

**OPINION
66-37**

May 9, 1966 (OPINION)

Mr. Richard P. Gallagher, City Attorney

Mandan, North Dakota

RE: Cities and Villages - Municipal judge - Qualifications

This is in reply to your letter of May 5, 1966, relative to the position of municipal judge in the city of Mandan. You note the provisions of Section 113 of the North Dakota Constitution, as amended, and the provisions of Sections 40-13-01 and 40-18-01 of the North Dakota Century Code, as amended. You state the following facts and question:

"In the recent municipal election held i this city no candidate filed for the office of municipal judge and, accordingly, no name appeared on the ballot for that office. However, upon the canvass of the election results, a majority of write-in votes were cast for an attorney licensed to practice in this state who had not been a resident of the city for at least nine months preceding the election, as required by Section 40-13-01 of the North Dakota Century Code set forth above.

"Accordingly, we propose the following question: Do the provisions of Section 40-18-01, as amended, prevail over Section 40-13-01, when an attorney licensed to practice law in this state has received a majority of write-in votes and is available in the city to serve as municipal judge?"

Section 113 of the North Dakota Constitution, as amended in June, 1964, provides: "The legislative assembly shall provide by law for the selection or election and the qualifications of municipal judges in cities, incorporated towns, and villages, who shall hear, try, and determine cases arising under the ordinances of said cities, towns and villages, and shall have such other jurisdiction as the legislative assembly may confer upon them."

Prior to the amendment in 1964 this section provided:

"The legislative assembly shall provide by law for the election of police magistrates in cities, incorporated towns, and villages, who in addition to their jurisdiction of all cases arising under the ordinances of said cities, towns and villages, shall be ex officio justices of the peace of the county in which said cities, towns and villages may be located. And the legislative assembly may confer upon said police magistrates the jurisdiction to hear, try and determine all cases of misdemeanors, and the prosecutions therein shall be by information."

It is to be noted that the amendment specifically provided that the Legislative Assembly should provide for the qualifications of municipal judges although such power was apparently inherent in the former constitutional provision also.

Section 40-13-01 of the North Dakota Century Code provides:

"QUALIFICATIONS OF ELECTIVE AND APPOINTIVE OFFICERS. No person shall be eligible to hold an elective municipal office unless he is a qualified elector of the municipality and unless he has been a resident thereof for at least nine months preceding the election. No person shall be eligible to hold an appointive office unless he is a citizen of the United States. No person in default to the municipality shall be eligible to any office."

The office of municipal judge is an elective municipal office. See Sections 40-07-08, 40-14-01 and 40-15-01 of the North Dakota Century Code, as amended, and as such the above cited statute would appear applicable to such office.

The 1965 Legislature did enact chapter 286 of the 1965 Session Laws changing the office of police magistrate to municipal judge in accordance with the 1964 amendment to Section 113 of the North Dakota Constitution. Section of this Act amended Section 40-18-01 of the North Dakota Century Code to provide as follows:

"JURISDICTION OF MUNICIPAL JUDGE. The municipal judge within a city or village having a population of three thousand or more shall be an attorney licensed to practice law in this state, unless no person so licensed is available in the city or village and shall have exclusive jurisdiction of, and shall hear, try and determine, all offenses against the ordinances of the city or village, as the case may be. The offices of county justice and municipal judge may not be held by the same person."

The term "available" according to Words and Phrases has been judicially construed to mean, "ready, accessible, attainable, and obtainable." The term "available" has been construed under numerous unemployment acts. The courts have consistently held that such term means "ready, willing and able." The judicial construction placed upon such term in unemployment compensation acts appears to be applicable to the term as it is found in this section. We believe this means "legally able" to serve as well as "physically able" to serve.

The question which arises is, as you have noted, whether Section 40-13-01 applies to the office of municipal judge or whether Section 40-18-01 contains all the provisions governing the qualifications of persons to the office of municipal judge. In discussing this matter we would note that the Legislature in enacting the county justice law specifically provided that the county justice need not be an elector of the county for which he was elected or appointed. See Section 27-18-01 of the North Dakota Century Code. No such provision is found with respect to the office of municipal judge.

The title to chapter 286 of H.B. 870 of the 1965 Legislature (chapter 286 of the 1965 S.L.) establishing the office of municipal judge provides it is an act "relating to the jurisdiction selection, qualifications, compensation, duties and powers of police

magistrates, and changing the name thereof to municipal judges."

We do not believe chapter 286 of the 1965 Session Laws repeals the provisions of Section 40-13-01 of the North Dakota Century Code insofar as the office of municipal judge is concerned. That chapter did add an additional qualification to the office that was not previously required for the office of police magistrate, i.e., that in cities or villages having a population of 3,000 or more the municipal judge should be an attorney licensed to practice law in North Dakota unless no person so licensed is available in the city or village. Had the Legislature intended that the municipal judge need not be an elector of the city or village for nine months as had been the case with the police magistrates, we believe they would have so stated as was done in the creation of the office of county justice. By its terms Section 40-13-01 of the North Dakota Century Code is applicable to all elective municipal offices. We can find nothing in chapter 40-18, as amended, which would except the elective office of municipal judge from this provision. The two provisions are not contradictory.

It is therefore our opinion that when a person, including an attorney, has not been a resident of the municipality for nine months, he is not qualified to hold the office of municipal judge, either by election or appointment, until the nine months residency provision has been met. A qualified person should therefore be appointed to the office of the city governing body.

HELGI JOHANNESON

Attorney General