

Opinion No. 60-222

December 8, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Patrick F. Hanagan District Attorney Fifth Judicial District Chaves County
Courthouse Roswell, New Mexico

QUESTION

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Are deputy sheriffs, county jailers, and jail guards subject to the statutory requirement of one year's residence in New Mexico prior to being appointed or employed, or is it sufficient that they be residents of New Mexico at the time of their appointment or employment?

CONCLUSION

The statutory residence requirements apply.

OPINION

{*643} **ANALYSIS**

Your question requires us to review several authorities, and for convenience we will state the applicable authorities at the beginning of this opinion.

Section 15-40-12, N.M.S.A., 1953 Compilation, provides, in part, as follows:

"Provided, no person shall be eligible to appointment as a deputy sheriff, unless he is a legally qualified voter of the state of New Mexico . . ."

Section 15-43-13, N.M.S.A., 1953 Compilation does not specify any residence requirement for county jailers and jail guards, but will be referred to for other reasons. It reads, in part, as follows:

"The county jailer and jail guard or guards shall be appointed by, and shall be under the supervision and control of the sheriff.

Section 39-1-9, N.M.S.A., 1953 Compilation, states the requirement that a person must be a citizen of New Mexico before he may be appointed special deputy sheriff, special constable, marshal, policeman, or other peace officer.

Section 5-1-5, N.M.S.A., 1953 Compilation, reads, in part, as follows:

"Hereafter all employees of the state of New Mexico, including all political subdivisions thereof and including all of the departments, bureaus, boards, commissions and institutions in said state, and all of its political subdivisions shall be residents of the state of New Mexico, having resided in this state for a period of at least one (1) year prior to the commencement of their employment. . ."

The overriding provisions of law in the area of residence requirements for public servants are contained in the Constitution of New Mexico, Art. VII, § 2, which provides:

"Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this Constitution."

and Art. V, § 13, which provides:

"All district, county, precinct and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed."

The Legislature has no power to add restrictions upon the right to hold public office beyond those provided in the Constitution, and the only restriction against the {**644*} right of every citizen of the United States who is a resident of and a qualified voter within this state to hold any public office is that all district, county, precinct, and municipal officers shall reside within the political subdivision for which they were elected or appointed. **Gibbany v. Ford**, 29 N.M. 621, 225 Pac. 577 (1924.)

From these authorities it is apparent that any restrictions on the right to hold public office that go beyond the constitutional restrictions are void. It is important to note at this point that the Constitution deals with public **officers** and not public **employees**. Therefore, nothing in the Constitution prevents the legislature setting such restrictions as it sees fit upon public employees. The legislature has exercised its power in § 5-1-5, supra, over all public employees, and in § 15-40-12 and § 39-1-9, additional requirements are stated for deputy sheriffs and other peace officers. If deputy sheriffs, county jailers, and jail guards are public employees, the legislative requirements apply; if they are public officers, those requirements do not apply, but the requirements of the Constitution govern. It becomes necessary to determine whether deputy sheriffs, county jailers, and jail guards are public officers or public employees

The distinction between a public officer and a public employee has been stated in **State ex rel., Gibson v. Fernandez**, 40 N.M. 288, 58 P. 2d 1197 (1936) as follows:

"After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be

discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional."

Using these elements as our guide, let us now scrutinize the functions of the deputy sheriff, county jailer, and jail guards to see whether any or all of those offices can be classified as public offices.

Referring to the duties of the deputy sheriff, we quote from § 15-40-11, N.M.S.A., 1953 Compilation:

"The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, **that may be placed under their charge by their principals**, with the same effect as though they were executed by the respective sheriffs."

A fair reading of this statute indicates that deputy sheriffs may not exercise any power other than those delegated by the sheriff, and, therefore, the deputy sheriff does not exercise his powers and duties independently of a superior power, nor is he subject only to the general control of a power placed over him by the legislature. We feel that the detailed supervision and control exercised over deputy sheriffs by their sheriffs eliminate the office of deputy sheriff from the category of a public office and place it in the category of public employment. That being so, the constitutional requirements for {*645} holding public office do not apply to the office of deputy sheriff, and the legislative requirements for public employees do apply. Therefore, it is our opinion that § 15-40-12, supra, requiring deputy sheriffs to be qualified voters of the state is valid and applicable, and furthermore, § 5-1-5, supra, requiring all public employees of the state of New Mexico and its political subdivisions to have one year's residence in the state prior to the commencement of their employment is applicable to the office of deputy sheriff. Section 39-1-9, supra, requiring all peace officers to be citizens of New Mexico prior to their appointment is also applicable, but does not, in our opinion, add any additional requirement, because under the provisions of the Constitution of the United States, Amendment 14, § 1, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. Residence in New Mexico, therefore, satisfies the requirement of citizenship, so long as the resident was born or naturalized in the United States.

This holding requires us to review Attorney General's Opinion No. 209, July 15, 1931, which indicated an opinion that the requirement that deputy sheriffs be qualified voters of the state was unconstitutional as an attempt to add requirements other than those stated in Art. V, § 13, Constitution of New Mexico. That opinion did not consider the question whether a deputy sheriff is a public officer, nor did it consider the effect of Art. VII, § 2, Constitution of New Mexico. Our present opinion is that the requirement that deputy sheriffs be qualified voters is valid, and any implication to the contrary in Opinion

No. 209, supra, is overruled. (We add at this point the observation that in the Report of the Attorney General, 1931-32, there is a misprint that indicates that Opinion No. 209 ruled the qualified voter requirement valid. This error was carried over into the 1953 Compilation of New Mexico Statutes Annotated, and is reflected in the annotations to Art. V, § 13, Constitution of New Mexico, and § 39-1-9, N.M.S.A., 1953 Compilation. The original opinion on file in this office shows that Opinion No. 209 thought the qualified voter requirement for deputy sheriffs unconstitutional. The misprint has had the happy result that, through error, the printers and compilers have reported what we now consider the correct result.)

As to the status of county jailers and jail guards, though their offices are authorized by the legislature, we find by reference to § 15-43-13, supra, that they are placed under the supervision and control of the sheriff, and the legislature does not specify their duties. It follows that the duties of county jailers and jail guards are specified by the sheriff, and we are of opinion that this supervision and control by the sheriff place county jailers and jail guards in the category of public employees rather than public officers. Therefore § 5-1-5, supra, is applicable to such offices, and county jailers and jail guards must have one year's residence in New Mexico before commencing employment.

We have conducted this lengthy discourse because your question is whether the **statutory** residence requirements are applicable to deputy sheriffs, county jailers, and jail guards. Our research shows that a satisfactory, though not equally definitive, result could have been reached more easily, for the one year residence requirement applies whether the persons in question are public officers or public employees. If public employees, the statutory requirements apply. If public officers, the constitutional requirements apply, including the requirement that all public officers be qualified electors of the state before their election or appointment. To be a qualified elector requires at least one year's residence in New Mexico. See § 3-1-1, N.M.S.A., 1953 Compilation. Thus, under existing laws, both public officers and public employees must have been residents of New Mexico for {*646} at least one year prior to their election, appointment, or employment.

This opinion does not consider the residence exemptions for certain public employees contained in § 20, Chapter 288, Laws of 1959, the general appropriations act, because those exemptions are only applicable to employees of state institutions or state departments in which professional or technical training is required and for which qualified employees are not available in New Mexico.

By: Norman S. Thayer

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