May 4, 1998

Mr. James O. Johnson
Sioux County State's Attorney
PO Box L
Fort Yates, ND 58538

Dear Jim:

Thank you for your letter asking whether a nonresident of the state may be a candidate for sheriff. You indicate that a resident of South Dakota is circulating petitions to have his name placed on the ballot as a candidate for county sheriff.

N.D.C.C. § 11-15-01.1 provides, in part:

> Except as otherwise specifically provided by state law, the sheriff must be a qualified elector in the county in which the sheriff is elected or appointed.[1]

Similarly, N.D.C.C. § 11-10-04 provides, in part:

> [A] county officer must be a qualified elector in the county in which the person is chosen or appointed. . . .

N.D.C.C. § 44-01-01, concerning eligibility for office, provides:

> 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.

A qualified elector is defined in the North Dakota Constitution as a "citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident." N.D. Const. art. II, § 1. N.D.C.C. § 16.1-01-04(1) provides:

> Every citizen of the United States who is: eighteen years or older; a resident of this state; and has resided in the

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[1] In construing this and related statutes, Attorney General Allen I. Olson noted that "the law does not refer to candidates for sheriff but refers to the sheriff" and that "'being elected' and 'being qualified' are viewed by the legislative assembly as two different steps to be accomplished at different times." Letter from Attorney General Allen I. Olson to Ronald G. Splitt (September 14, 1978).

precinct at least thirty days next preceding any election
. . . is a qualified elector.

Thus, a current resident of South Dakota could not meet the
definition of a qualified elector for Sioux County, North Dakota;
although it is possible that such a nonresident could become a
qualified elector of the county at some later date, but prior to the
commencement of the term of office of sheriff.

As you noted, the North Dakota Supreme Court in Nielsen v. Neuharth,
331 N.W.2d 58 (N.D. 1983), determined that where the statutes dealing
with eligibility for office do not further qualify the term,
eligibility refers to qualifications to hold office rather than
qualifications to be a candidate or elected to office. The court
noted the following:

> Quoting from a well-reasoned Idaho case, Bradfield v.
> Avery, 16 Idaho 769, 102 P. 687 (1909), this court said in
> Enge v. Cass: ". . .where the word 'eligibility' is used
> in connection with an office, and there are no explanatory
> words indicating that such word is used with reference to
> the time of election, it has reference to the
> qualification to hold the office rather than the
> qualification to be elected to the office." 28 N.D. at
> 226, 148 N.W. at 609.

Id. at 60. See also Letter from Attorney General Allen I. Olson to
Ronald G. Splitt (September 14, 1978) (certificate of nomination
could not be withheld from a winning candidate in a primary election
for county sheriff on the grounds such candidate was not an elector
of the county; "[p]resumably, 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");
Letter from Attorney General Nicholas J. Spaeth to Representative
Rick Berg (April 8, 1992) ("[q]ualifying for office is not the same
as qualifying to have an individual name placed on the ballot").

It should also be noted that the legal requirements pertaining to
qualifications for county office do not include any special
durational residency requirements like that for state executive
department constitutional offices. See N.D. Const. art. V, § 4
("[t]o be eligible to hold an elective office established by this
article, a person . . . must have been a resident of this state for
the five years preceding election to office"). Had the Legislature
intended such a durational residency requirement for county

officeholders, it certainly could have easily enacted one, or made the requirements of being a resident and qualified elector of the county requirements for candidacy rather than for office. <u>See</u> <u>Nielsen v. Neuharth</u>, 331 N.W.2d at 61.

Thus, based on the foregoing, a candidate for county sheriff would not have to be a qualified elector of the county in order to circulate petitions, run in the primary election, or have his or her name placed on the general election ballot.[2] However, if such a candidate were elected at the general election, the elected candidate would have to meet all applicable requirements in time to qualify for and assume the office of sheriff.

You also noted that in the particular facts and circumstances involved in the <u>Neuharth</u> case, the successful candidate was not at the time of election a qualified elector of the county but was a North Dakota resident and elector of a different county, and you questioned whether that distinguishes the <u>Neuharth</u> case from the present situation where the putative candidate is neither a North Dakota resident nor a North Dakota elector. I do not believe that the nature of a disqualification is dispositive as long as the disqualification can be removed before the time for taking office. It does not appear that the fact that the candidates in <u>Neuharth</u> were North Dakota residents had any direct bearing on the outcome of that case and that fact was not essential to the court's ruling. None of the pertinent authorities I have reviewed appear to make state nonresidency an overriding disqualifying factor that cannot be remedied prior to the taking of office.[3]

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[2] N.D.C.C. § 16.1-11-11 requires a candidate for county office to present a nominating petition to the county auditor "of the county in which the candidate resides. . . ." An argument could be made that the statute requires a candidate to at least reside in the county in which such person is a candidate. However, in construing a similar provision contained in former N.D.C.C. § 16-04-04, Attorney General Allen I. Olson opined that the statute is procedural only and does not "substantively speak to a candidate's qualifications for office." Letter from Attorney General Allen I. Olson to Ronald G. Splitt (September 14, 1978).

[3] In some instances, if a disqualification would be factually impossible to remedy prior to the taking of office, such a disqualification may preclude placing a candidate on the ballot. <u>See</u>, <u>e.g.</u>, <u>Petition v. Teigen</u>, 221 N.W.2d 94 (N.D. 1974). In <u>Teigen</u>, the North Dakota Supreme Court determined that the Constitution of the state required Supreme Court judges to be admitted to the bar and therefore a nonlawyer was disqualified from having his name appear on

The disqualifying factor of being a nonresident of the state could be easily remedied by the candidate by abandoning his or her current residence and moving to a new residence within the North Dakota county with the intention to establish and remain at the new residence. See N.D.C.C. § 54-01-26; Keating v. Keating, 399 N.W.2d 872, 875 (N.D. 1987).

In conclusion, it is my opinion that a nonresident of the state may be a candidate for county sheriff and if the nonresident elected can become a resident and elector of the county before the date the person is to assume office, the person is eligible to hold the office. See Nielsen v. Neuharth, 331 N.W.2d at 60. This result would be different if a proposed initiated measure to amend Article VII, Section 8 of the North Dakota Constitution gets on the ballot and passes. That amendment would require candidates for elected county offices at the time of the election to be residents of the jurisdiction in which they would serve.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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the ballot since it was not possible for him to become qualified prior to assuming the office of Supreme Court justice, if elected.