

**OPINION
60-257**

August 24, 1960 (OPINION)

TOWNSHIPS

RE: Officers - Residence - Vacancy in Office

We have received your letter of August 17, 1960, in which you requested an opinion from this office concerning vacancies in township offices. You have asked the specific question:

Whether or not a vacancy in a township treasurer's office is created when the township treasurer physically moves out of the township but said treasurer intends to retain his voting rights in the township."

You cite section 58-0501 of the North Dakota Revised Code of 1943 which provides:

Every person qualified to vote at a township meeting is eligible to any township office."

You also cite section 58-0516 of the 1957 Supplement to the North Dakota Revised Code of 1943 which provides:

If the electors of a township fail to elect the proper number of officers, or a person elected to a township office fails to qualify, or a vacancy happens in any such office from death, resignation, removal from the township or other cause, the board of township supervisors, or a majority of them, shall fill the vacancy by appointment" (Emphasis supplied).

We wish to cite to you several pertinent statutes at this point.

Section 44-0101 of the North Dakota Revised Code of 1943 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."

Further, section 16-0103 of the 1957 Supplement to the North Dakota Revised Code of 1943 provides:

QUALIFICATIONS OF ELECTORS. Any person of the age of twenty-one years or upwards, who has resided in this state one year, in the county ninety days, and in the precinct thirty days next preceding any election, shall be a qualified elector at such election if he is a citizen of the United States."

This office has ruled on this particular question when we answered the following specific inquiry on February 26, 1959: "Can people who live in town, but who farm in the township vote in the township?" Our answer stated that "If persons live in town and maintain their legal domicile in town, they are not qualified voters in the

township. It is usually a question of fact as to where their legal residence is."

We also cite you at this point, section 58-0408 of the 1943 North Dakota Revised code which states:

No person shall vote at any township meeting unless he is qualified to vote at general elections therein."

In going back to section 58-0501 of the North Dakota Revised Code of 1943, it simply requires that the persons eligible to hold township office be qualified electors.

Section 44-0201, subsection 7, of the 1957 Supplement to the North Dakota Revised Code of 1943 provides:

An office shall become vacant if the incumbent shall:

. . . .

7. Cease to be a resident of the state, district, county, or township in which the duties of the office are to be discharged, or for which he may have been elected;

. . . ."

As you have surmised, the crucial question which all the statutes refer back to, or are based on, deals with residency of the particular person. Generally, if the person does not satisfy the residency requirements, he would be barred from voting or holding office. If he does satisfy the proper residency requirements, he is not barred.

We now come to a consideration of section 54-0126 of the North Dakota Revised Code of 1943 which provides:

Every person has in law a residence. In determining the place of residence the following rules shall 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;

. . . .

7. The residence can be changed only by the union of act and intent." (Emphasis supplied).

In a letter dated April 1, 1958, this office stated:

We believe the test of a man's residence for voting purposes is the voter's intention as to residence as shown by his acts. The fact that this man has always voted in the township, owns

land there, and makes his living there, if coupled with a statement from him that he considers the township his place of residence for voting purposes, would qualify him as a voter in the township."

Based on the preceding information, when read with 58-0501 of the North Dakota Revised Code of 1943, it appears clear that if a person can vote in the township he may also hold an office in the township.

We wish to refer you to another letter from this office dated January 31, 1958, dealing with section 54-0126 of the North Dakota Revised Code of 1943, and we quote in part:

The courts recognize that there is difficulty in applying the statutes to individual cases to determine whether a person has changed his residence. The difficulty arises because actual removal to another location does not alone establish a new residence, along with the actual removal, there must be a bona fide intention to change to remain in the new domicile or location permanently or for an indefinite time."

In State v. Moodie, 65 N.D. 340, (1935), at page 355, 258 N.W. 558 at page 564, the North Dakota Supreme Court quoted, with apparent approval, the following:

That a person may live in one voting district and do business there and at the same time retain a right to vote in another district is undoubtedly true; but the right depends upon a reasonable intention to resume his former home and to rebut the presumption that he had abandoned it."

However, from Kennan on Residence and Domicile, Section 92, the court also quoted that:

"Nothing is better settled in the law of domicile than that every change must be facto et animo - in fact and intent. It is also elementary that every man must have a domicile somewhere, that the presumption is against a change of domicile and that the burden of proof rests upon the one alleging a change of domicile."

In brief, the cited case held that leaving a place of residence does not constitute an abandonment thereof unless the resident establishes another, and a new residence can be established only by union of act and intent.

By the stated circumstances which you gave us, it would appear that the treasurer is now physically residing in town but it is entirely possible that this man, if he moved to town with intent to live there only temporarily, after which he intends to return to the township, is or could still legally be a resident of your township and therefore still qualified to continue his term as treasurer of the township. If he does not wish to give up his office, judicial procedure could be brought to determine whether he is in fact a resident of your township and therefore entitled to serve his elected term. We note, however, that the person in question has definitely expressed his intent to retain his voting rights within the township.

These residence problems are always bothersome, and do not lend themselves to definite answers. Each case must be decided on its own facts and circumstances. In reiteration, we point out that residence is a question of fact in which the intent of the party is the most important element. We do offer you some case citations purely as supplementary material relating to the problems of residency and domicile. See 71 N.D. 262, 300 N.W. 28 (1941); 75 N.D. 684, 32 N.W.2d. 106 (1948); 71 N.W.2d. 68 at page 70 (N.D. 1956). See also 98 A.L.R. 242n.

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