

Opinion No. 56-6400

March 2, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable Ralph Gallegos, State Representative, 408 San Mateo Blvd., N.E., Albuquerque, New Mexico

You have presented for our opinion the question of your status as a candidate for the Legislature from Rio Arriba County. You relate that you were born in Rio Arriba County and that you lived there when you registered to vote; that you are still registered there; that you have served three terms in the House and one in the Senate as a Representative of Rio Arriba County, the last session at which you served being the Twenty-Second Legislature of which you are presently a member; that the last few years you have lived in Santa Fe in a rented home; that you have been engaged in the general insurance business and now maintain an insurance office in Albuquerque, New Mexico; that your present intention is to ultimately return to Rio Arriba County, your birth place.

Your question is prompted by the language used in Article IV, Section 3 of the New Mexico Constitution, as amended on September 20, 1955, which provides:

"Senators shall not be less than twenty-five years of age and Representatives not less than twenty-one years of age at the time of their election. **If any Senator or Representative permanently removes his residence from or maintains no residence in the County from which he was elected**, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. . . ." (Emphasis Supplied)

This provision requires that a person has attained a stated age at the time of his election. The next sentence concerning residence deals with the county where he resides at the time of his qualification for office and provides an automatic resignation from that office unless he maintains a residence therein.

This new constitutional amendment is a departure from our former holdings that in election laws "residence" means "domicile", or the place where a person has lived and intends to return to. At the time of the qualification for the office of Representative or Senator the person must maintain a residence within the county, that is to say have a place of abode. This place of abode must be maintained as a residence either full or part time, and any failure to do so would constitute an abandonment of the office and resignation would be automatic.

In departing from the rule which has been followed heretofore concerning elections in this state, we are forced to do so by reason of the two phrases "permanently removes his residence from" with the additional phrase, in the disjunctive, "or maintains no

residence in". To say that both of these terms mean domicile would be giving no effect to the last phrase.

You have asked our opinion on the question of a candidate being elected and what effect Article IV, Section 7, would have upon that fact. Of course, Article IV, Section 7, provides that each House of the Legislature is the sole judge of the qualifications of its members and, as it relates to your first question, points up a possible conflict between Article IV, Section 7 of the Constitution and Article IV, Section 3 of the Constitution.

The question presented is not immediately before us and the answer to that inquiry would necessarily depend upon the method of raising the question. There is a distinct split of authority upon this question and a solution is certainly one upon which reasonable minds may differ.

Upon the question of whether a candidate's qualifications could be raised before election, the case of *State ex rel. Cloud v. Election Board of State of Oklahoma*, 36 P. 2d 20, and the case of *State ex rel. Brobston v. Culbreath*, 168 So. 244, is authority for the proposition that the matter can be raised in the courts at this stage. The contrary authority can be found in the case of *Lucas v. McAfee*, 29 N.E. 2d 403 and 588, (Ind.).

There is authority to the effect that once a candidate has been elected that the Legislature then is the sole judge as to his qualifications for seating, and that the courts will not take jurisdiction in such a matter as it is a legislative problem. *Lessard v. Snell*, 63 P. 2d 893, (Ore.); *State v. Shumate*, 113 S.W. 2d 381; and *Attorney General v. Board of Canvassers, Seventh Senatorial District*, (Mich.), 118 N.W. 584.

After a person has taken office, there is a very serious question as to whether said person can be divested of his office by judicial action pursuant to a constitutional provision which on the face of it disqualifies a person from holding a legislative office. The basic reason for the courts failing to take jurisdiction on this question is because it presents a question of separation of power, and the courts will not interfere with the organization of one of the other equal branches of government. The case of *State ex rel. Martin v. Gilmore*, (Kans.), 27 Am. Rep. 189, states that once a member of the legislature is seated, he retains his seat during the entire term. See also *Culbertson v. Blatt*, 194 S.C. 105, 9 S.E. 2d 218. Contrary authority can be found in the case of *Wilentz v. Stranger*, 30 A. 2d 885, 129 N.J.L. 606, which is a case wherein the Court of Errors and Appeals of New Jersey held that the Court would take jurisdiction to decide the constitutional question as presented.

As can be seen, this is a very close question and one in which this office entertains grave doubts. Because of this, we hesitate to give an opinion and suggest that this determination await the time when the question actually arises.

Therefore, it is the opinion of this office that the constitutional provision is not a restriction upon your filing for, running for or being elected to the office of State Representative, but at the time of qualification for the office and during your entire

tenure as State Representative you must maintain an actual residence within the county from which you are elected.

By Fred M. Standley

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