

**OPINION
68-161**

September 26, 1968 (OPINION)

Mr. Raymond R. Rund

Steele County State's Attorney

RE: Elections - Presidential Electors - Residence

This is in reply to your letter of September 23, 1968, with regard to the interpretation of Chapter 16-16 of the 1967 Supplement to the North Dakota Century Code, enclosing various items of correspondence you have noted with regard thereto and informing us of your expressed opinion in regard thereto.

You indicate that it does not appear to you that mere absence from a polling place of itself is sufficient to enable a voter to take advantage of the provisions of said Chapter 16-16, but that this law was written to give a voter a chance to vote for the presidential candidate where he has not gained the right to vote here and has lost it back where he moved from. We are substantially in agreement with this conclusion for the reasons as follows:

Looking to the background of this statutory provision we note the provision of section 121 of the North Dakota Constitution that:

Every person of the age of twenty-one or upwards who is a citizen of the United States and who shall have resided in the state one year and in the county ninety days and in the precinct thirty days next preceding any election shall be a qualified elector at such election.* * *

Problems arising with North Dakota voters moving from one precinct to another within the state within less than thirty days of an election are probably in large part solved by the further provision of said section 121 that:

* * * Provided that where a qualified elector moves from one precinct to another within the state he shall be entitled to vote in the precinct from which he moves until he establishes his residence in the precinct to which he moves."

However, there would appear to be a problem still remaining with regard to voters moving from one state to another. This situation is outlined in 25 Am. Jur.2d. 761, 762, Elections, Section 69, as follows:

* * * If a voter having a residence in one district abandons that residence and removes to another voting district at a time too close to the election to enable him to qualify in the latter, he will not be entitled to vote in either district. However, the Uniform Voting by New Residents in Presidential Elections Act, although as yet adopted in only a few jurisdictions, would relax the requirement in most states for an extended period of residence so that new residents would be

allowed to vote in presidential elections if they would otherwise be qualified by filing an application to vote."

We note that the decision of the North Dakota Supreme Court in *Nelson v. Gass*, 27 N.D. 357, 146 N.W. 537, is cited as one of the authorities for that statement. We note our Supreme Court does say in that decision at page 373 of the North Dakota Report, that:

* * * It was not the intention of the Constitution makers who prescribed the qualifications of an elector to permit transients and floaters to vote in a place where they make an occasional stop but where there is no tangible evidence of a permanent residence. Authorities holding that one domicile is retained until another is established are not applicable to the question of residence of a party claiming to be entitled to vote.* * *

It is our opinion that the statutory sections to which you make reference are designed to solve the problem arising with regard to persons who find themselves in the position of being citizens of the United States, but who have not resided in this state for a full year prior to the date of the presidential election, but who are residents of this state at the time of such election. This statutory chapter should be construed literally according to its terms. On such basis the term "residence" as used therein refers to actual residence, not simply mere physical presence in this state. Presence in the state for temporary or special purpose does not of itself establish voting residence. Voting residence requires an intention that the place claimed be intended to be the residence.

The required form of application for ballot is specified by section 16-16-18 of the 1967 Supplement to the North Dakota Century Code. Section 16-16-19 of the 1967 Supplement to the North Dakota Century Code determines that a duplicate of the application be mailed to the appropriate official of the state in which the applicant last resided. Section 16-16-20 of the 1967 Supplement to the North Dakota Century Code requires filing of duplicate applications or other official information received indicating that former residents of this state have made application to vote at a presidential election in other states. The criteria for delivery of the ballot to the applicant specified by section 16-16-21 of the 1967 Supplement to the North Dakota Century Code is specified to be: "If satisfied that the application is proper and that the applicant is qualified to vote at the presidential election. * * * " The deadline for delivery of the ballots is specified by said section 16-16-21 to be " * * * not later than one day prior to the next presidential election." The application form specified is of course a sworn statement which asserts the qualifications of the prospective elector. Such affidavit of itself should establish prima facie the eligibility of the prospective presidential elector in the usual instance. We note with interest also that among the criteria set out in the chapter is that the prospective presidential voter immediately prior to his removal to this state was a citizen of another state, although it does not indicate that such citizen must have voted in that other state at prior elections.

To conclude, this chapter should be literally construed according to

its terms in the context of the problem it was designed to solve, not as merely another form of absentee ballot statute.

HELGI JOHANNESON

Attorney General