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NO.
STATE OF NEBRASKA
OFFICIAL
SEP 10 1992
DEPT. OF JUSTICE

DATE: September 9, 1992

SUBJECT: Consideration of Residency in Nominating Candidates for Vacancy on Nebraska Supreme Court

REQUESTED BY: Judge Dale E. Fahrnbruch, Chairman, Judicial Nominating Commission for the Fourth Supreme Court Judicial District

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

You have requested our opinion on several questions concerning the nomination of candidates to fill the Nebraska Supreme Court vacancy which will be created by Judge John T. Grant's retirement at the end of this year. You have advised us that this vacancy will occur in the fourth Supreme Court judicial district, the district which Judge Grant represents. Following a description of constitutional provisions, statutes, and other information relevant to your inquiries, we have separately addressed each of your questions.

Nebraska Constitutional and Statutory Provisions

Members of the 1919-1920 Nebraska Constitutional Convention framed the following underscored language, which was added to the Nebraska Constitution after adoption by the people:

> Sec. 7. No person shall be eligible to the office of chief justice or judge of the supreme court unless he shall be at least thirty years of age, and a citizen of the United States, and shall have resided in this state at least three years next preceding his election; <u>nor, in</u>

L. Jay Bartel
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Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
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Barry Wald
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

> the case of a judge of the supreme court elected from a supreme court judicial district, unless he shall be a resident and elector of the district from which elected.

Neb. Const. of 1875, art. V, § 7 (1920).

Statements made during the 1919-1920 Constitutional Convention by members of the Committee on the Judicial Department, which proposed amendments regarding election of Supreme Court judges by district, indicate that the main reasons for requiring Supreme Court judges to be elected by district instead of statewide were to reduce the cost of campaigning and to create an intelligent electorate by allowing people within a district to elect someone with whom they were familiar. Proceedings of the 1919-1920 Nebraska Constitutional Convention, at 996, 1153-54, 1159-60, 1168-70 (statements of Messrs. Heasty, Te Poel, Ferneau, and Hastings, respectively).[1] These statements also establish that the above-quoted amendment to the Nebraska Constitution was intended to prevent electors of one district from electing a judge who resided in another district. Id. at 1166-67, 1183-84 (statements of Messrs. Marvin and Pollard).

In 1962 Nebraska's electorate abandoned this district election method by adopting the "merit plan" of judicial selection by constitutional amendment. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970). While most of the merit plan was written into Article V, Section 21 of the Nebraska Constitution, other amendments were made throughout Article V to reflect this new system. For example, Article V, Section 7 was amended into its current form:

> Sec. 7. No person shall be eligible to the office of Chief Justice or Judge of the Supreme Court unless he shall be at least thirty years of age, and a citizen of the United States, and shall have resided in this state at least three years next preceding his selection; nor, in the case of a Judge of the Supreme Court selected from

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[1]While one member of the Committee on the Judicial Department mentioned representation from all parts of the state as being an additional reason for district elections, another Committee member explicitly denied that the idea of district elections was based on territorial representation. Proceedings of the 1919-1920 Nebraska Constitutional Convention, at 1152-53 (statements of Messrs. Spillman and Te Poel). Other Committee members did not mention territorial representation as a basis for the Committee's proposed district election amendments to the Nebraska Constitution. Id. at 996, 1159-60, 1168-70 (statements of Messrs. Heasty, Ferneau, and Hastings, respectively).

> a Supreme Court judicial district, unless he shall be a resident and elector of the district from which selected.

Neb. Const. art V, § 7 (relevant amendments underscored).

The intent of the 1962 constitutional amendments implementing the merit plan of judicial selection was to ensure selection of the most qualified judges by avoiding elections based on one's popularity and by removing political pressure tending to affect legal decisions. Committee Statement on LB 315, 72nd Sess. 1 (Mar. 13, 1961). These constitutional amendments were intended to be a "basic formula," while the Nebraska Legislature was to be responsible for enacting and implementing the "details." Id. at 2; Introducer's Statement of Purpose on LB 315, 72nd Sess. (Mar. 9, 1961).

The Legislature enacted some of these "details" by adding to Neb. Rev. Stat. § 24-202 various eligibility requirements for the office of Nebraska Supreme Court Judge. See Neb. Laws 1979, LB 237, sec. 1. One of these requirements is that "No person shall be eligible to the office of Judge of the Supreme Court unless he or she . . . is, on the effective date of appointment, a resident and elector of the district he or she is to represent." Neb. Rev. Stat. § 24-202(d) (Reissue 1989).[2] The legislative history

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[2]For purposes of this opinion, we presume section 24-202(d) is constitutional. Because the Legislature has plenary legislative authority limited only by the state and federal constitutions, the Legislature may legislate on any subject not inhibited by these constitutions. State ex rel. Creighton Univ. v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984); Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981). Further, several courts have held that legislatures may enact judicial eligibility qualifications in addition to those required by state constitution, provided the qualifications do not abridge or conflict with constitutional provisions. Boughton v. Price, 70 Idaho 243, 215 P.2d 286 (1950); Glasco v. State Election Bd., 121 Okla. 119, 248 P. 642 (1926); Perry v. Lawrence County Election Comm'n, 219 Tenn. 548, 411 S.W.2d 538 (1967), cert. denied, 389 U.S. 821 (1967); LaFever v. Ware, 211 Tenn. 393, 365 S.W.2d 44 (1963). The Nebraska Legislature in section 24-202(d) has simply added a timeframe to the requirement in Article V, Section 7 of the Nebraska Constitution that nominees for the office of Nebraska Supreme Court Judge be residents and electors of the vacant judicial district.

We note that although the original reasons for election of judges by district (reduction of campaign costs and creation of an intelligent electorate) are inapplicable to the current merit system, it could be argued that territorial representation was at

concerning this statutory amendment evidences a clear intent to permit judicial nominating commissions to nominate persons residing outside the commission's assigned district, as long as the nominee is otherwise qualified and is able to become a resident and elector of the proper judicial district by the effective date of appointment. Floor Debate on LB 237, 86th Legis., 1st Sess. 1915 & 1917 (Mar. 21, 1979) (statements of Senator Nichol, introducer of LB 237, and Senator Stoney, member of Committee on the Judiciary); Committee Records on LB 237, 86th Legis., 1st Sess. 2-3 (Jan. 29, 1979) (statements of Charles Oldfather and Larry Ruth, presenters of LB 237, and Senator Nichol, introducer of LB 237).

Analysis

Based on the above constitutional and statutory provisions, we have individually answered each of your questions below.

(1) **QUESTION**: In selecting nominees for the position of Supreme Court Judge, should your nominating commission consider any applicant who does not currently reside within the fourth Supreme Court judicial district?

ANSWER: Yes, if the applicant who is not currently residing in the proper district, but is otherwise qualified, could become a resident and elector of the proper district by the effective date of appointment.

Section 24-202(d) clearly and plainly states that to be eligible for the office of Nebraska Supreme Court Judge, one must "on the effective date of appointment" be a "resident and elector of the district he or she is to represent." In the absence of anything indicating to the contrary, statutory language should be given its plain and ordinary meaning. When words in a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. State v. Stein, 241 Neb. 225, ___ N.W.2d ___ (1992); State v. Matthews, 237 Neb. 300, 465 N.W.2d 763 (1991).

Giving section 24-202(d) its plain and ordinary meaning, one need not become a resident and elector of the Supreme Court

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least part of the intent behind the district election provisions in the Nebraska Constitution, see f.n. 1 supra; that this intent is still applicable to the constitutional provisions implementing the merit plan; and that the requirement in section 24-202(d) that one be a resident and elector of the proper judicial district on the effective date of appointment is inconsistent with the idea of territorial representation by one who was a resident and elector of the proper judicial district long before the effective date of appointment.

judicial district he or she will represent until the date the judicial appointment becomes effective; that is, when the judge begins fulfilling his or her official duties or begins serving in an official capacity.

This interpretation of section 24-202(d) is consistent with the statute's legislative history described in the first section of this opinion. See Committee Records on LB 237, 86th Legis., 1st Sess. 1915 (March 21, 1979) (Senator Stoney, member of the Judiciary Committee which introduced LB 237, stated that LB 237 contained "provisions that if an individual does not live within that district [but] wishes to make application, they can do so and if selected, then can make that transition and move" (emphasis added)). The purpose of all rules or maxims regarding the construction or interpretation of statutes is to discover the true intention of the law. Grosvenor v. Grosvenor, 206 Neb. 395, 293 N.W.2d 96 (1980).

Therefore, it would be proper for your nominating commission to consider qualified applicants for the vacancy in the fourth Supreme Court judicial district who are not currently residents of that district, but who could, and are willing to, become residents and electors of that district by the effective date of appointment to the bench.

(2) **QUESTION**: When must an applicant become a resident of the Supreme Court judicial district in which the vacancy is located?

ANSWER: As indicated in our answer to question (1) above, the applicant must become a resident and elector of the proper Supreme Court judicial district by the effective date of appointment, which is the date the judge begins serving in an official capacity or begins fulfilling his or her official duties.

(3) **QUESTION**: If an applicant does not currently reside within the fourth Supreme Court judicial district, may your judicial nominating commission nevertheless consider the applicant "sufficiently qualified" to be nominated under Neb. Rev. Stat. § 24-811.01?

ANSWER: Yes.

Neb. Rev. Stat. § 24-811.01 (Reissue 1989) requires a judicial nominating commission, which has for its consideration three or more candidates, to nominate at least three candidates for the Governor's consideration if the commission finds the candidates to be "sufficiently qualified." Section 24-811.01 lists several factors relating to judicial quality which the commission is to consider in evaluating whether a candidate is "sufficiently

qualified," and allows consideration of other qualities contained in rules promulgated by the Nebraska Supreme Court.

The plain and ordinary meaning of "qualified" is "having met conditions or requirements set" or "having the necessary or desirable qualities." Webster's Unabridged Dictionary 1473 (2d ed. 1983). See State v. Stein, 241 Neb. 225, ___ N.W.2d ___ (1992) (give statutory language its plain and ordinary meaning in the absence of anything indicating otherwise).

As discussed above, since an applicant for a judicial vacancy is not required to meet the "resident and elector" qualification until the effective date of appointment, your commission is capable of evaluating that condition or requirement only by determining whether the applicant can, and is willing to, become a resident and elector of the proper judicial district by the effective date of appointment.

Therefore, if your commission determines that an applicant who does not currently reside in the fourth Supreme Court judicial district is willing and able to become a resident and elector of the fourth district by the effective date of appointment, and meets the other conditions, requirements, and qualities set by the Nebraska Constitution, statutes, and Supreme Court Rules, your commission may consider that applicant "sufficiently qualified" under section 24-811.01.

(4) **QUESTION**: What is the legal definition of an elector?

ANSWER: In Nebraska, an elector may be defined as a person possessing the constitutional and statutory qualifications that entitle him to vote.

The term elector has a variety of meanings; it may mean one entitled to vote, one who has the right to vote, or one having the constitutional and statutory qualifications necessary to vote. Heuchert v. State Harness Racing Comm'n, 403 Pa. 440, 170 A.2d 332 (1961). See also Black's Law Dictionary 519 (6th ed. 1990) (lists several meanings of the term elector).

Article VI, Section 1 of the Nebraska Constitution defines an elector as follows:

> Every citizen of the United States who has attained the age of eighteen years on or before the first Tuesday after the first Monday in November and has resided within the state and the county and voting precinct for the terms provided by law shall, except as provided in section 2 of this article [person who is non compos mentis or convicted of treason or a felony without having

> civil rights restored], be an elector for the calendar year in which such citizen has attained the age of eighteen years and for all succeeding calendar years. Nebraska election statutes define an elector as:
>
> every person of the constitutionally prescribed age or upwards, and who shall have the right to vote for all officers to be elected to public office, and upon all questions and propositions lawfully submitted to the voters at any and all elections authorized or provided for by the Constitution or laws of the State of Nebraska; Provided, no person shall be qualified to vote at any election unless such person shall be a resident of the state, county, precinct, township, or ward on or before election day, and shall have been properly registered with the county clerk or election commissioner, and shall be a citizen of the United States.

Neb. Rev. Stat. § 32-102 (Reissue 1988).

Based on these definitions, the term elector under Nebraska law seems to mean United States citizens having the constitutional and statutory qualifications necessary to vote.

(5) **QUESTION**: At what point is a person "selected" as provided in Article V, Section 7 of the Nebraska Constitution?

ANSWER: A person is "selected" under this constitutional provision when the Governor or Chief Justice chooses the judge from the list of nominees prepared by the judicial nominating commission involved.

Constitutional provisions are not open to construction as a matter of course; such construction is appropriate only when the meaning of the provision is unclear. State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991); State ex rel. Spire v. Public Employees Retirement Bd., 226 Neb. 176, 410 N.W.2d 463 (1987). If a constitutional provision must be construed, its words should be interpreted in their most natural and obvious sense; they should receive a more liberal construction than statutes; and they are not subject to rules of strict construction. Id.

In interpreting the meaning of ambiguous constitutional language, the key is discovering and giving effect to the intent of the framers of the constitution and the people adopting it. State ex rel. Douglas v. Beermann, 216 Neb. 849, 347 N.W.2d 297 (1984). When construing constitutional amendments, consideration should be given to the circumstances surrounding the amendment's adoption and the purpose sought to be accomplished. School Dist. of Seward

Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972).

The words "selection" and "selected" as used in Article V, Section 7 of the Nebraska Constitution, quoted in the first section of this opinion, are unclear regarding when "selection" actually occurs. Therefore, these words must be construed in their most natural and obvious sense, in light of the intent and purpose of the constitutional amendment which created these words.

As noted in the first section of this opinion, the Nebraska Constitution was amended in 1962 in order to implement the merit plan of judicial selection. Part of these amendments included changing the words "election" and "elected" in Article V, Section 7 to "selection" and "selected." The Judiciary Committee, which proposed this amendment, deemed the amendment a "merely technical" one. Committee Statement on LB 315, 72nd Sess. 2 (Mar. 13, 1961). We were unable to locate any other legislative history or Nebraska case law which would assist in construing these terms in their most natural and obvious sense. However, Webster defines the adjective "select" as "chosen in preference to another or others; picked out," and defines the verb "select" as "to choose and take from a number; to pick out." Webster's Unabridged Dictionary 1644 (2d ed. 1983).

Under Nebraska's merit system of judicial selection, judicial nominating commissions are responsible for nominating candidates to fill judicial vacancies, while the Governor (or Chief Justice of the Nebraska Supreme Court if the Governor fails to make a timely appointment) actually selects and appoints judges from lists of nominees provided by the nominating commissions. Neb. Const. art. V, § 21. Therefore, one is "selected" as provided in Article V, Section 7 of the Nebraska Constitution when the Governor or Chief Justice chooses the judge in preference to others from the list of nominees prepared by the judicial nominating commission involved.[3]

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[3]Your concern in asking question (5) may have been that the second clause of Article V, Section 7 could somehow be construed to mean that a person is not eligible to be a Nebraska Supreme Court Judge unless the person is a resident or elector of the proper district when the Governor's "selection" is made. However, "selected," as used in that clause of Section 7, simply modifies the terms "Judge" and "district," respectively. As written, this clause does not specify when a person must become a resident and elector of the proper district--thus, the creation of Neb. Rev. Stat. § 24-202(d) (Reissue 1989), discussed above.

Sincerely,

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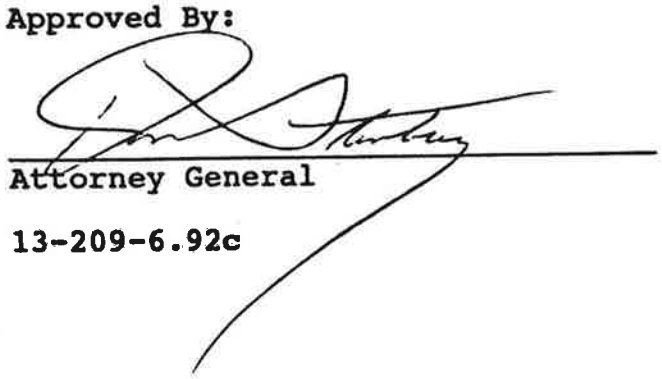
Approved By:



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