Opinion No. 61-131

December 21, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Marvin Baggett, Jr., Assistant Attorney General

TO: Dan Sosa, Jr., District Attorney, Third Judicial District County Court House, Las Cruces, New Mexico

QUESTION

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When a member of the Legislature is convicted of a felony during his term of office, is his office automatically forfeited?

CONCLUSION

No.

OPINION

ANALYSIS

Article VII, Sec. 2 of the Constitution of New Mexico states:

"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. . ."

A qualified elector is defined in Article VII, Sec. 1 as:

"Every male citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, persons convicted of a felonious or infamous crime unless restored to political rights, and Indians not taxed, . . ."

While there would appear to be little or no question that these qualifications apply to all office holders, there is a basic question of who is to interpret such qualifications in each instance.

Article IV, Sec. 3 (a) of our Constitution provides that:

"Senators shall not be less than twenty-five [25] years of age and representatives not less than twenty-one [21] 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. No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary."

At the outset, it must be emphasized that we are not here considering what qualifications are necessary in order to get on a ballot, or what votes should be counted for whom, but are concerned strictly with the question of who may interpret the qualifications required to occupy the office of Member of the House to which a person has been duly elected and accepted by the body to which he has been elected.

Article IV, Sec. 7 of our Constitution states that:

"Each house shall be the judge of the election and **qualifications** of its own members. . ." (Emphasis supplied).

In a rather extensive annotation beginning at 107 A.L.R. 205, the writer makes the following statement:

"The constitutions of most if not all, of the states contain provisions similar to Art. 1, § 5, of the Federal Constitution, to the effect that each house of the state legislature shall be the judge of the election and qualifications of its own members. And it is well settled that such a provision vests the legislature with sole and exclusive power in this regard, and deprives the courts of jurisdiction of those matters."

The writer, at page 218, quotes from **People ex rel. Drake v. Mahoney,** 13 Mich. 481 (1865), wherein the Court observed:

". . . 'While the Constitution has conferred the general judicial power of the state upon the courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers; and among them is the power to judge of the qualifications, elections, and returns of members of the legislature. The terms employed clearly show that each house, in deciding, acts in a judicial capacity, and there is no clause in the Constitution which empowers this, or any other court, to review their action. The "general superintending control," which the supreme court possesses under § 3 of Article 6 of the Constitution "over all inferior courts," does not extend to the judicial action of the legislative houses in the cases where it has been deemed necessary to confer judicial powers upon them with a view to enable them to perfect their organization and perform their legislative duties. The houses are not "inferior courts," in the sense of the Constitution, but, as legislative organizations, are vested with certain powers of final decision, for reasons which are clearly imperative.'"

In **Lucas v. McAtee et al,** 217 Ind. 403, 29 N.E. 2d 403, rehearing denied, 217 Ind. 534, 29 N.E. 2d 588, the Court stated:

"The right of legislative bodies to judge the elections, qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth. A controversy arose over the election of a member of the House of Commons. The Queen ordered the Speaker to advise the House that it was the prerogative of the Lord Chancellor to determine who had been elected. The decision of the House is indicated by the following historic quotation: 'Nevertheless, the House appointed a committee to examine into the returns and this committee reported that they had not thought it proper to inquire of the Chancellor what he had done, because they thought it prejudicial to the privilege of the House to have the same determined by others than such as were members thereof. And though they thought very reverently of the said Lord Chancellor and judges, and knew them to be competent judges in their places; yet in this case they took them not for judges in Parliament in this House.' Luce, Legislative Assemblies, 1924, p. 192. Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law of every state in the Union, in language substantially if not identically like that employed in ours. See: Thorpe's American Charters, Constitutions and Organic Laws, 1909. The right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. Dinan v. Swig, 1916, 223 Mass. 516, 112 N.E. 91. . ."

In **State v. Wheatley,** 197 Ark. 997, 125 S.W. 2d 101, the Court was faced with a problem similar to the one before us. In denying jurisdiction to the judiciary to determine the legality of the office of a State Senator, it was held:

"The appellant insists here that the trial court had jurisdiction to hear and determine this cause; that the action of the Senate in seating Wheatley as a member of that body did not deprive the courts of jurisdiction to pass on his eligibility to serve as a Senator, and that the constitutional provision, that each house of the General Assembly shall be the sole judge of the elections and qualifications of its members, did not include the power to judge as to the eligibility or ineligibility of anyone who might be elected to such a body.

Article 5, Section 11 of the Constitution of the State of Arkansas provides as follows: 'Each house shall appoint its own officers, and shall be sole judge of the qualifications, returns and elections of its own members.' We are of the opinion that this section of the Constitution is decisive of this case and that the Senate is the sole judge of the qualifications of its members. The above language is clear and unambiguous. This court said in State ex rel. Attorney General v. Irby, 190 Ark. 786, 790 81 S.W. 2d 419, 420, '* * where the language employed in the Constitution is plain and unambiguous, the courts

cannot and should not seek other aids of interpretation. Clayton v. Berry, 27 Ark. 129; State v. Ashley, 1 Ark. 513; Ellison v. Oliver, 147 Ark. 252, 227 S.W. 586, and every word used should be expounded in its plain, obvious, and common acceptation, State v. Martin, 60 Ark. 343, 30 S.W. 421, 28 L.R.A. 153.' It is undisputed here that the Senate has passed upon the qualifications of Senator Wheatley and held him qualified. Article 5, Section 9 of the Constitution provides: 'No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State.' Appellant insists that Senator Wheatley is ineligible to a seat in the Senate under this provision of the Constitution for the reason that he has been convicted of an infamous crime. We hold that the Senate is the sole judge of his eligibility under this section. It may be that the Senate in passing upon his eligibility or qualifications found that the crime with which he was charged was not infamous. But be that as it may, the action of the Senate in that regard and in seating him is final and the trial court in this case was without jurisdiction to determine that matter. We cannot agree with appellant that the word 'qualifications', as used in Section 11, Article 5 of the Constitution, should be given the restricted definition and interpretation which he insists should be placed upon it. We think it includes and embraces the word 'eligibility'. In Rainey v. Taylor, 166 Ga. 476, 143 S.E. 383, the Supreme Court of Georgia said: 'The Judge, in a written opinion included in the record, distinctly recognizes the constitutional provision embodied in section 6430 of the Civil Code, which declares that "each house shall be the judge of the election, returns, and qualifications of its members," but in effect holds that the question raised in this case is not one as to the qualifications of the respondent as a member of the General Assembly, but is as to his "eligibility," and in effect holds that the court has the right to pass upon the "eligibility" of a member of the General Assembly, and, if the member in question be found to be "ineligible," to deprive him of his seat. In support of that conclusion the trial judge sets forth in his opinion the definitions of the word "qualification" and the word "eligibility." These definitions are taken from Webster's Dictionary, and are as follows: "Qualification" is defined: "any natural endowment, or acquirement which fits a person for a place, office, or employment, or enables him to sustain any character with success; an enabling quality or circumstance; requisite, capacity or possession." "Eligibility" is defined: "Proper to be chosen, qualified to be elected -- legally qualified." We are of the opinion that the word "qualifications," as used in the constitutional provision quoted, is not subject to the limitations which the definition taken from the dictionary referred to would seem to impose. The word "qualification," as thus used in the Constitution, seems to include also certain of the elements of "eligibility."' In Commonwealth v. Jones, 10 Bush, Ky., 725, at page 744, the court said: 'We concur in the construction of the constitution as given by the court in the case of Hall v. Hostetter (17 B. Mon [784]), "That the words qualifications and qualified are used therein in their most comprehensive sense, to signify not only the circumstances that are requisite to render a citizen eligible to office or that entitle him to vote, but also to denote an exemption from all legal disqualifications for either purpose;" and we concur fully in the illustration given in that case: "The circumstances under which a citizen is entitled to vote are prescribed in the constitution; but he may have those qualifications and still by some act have become disqualified, and not be a qualified voter in the sense in which the word is used in the constitution. The word qualification seems to be used in

the same sense, and implies not only the presence of every requisite which the constitution demands, but also the absence of every disqualification which it imposes."'

By the above provision, Article 5, Section 11 of the Constitution, a clear mandate is given to each house of the General Assembly to be the sole judge of the qualifications of its members and the courts of this state have no authority or jurisdiction to question the wisdom of their actions in seating or refusing to seat one elected to membership."

We have quoted at length from the above decisions because they express the general reasoning of courts in declining to interfere with the right of State Legislatures to seat or not to seat a purported member.

This office has previously indicated that only the Legislature is the judge of the qualifications of its own members. In Attorney General's Opinion No. 58-233, December 16, 1958, we rendered our interpretation of the legality of a person serving as a State Representative where it appeared that he was precluded from so serving by virtue of simultaneously holding another office in violation of Article IV, Sec. 3 of our Constitution. We intimated, however, that only the house of Representatives could judge the qualifications of its own members.

And in Attorney General's Opinion No. 61-119, November 27, 1961, we concluded that the House of Representatives was the sole body to decide whether or not a member had permanently changed his residence so as to be deemed to have resigned under the provisions of Art. IV, Sec. 3, of our Constitution, even though the County Commissioners might formally find that the member had in fact, permanently changed his residence.

It is our opinion, then, that unless and until the House of Representatives refuses to seat a member who, since his election, has been convicted of a felony, the member will continue to occupy his office and no vacancy exists.

Of course, a purported successor could be appointed now by the Board of County Commissioners on the finding that the present holder of the office had become ineligible to continue in such office, and that a vacancy exists which may be filled as provided in Article IV, Sec. 4, in which case the House would still have the authority to agree or disagree with the findings and appointment of the Board, and would have the final word on which claimant to seat. However, in view of the absence in our Constitution of any provision forfeiting the office of a Member of the House who has been convicted of a felony, and absent any authority on the part of the Board of County Commissioners to declare that a vacancy exists under circumstances present here, the better procedure would appear to require that the Board of Commissioners await the decision of the House. Any findings by the Board at this time would, at most, be merely advisory insofar as the House is concerned.

As was said in the **Lucas** case cited above:

". . . It will be assumed, of course, that a legislative body called upon to judge the election, qualifications, or returns of one of its members will exercise that high prerogative in accordance with the Constitution from which the power is derived, but if it fails to do so it is answerable to the people and not to the courts."