Opinion No. 60-27

February 23, 1960

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

TO: Honorable Betty Florina Secretary of State Santa Fe, New Mexico

QUESTION

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Is an ex-serviceman who has been physically out of the State of New Mexico since 1940 on active duty with the armed forces of the United States, but who has continued to establish his residence in the State of New Mexico since 1940 and who voted in the 1958 Primary and General Elections, eligible to qualify for candidacy for a State executive office?

CONCLUSION

Yes, but see Analysis.

OPINION

*{*373}* **ANALYSIS**

Under the New Mexico Constitution, at Article V, § 3, the qualifications for eligibility for the executive offices of the State are set forth. This section reads as follows:

"No person shall be eligible to any office specified in section one, hereof, unless he be a citizen of the United States, at least thirty years of age, **nor unless he shall have resided continuously in New Mexico for five years next preceding his election;** nor to the office of attorney general, unless he be a licensed attorney of the Supreme Court of New Mexico in good standing; nor to the office of superintendent of public instruction unless he be a trained and experienced educator." (Emphasis supplied.)

*{*374}* The executive officers of the State are, under Article V, § 1, as amended effective January 1, 1959, the Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Attorney General and Commissioner of Public Lands. The office of Superintendent of Public Instruction was deleted by the 1959 amendment, and is now an appointive office. See Article XII, § 6.

Your question turns on an interpretation of the requirement of Article V, § 3, that an executive officer shall have resided continuously in the State for five years next preceding his election. There are no New Mexico cases or opinions of this office interpreting this language. Therefore, we must turn to the case law from other states to

determine what the law of this State would probably be, should this question ever be litigated here.

A careful search for authority on this question has led to only one case which is nearly in point. This case is **State ex rel. Sathre, Atty. Gen., v. Moodie et al., 65 N.** D. 340, 258 N.W. 558 (1935), an action in quo warranto instituted by the Attorney General of North Dakota to test the eligibility of Thomas Moodie for the office of Governor. North Dakota had a constitutional provision (§ 73) very similar to the one in New Mexico. Moodie, a newspaperman from Mohall, North Dakota, moved with his family in August, 1929, to Minneapolis, Minnesota, where he resided until April, 1931, at which time he moved back to North Dakota. While in Minnesota, he was gainfully employed and legally registered and voted in Minnesota elections. The court held that he was not entitled to the office of Governor since he had not met the five-year residence requirement of the North Dakota Constitution.

The precise result in this case is not important for our consideration, but the reasoning behind it is. The court reasoned that the term "resided" as used in the North Dakota Constitution meant legal residence, or residence entitling one to vote or hold office. The court then said that in the case of Mr. Moodie, the fact that he had been away from North Dakota for some 20 months and had legally registered and voted in Minnesota during his absence showed an intent to take up a legal residence in Minnesota. Therefore, he lost his legal residence in North Dakota, and, having resided less than five years continuously therein before election to the office of Governor, he was not entitled to that office.

What little other authority there is on the question of residence for the purpose of holding public office bears out the holding of the North Dakota court. See **Rasin v. Leaverton,** 181 Md. 91, 28 A. 2d 612 (1942) and **Wilson v. Hoisington,** 110 Mont. 20, 98 P. 2d 369 (1940). The **Wilson** case is particularly enlightening since it held under a provision of the Montana Constitution, prohibiting election or appointment to any civil or military office in the State unless the person so elected or appointed to the office was a citizen of the United States and had resided in the State at least one year next preceding his election or appointment, the acceptance of State or Federal employment did not work to change residence unless such a change of residence was intended by the person who accepted such employment.

Therefore, we conclude that if a person is a resident for the purpose of voting in New Mexico elections, and has been for at least five continuous years preceding election to an executive office of the State, he is qualified to be a candidate for, and hold such office.

Is a person who has left the physical limits of the State to serve with the armed forces of the United States after having once established residence here, eligible to hold an executive office? In our opinion he is, provided he has not evidenced an intent to take up residence elsewhere.

*{*375}* Article VII, § 4 of the New Mexico Constitution, relating to residence for the purpose of the elective franchise, reads as follows:

"No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while at any school."

Thus, for the purpose of the elective franchise (voting), the mere fact that one leaves the limits of the State does not, ipso facto, mean that he is no longer a resident for voting purposes. Of course, if an intent to take up a new residence is shown, residence in New Mexico will be lost, but such intent is not to be presumed. **Wilson v. Hoisington,** supra. See also **Allen v. Allen,** 52 N.M. 174, 194 P. 2d 270 (1948), which held that Article VII, § 4, does not mean that a serviceman from out of State stationed in New Mexico may not acquire residence here, but it does mean that residence in New Mexico is not acquired from the mere fact that he was stationed here. While the **Allen** case was in regard to the establishment of New Mexico residence, it seems safe to assume that its reasoning could be equally applied to the situation where a New Mexico resident in service was stationed outside the State, i.e., residence is not lost merely because the serviceman is stationed elsewhere.

We cannot determine by an opinion the intent of any person in this regard, but with the reservation that a contrary intent might possibly be shown, we conclude that under the facts as you have presented them to us, the ex-serviceman who has been physically outside the limits of the State of New Mexico since 1940, but who has continued his residence here since then, and who voted in the Primary and General Elections in 1958, is eligible for election to an executive office.

We realize that in a very recent opinion, No. 59-103, dated August 13, 1959, we held that the word "reside" in § 68-4-6, N.M.S.A., 1953 Comp., regarding residence requirements for members of the New Mexico Public Service Commission, meant actual physical residence at the State Capitol. However, as was pointed out in that opinion, the term "reside" is elastic and should be interpreted in light of the object and purposes of the statute in which the term is applied. We then reasoned that the purpose of a statute requiring residence of a member of a State body in the State Capitol was to have such member physically present in the seat of Government.

In our opinion, the purpose of the residence requirement in Article V, § 3 is to give the right to hold an executive office to persons legally resident for voting purposes.

As was said by the Supreme Court of Florida in **Ervin v. Collins, et al.,** Fla. , 85 So. 2d 852 (1956), in referring to the eligibility of LeRoy Collins to be the Governor of Florida.

"Even if there were doubts or ambiguities as to his eligibility, they should be resolved in favor of a free expression of the people in relation to the challenged provision of the constitution. It is the sovereign right of the people to select their own officers and the

rule is against imposing disqualifications to run. The lexicon of democracy condemns all attempts to restrict one's right to run for office."

We trust that your question has been answered fully.

By: Philip R. Ashby

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