Opinion No. 73-76

December 4, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Eloy Francis Martinez City Attorney City of Santa Fe P.O. Box 909 Santa Fe, New Mexico 87501

QUESTIONS

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1. What legal limitations, if any, would prohibit the governing body of a municipality from requiring that a candidate for the office of city council reside in the ward from which he files his declaration of candidacy?

2. What legal limitations, if any, would prohibit the governing body of a municipality from ratifying by ordinance the following question affirmatively adopted by more than the requisite number of qualified municipal residents voting thereon: "Shall the city council candidate be required to file their declaration of candidacy from the ward in which they reside, but shall be elected at large?

CONCLUSIONS

1. The legal limitations are contained in Article VII, Section 2 and Article 5, Section 13, New Mexico Constitution as construed in **Gibbany v. Ford,** 29 N.M. 621, 225 P. 577 (1924).

2. The legal limitations are contained in Article VII, Section 2 and Article 5, Section 13, New Mexico Constitution as construed in **Gibbany v. Ford,** 29 N.M. 621, 225 P. 577 (1924).

OPINION

*{*148}* **ANALYSIS**

There may be exceptions, but basically Attorney General Opinions fall into four categories -- or a combination thereof.

In one category are those opinions where the answer to a particular question is based wholly or primarily on New Mexico court decisions in which similar, comparable or analagous questions have been raised and ruled on by the court.

In a second category are those opinions in which the answers to the questions presented must be based upon court decisions handed down in other jurisdictions, including the federal courts.

A third category involves questions and answers thereto which must revolve around a long established rule or rules of statutory interpretation or construction in an effort to ascertain the intent of the legislature in enacting a law or in proposing a constitutional amendment, as well as attempting, on occasion, to determine the intent of the original framers of the constitution.

Finally, and this has been the purpose of this brief dissertation, we would point out that there is a fourth category, namely, where there is a controlling State Supreme Court decision ruling on the identical question which is raised in an opinion request. It is into this category that the present questions fit precisely.

*{*149}* Apparently though, this office has had less than unqualified success in making this fact known and understood since questions concerning ward residency, county commission district residency, school sub-district residency and the like appear in our office periodically. See Attorney General Opinion Nos. 57-183, 60-25, 60-48, 61-6, 67-14, 67-33, 70-36. And even though the answers from this office have been uniform and harmonious over the years, we must conclude that we have not been overly adept in explaining the constitutional provisions involved and their interpretation by our State Supreme Court in the case of **Gibbany v. Ford,** 29 N.M. 621, 225 P. 577 (1924), **which is still the law in this jurisdiction.** We will now attempt to lay the issue of ward residency at rest, at least as to municipalities which do not operate under the constitutional home-rule provision.

Article VII, Section 2A of the State Constitution provides that

"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 elective public office except as otherwise provided in this Constitution."

Article V, Section 13, New Mexico Constitution provides as follows:

"All district, county, precinct and municipal officers, shall be residents of the **political subdivisions** for which they are elected or appointed. The legislature is authorized to enact laws permitting the division of counties of this state into county commission districts. The legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts." (Emphasis added).

Looking at these two provisions, the Supreme Court in the case of **Gibbany v. Ford,** 29 N.M. 621, 225 P. 577 (1924) had this to say:

"It therefore becomes apparent that the only restriction against the 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. **The question presented then, is whether a ward within a city, town, or village is a political subdivision within the intendment and meaning of the Constitution.** (Emphasis added)

Before answering the question presented, which is the same one at issue here, the court discussed the status of wards in the following language:

"In determining whether wards are political subdivisions we must keep in mind our recent holding that aldermen are not elected by the voters of their respective wards, but by the voting citizenry of the city at large . . . There is therefore no legal entity to wards for the purpose of electing aldermen. Under the laws of this state as they now exist, wards within a municipality exercise no governmental functions. They are not political entities for any governmental purposes, and they possess no powers of local self-government."

Saying that wards are for convenience purposes only, the court went on to state:

"Wards are not entities for voting purposes; they do not even elect their own aldermen, but must join with the entire voting population of the city . . . **Under such circumstances, they cannot be political subdivisions,** because the very term implies a division of the parent entity for some governmental purpose, a thing which a ward does not have." (Emphasis added.)

Having said that wards are not political subdivisions, and that the right to hold office is not a negative right but a positive one, which cannot be abridged except in the constitution itself, the court reached the following conclusion:

"To permit the Legislature to say that a person who resides within a municipality cannot hold the office of alderman **unless he also resides within the ward he represents authorizes a restriction and an added eligibility to hold that office, which the constitution in plain terms denies.** No such super-addition can be made effective until such time as the Legislature confers *{*150}* upon wards of a city, town, or village some powers or functions of local self-government, so that they may be said to be political subdivisions." (Emphasis added)

Since, as the court said, the constitution denies to the legislature the right to impose this additional restriction (ward residency) on the right to hold office, it also denies to municipal governing bodies any authority to add restrictions on the right to hold office. Obviously, constitutional rights may not be abridged by any political entity. This is clear from the following concluding statement by the court in the **Gibbany case:**

"But here **the Constitution gives the right to every person meeting the qualifications prescribed in the Constitution to hold any public office,** and to say that the Legislature may restrict that right by providing that, although a person resides

within a municipality, he cannot hold the office of alderman unless he meets still another requirement entirely beyond those set forth in the Constitution, **is too obviously unconstitutional to warrant serious argument."** (Emphasis added)

Ordinarily we do not quote as extensively from a Court decision as we have done in this opinion, but here we deem it appropriate, indeed necessary, to do so since a great deal of confusion has existed over the years as to the interrelationship of Article VII, Section 2 and Article V, Section 13 as applied by the Court in the **Gibbany case.**

In writing opinions, this office, and others, are bound by definitive Supreme Court decisions resolving the particular issue. Accordingly, all of our many opinions on the subject of local residency requirements in order to be eligible to run for a particular office are answered based on the principles enunciated in **Gibbany v. Ford, supra.**

In summation, the **Gibbany** decision compels the conclusion that a ward residency requirement, no matter by whom imposed, adds an additional, and therefore unconstitutional, restriction on the right to hold public office. "Article V, Section 13 was amended in 1960 to provide 'that the legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts.' It has not been so amended in the case of city commissioners, and thus **no statute, charter or ordinance** provision could validly require district residence." Such a provision is unconstitutional. Attorney General Opinion No. 69-23.

By: Oliver E. Payne

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