has been made in canvassing ballots. This section, however, is probably not broad enough to allow a contest based on the present fact situation. It is likely that the section is intended to correct mistakes in ballot sufficiency and ballot canvassing.

The remedy provided in N.D.C.C. Section 16-01-10, however, is very broad and would clearly include the present fact situation. This section provides as follows:

16-01-10. CORRECTING ERRORS ON BALLOTS - REQUIRING PERFORMANCE OF DUTY OR DESISTANCE FROM WRONGFUL PERFORMANCE. Wherever it shall be made to appear by an affidavit to the supreme court, or to the district court of the proper county that:

1. An error or omission has occurred or is about to occur in the placing of any name of an official election ballot;
2. Any error has been or is about to be committed in printing such ballot;
3. Any wrongful act has been or is about to be done by any judge or clerk of election, county auditor, canvassing board, member thereof, or other person charged with and duty concerning the election; or
4. Any neglect of duty has occurred or is about to occur,

a judge of such court shall order the officer or person charged with such error, wrong, or neglect to correct the error, desist from the wrongful act, perform the duty, or show cause at a time and place to be fixed by the court why he should not do so. Failure to obey the order of such judge shall be contempt of court.

We point out these particular sections for the benefit of opposing candidates or citizens who are aggrieved by the outcome of this election and our opinion relative thereto.

You should also note that if our opinion was the name of the nonresident candidate could not be placed on the general election

ballot it would not follow that the name of the third place candidate could be placed on the general election ballot. This office has previously ruled on this question in an opinion dated September 10, 1970. The 1970 opinion, although contrary to an earlier opinion dated September 25, 1948, was based on the North Dakota Supreme Court decision of *In Re Murray*, 145 N.W.2d. 899, wherein the court held in substance that the candidate receiving the third highest number of votes in a no-party primary election would not be entitled to the nomination even if the nomination of the first and second place candidates were set aside for any legal reason. The court further held that such vacancy could be filled only pursuant to N.D.C.C. 16-08-07 which provides in part:

Whenever a vacancy shall exist on a no-party ballot in a county or district within a county, such vacancy may be filled by filing with the county auditor at least thirty-five days prior to the general election and before four o'clock p.m. of the thirty-fifth day a written petition as provided in section 16-04-04, stating that the petitioner desires to become a candidate for election to the office for which a vacancy exists. If such petition is mailed it shall be in the possession of the county auditor before four o'clock p.m. on the thirty-fifth day prior to the general election. The petition for the nomination of any person to fill such vacancy shall be signed by qualified electors equal in number to at least thirty percent of the total vote cast for governor at the most recent general election in the county or district at which the office of governor was voted upon.

A vacancy in the no-party ballot shall be deemed to exist when a candidate nominated at the primary election shall die, resign, or otherwise become disqualified to have his name printed on the ballot at the general election.

When such a vacancy occurs any person who fulfills the requirements of Section 16-08-07 could gain a place on the ballot.

We trust the foregoing discussion will be of assistance to you.

Sincerely,

ALLEN I. OLSON

Attorney General