

Opinion No. 46-4895

April 29, 1946

BY: C. C. McCULLOH, Attorney General

TO: Mr. S. E. Greisen County Clerk Lincoln County Carrizozo, New Mexico

{*223} Mr. W. T. Scoggin, your District Attorney, has asked our opinion on the following question:

It appears that a candidate for county office is registered in Lincoln County but that he was absent from the county for a period of two years, during which he was a rancher in Otero County. In view of this situation, you ask our opinion whether you, as county clerk, should accept his declaration of candidacy.

In order to be qualified to hold public office or run for nomination in the primary, a person must, of course, be a resident of the county. However, the question of residence is a mixed question of law and fact, being dependent primarily on the intention of the person involved. I enclose herewith a copy of Opinion No. 4604, dealing at length with this question of residence.

From the meager facts before me, I cannot determine with certainty whether or not the man involved is in fact a resident of Lincoln County.

Section 56-810 provides in part that:

"The county clerk and secretary of state, upon receipt of the declaration and petition required hereunder, accompanied by the required filing fee, shall, if such declarant is eligible to hold the office for which he seeks nomination under the Constitution and laws of the State of New Mexico, receive and file such declaration and petition."

{*224} Based on this, the Supreme Court, in the case of State ex rel Van Schoyck v. Board of County Commissioners, 46 N.M. 472, said:

"Furthermore, this section imposes a duty on the proper officials to receive and file the declaration and nominating petitions only in the event 'such declarant is eligible to hold the office for which he seeks nomination under the constitution and laws of the State of New Mexico.' This provision undoubtedly is to avoid the confusion and complications arising where ineligible candidates appear on the ballot. If, for instance, in the case at bar the relator were herself not a qualified elector, were a nonresident, or should be seeking a third successive term to the office of county clerk, a result prohibited by the constitution, the county clerk or secretary of state, **upon ascertaining these facts should and would decline to receive and file the declaration.**" (Emphasis ours.)

However, it appears to me that neither this section nor the decision of the Supreme Court requires the county clerk or secretary of state, at his peril, to determine these facts, since it is not contemplated that these officers will be skilled in the law. It is only in the event that the county clerk or secretary of state does make such finding that the Court indicates they should refuse to accept the declaration of candidacy.

It is my opinion that the county clerk is not under the duty of determining whether or not a person seeking to file a declaration of candidacy is a resident of the county and qualified to hold the office, but that if the county clerk does make such determination, he should refuse to file the declaration of candidacy.

The Constitution requires only that a person be a resident of the state a year and the county 90 days in order to be eligible to hold public office. This eligibility would be determined as of the date of the election. The primary law does not require that a person running in the primary shall have been a resident of the county for any particular time. The only limitations are that he be eligible to hold the office (Sec. 56-810), that he be a member of the political party through which he seeks nomination as shown by his affidavit of registration, and that he shall not have changed his party affiliation within 12 months prior to the issuance of the proclamation by the Governor (Sec. 56-809 as amended by Sec. 3, Ch. 86, Laws of 1943).

In view of the foregoing, if the person was a resident of the county on the date he files his declaration and is registered to vote, it is my opinion that he is qualified to run in the primary, even though he has not been a resident of the county for 90 days preceding the date of filing his declaration.

I sincerely regret that this opinion has been so long delayed, but Mr. Scoggin's request was either lost in the mail or here in this office.

By ROBERT W. WARD,

Asst. Atty. General