OFFICIAL OPINION NO. 69-32, Candidate for City Commissioner, residency requirement. Interpretation of phrase "for at least two years prior to his election" in SDC 45.0802

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Dear Mr. Kolker:

You have requested my opinion in regard to the pending mayor election for the City of Aberdeen, scheduled on April 8, 1969.

The factual situation shows that one of the candidates for Mayor lived in Aberdeen for twenty-five years, and in mid-19G6 until April, 1968 resided with his family in Sioux Falls, Minnehaha County, South Dakota. During such period, such candidate was employed inSioux Falls, became a registered voter of such city and county, and in all matters acted as a resident of such city.

The City of Aberdeen is governed by a Board of Commissioners, one member of which is mayor. SDC 45.0802, in providing qualifications for Commissioner, provides:

"No person shall be eligible to nomination or election as a member of the Board unless he shall be a citizen of the United States, over the age of 26 years, and shall have been a resident of the city for at least two years prior to his election."

The mentioned candidate has interpreted this provision to mean that such residency in the city may have been at any time, and need not be limited to the period of time immediately preceding such election. Others, including the City Attorney of Aberdeen, have construed

this statutory requirement to require such residency to have immediately preceded such election, so that under the facts this candidate is not eligible to file a petition to run as a candidate in such election.

You have asked me to interpret such phrases "for at least two years prior to his election" as used in the quoted provisions of the statute.

You can appreciate that in purely municipal matters, this office should decline to issue opinions. However, because of the statewide interest in the problem presented, and the patent fact that such statute has not been interpreted by our Supreme Court with reluctance I am issuing an official interpretation expressing my interpretation of the statutes.

In 67 CJS 126 (OFFICERS, Section 11) it is suggested that the proper rule in interpreting statutes or constitutional restrictions upon qualifications to hold office should be liberally construed in favor of the right of the people to exercise freedom of choice in the selection of their officers. (This broad statement may support the contentions of the candidate.) However, the text-writer adds the words of caution that merely because of this rule it does not follow that the courts should give the statutory language an unreasonable construction in order to uphold this right of the electorate or the right of the candidate.

In **State ex rel Jones v. Sargent** (1910) 145 Iowa 298, 124 W 339, 27 LRA (NS) 719, 139 Am. St. Rep, 439 it was pointed out when, a in South Dakota, the Constitution provides no qualifications for municipal officers and in fact provides for no specific municipal officers, the Legislature has the authority to create officers for such municipal corporations, and has the right to provide who shall be eligible for such office. The Court also pointed out that which is obvious that there is no absolute right to hold public office or to be a candidate therefor.

In considering the question you have presented, we must start with the premise that the Leislature has the authority to provide qualifications for municipal officers. This has been done in SDC 45.0802. The problem you have presented is to determine what qualifications, insofar as residency is concerned, the Legislature required as a prerequisite to being a candidate for the Board of Commissioners of a municipality. The solution of such problem must come from interpreting and construing such statute.

Our Supreme Court has on numerous occasions, discussed the problem of statutory construction. Since **Quebec Bank v. Carroll**(1890) 1 SD 1, 44 NW 723, our Court has been committed to that which is obvious. The paramount question presented in construing any

statute is to first determine the intent of the Legislature. Once this intent is found, the statute must then be construed to conform with the intention of the Legislature, and if a literal construction of the words used do not conform with such intent, the literal construction must give way to such intent.

In the landmark case, **State v. Morgan** (1891) 2 SD 32, 48 NW 314 (Writ of Error dismissed) 159 US 261, 15 S. Ct. 1041, 40 L ed 145, our Court said:

"In interpreting statutes, the intention of the lawmakers will prevail over the literal sense of the letter. When the words used are not explicit the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion.

In pursuance to this manadate, our court in **Lawrence County v. Meade County** (1895) 6 SD 528, 62 NW 131 pointed out that when the intention can be collected from the statute itself, words may be modified, altered or supplied so as to obviate any repugnance or inconsistence with the intention. Many times our court has pointed out that there is always a presumption that the Legislature had some object in mind in enacting any particular legislation, and that all legislation must be construed consonant with an intention not to do an absurd, unjust or useless thing. See **Lawrence County v. Meade County,** supra, **Red Wing Sewer Pipe Co. v. City of Pierre**(1915) 36 SD 276, 154 NW 712 and **Olson v. Rogers** (1923) 47 SD 63, 195 NW 1019. Consistent with these admonitions of our court, there seems little question that the Legislature, within its right, provided some form of residency as a qualification to be eligible to participate as a candidate for the Commission of any municipal corporation within this state. To say that by the use of the phrase "for at least two years prior to his election," the Legislative intent was that such two year residency could have occurred at any time, and that the intent was not to limit such to that period of time immediately preceding such election, is in fact to state the Legislature intended an absurd, unjust or useless requirement, which is inconsistent with reason and good discretion. This must follow because such an interpretation carried to its extreme, as has been suggested to me, would provide that a person could be born in Municipality "X", live there until he was two and one-half years old, at which time with his parents he moved from the state. At any time thereafter, and after obtaining the age of twenty-six, and qualifying as a "Citizen of the United States," irrespective of where he may have lived, such person could return to Municipality "X", and if he could obtain sufficient signatures to his

petition, he could be a candidate for the City Commission, irrespective of the time in fact that he had resided within such municipality.

I must agree with the City Attorney of Aberdeen. The argument and rationale of the Supreme Court of Pennsylvania in **Commonwealth ex rel Adams v. Stephans**, 345 Pa 436, 28 A 2d 924 in interpreting the legislative enactment of the qualification "four years prior to his election," must be construed to mean that period of time immediately prior to his election, is correct, and applicable to our statute.

Following the mandate of our Court in **Lawrence County v. Meade County**, 6 SD 528, 62 NW 131, in order to express the legislative intent we must interpret the phrase in question to read as follows:

"and shall have been a resident of the city for at least two years **immediately** prior to his election."

Thus interpreted, it seems clear that this particular candidate is not qualified to participate in the election of April 8, 1969 for Mayor of the City of Aberdeen.

Respectfully submitted,

Gordon Mydland
Attorney General