

OPINION
56-9

April 16, 1956 (OPINION)

ALDERMEN

RE: Residence in Ward

We have your letter of April 3, 1956, which reads, in part, as follows:

On our election of April third this year we have an alderman living in ward two and acting as alderman in ward one. Also while still living in ward two he voted in ward one. He claims that his residence is still in ward one but has lived out of there for about one year.

We would like your opinion on this matter as soon as possible."

The law of this state pertaining to qualifications of aldermen is found in section 40-0805 of the North Dakota Revised Code of 1943. Subsection 1 thereof reads as follows:

No person shall be eligible to the office of alderman if he:

1. Is not a qualified elector of and resident within the ward for which he was elected, except that in cities where aldermen are elected at large, he shall be a qualified elector of and a resident within the city;"

Nevertheless, the question of residence must be determined from all the facts and circumstances surrounding the person, as related to his residence, and the intention must be accompanied by acts in harmony with the declared intention.

Section 40-0802 of the North Dakota Revised Code of 1943 provides as follows:

GOVERNING BODY IS JUDGE OF ELECTION AND QUALIFICATIONS OF MEMBERS. The city council shall be judge of the election and qualifications of its own members."

This law gives the city council the duty of determining whether or not a member or members meet the qualifications set forth in section 40-0805. In making such a determination, consideration must be given to all facts and circumstances surrounding the person, relating to his residence. The members of the city council are on the scene and in a position to know all such facts and circumstances. This office does not have such information and even if it were available to us we would not attempt to rule on individual qualifications of aldermen since such authority is vested in the city council pursuant to section 40-0802.

In reply to your second question, we find the law in regard to persons receiving the "next highest vote" to be stated in 29 C.J.S.

page 353, sec. 243, as follows:

It is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried, unless he or it receives a majority or a plurality of the legal votes cast in the election. Accordingly, the general rule is that the fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected. In such case the electors have failed to make a choice and the election is a nullity."

Therefore, if the person receiving the highest number of votes were disqualified, it would be necessary to proceed in accordance with section 40-0808 of the North Dakota Revised Code of 1943 as amended by Chapter 263 of the 1955 Session Laws. This statute reads as follows:

VACANCIES ON CITY COUNCIL; HOW FILLED. If a vacancy occurs in the office of alderman by death, resignation, or otherwise, the city council may call a special city election to fill such vacancy for the unexpired term, or may, after fifteen days of the date of such vacancy appoint a person from the ward in which the alderman previously holding was elected or appointed to fill such vacancy until the next city election, at which election the unexpired term shall be filled. Upon petition of five percent of the electors of such ward, as determined by the total number of votes cast in such ward in the last general election, the council shall call a special election to fill a vacancy occurring more than six months before the next city election, provided such petition has been submitted within fifteen days of the date of such vacancy."

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