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December 4, 2000

Rex Carpenter
General Manager
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FILE COPY

Re: Election of Ineligible Candidate for Board of Public Power District

Dear Rex:

You have asked what a Public Power District ("PPD") can do if an ineligible candidate for the Board of Directors has been elected to the Board.

FACTS

As I understand the facts, a candidate was elected to a PPD Board of Directors who may not be eligible to hold the office. I further understand that the candidate may not be a registered voter residing within the chartered territory of the PPD or a retail customer duly certified, but may own a farm that is served with electricity by the PPD.

ELIGIBILITY FOR ELECTION

First, the requirements for eligibility should be examined. The requirements for eligibility for election as a director of a public power district are set out in *Neb. Rev. Stat. § 70-610(2)* which provides "[a] candidate for director shall be a registered voter residing within the chartered territory or subdivision as defined in the charter of the district or a retail customer duly certified in accordance with subsection (3) of section 70-604.03." In addition, § 70-619 provides that no person is qualified to hold the office of director unless he or she is a registered voter of the chartered territory or a retail customer duly certified.

In order to be eligible for election as a director, a candidate must be a registered voter residing within the chartered territory or a retail customer duly certified in accordance with the law. Chapter 70 Article 6 of the Nebraska Statutes (Public Power District Law) does not define the words "candidate," "registered voter," or "residing within the chartered territory." Nevertheless, *Neb. Rev. Stat. § 70-610(1)* refers to the Election Act, *Neb. Rev. Stat. §§ 32-101 to 32-1551* (the "Act"), and states in part that "[e]lections shall be conducted as provided in the Election Act." Furthermore, § 32-102 states that "[t]he Election Act shall apply to all elections held in the state unless otherwise specifically provided. . . ." Since the Public Power District

law does not specifically define these terms, the Act applies. The Act defines, among others, the terms candidate, registered voter and residence.

Neb. Rev. Stat. § 32-104 defines “candidate” as “a registered voter for whom votes may be cast at any election and who, either tacitly or expressly, consents to be considered. . .”

Neb. Rev. Stat. § 32-115 defines “registered voter” as “an elector who has a valid voter registration record on file with the election commissioner or county clerk in the county of his or her residence.”

The term residence has the same meaning as residing. See *Webster’s New Word Dictionary* (3rd ed.1988, 1142) (“residence” means “the act or fact of residing”). *Neb. Rev. Stat.* § 32-116 of the Act defines residence as:

- (1) that place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent home and principal home, and to which, whenever he or she is absent, he or she has the intention of returning,
- (2) the place where a person has his or her family domiciled even if he or she does business in another place, and
- (3) if a person is homeless, the county in which the person is living. No person serving in the armed forces of the United States shall be deemed to have a residence in Nebraska because of being stationed in Nebraska.

The Nebraska Supreme Court, in *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979), discussed the differences between a residence and domicile as follows:

It is clear that a person may have two places of residence, but only one of them may be his domicile.

In *re Estate of Meyers*, 137 Neb. 60, 288 N.W. 35, this court quoted with approval the following language: 'No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case.'

It is universally held that in order to acquire a domicile by choice, these essentials must concur: (1) Residence (bodily presence) in the new locality, and (2) an intention there to remain. In other words, there must be a concurrence of the fact and the intent, the factum and animus. Act and intent must, therefore, concur, and the absence of either of these thwarts the change. In addition there must be an intention to abandon the old domicile.

Because § 32-116 uses both of the words “residence and domicile” in defining residence, it is clear that merely residing at a location is not enough. There must also exist an intention to

remain at that location in order for the location to be considered a residence. In addition, the candidate must be a registered voter residing within the chartered territory of the district.

If the candidate is a registered voter residing in the city or village that is not within the chartered territory of the PPD, or is not a retail customer duly certified, then he is not eligible to be a candidate for election to the Board of Directors of a PPD. The fact that he may own a farm that is being served by the PPD does not make him eligible as a candidate for election to the board, unless he is a registered voter residing on the farm. In addition, the voter registration and the residence of the candidate should be at the same location.

The Secretary of State is required within 40 days after the election to prepare and deliver a certificate of nomination or certificate of election to each person who meets the constitutional and statutory requirements of office and whom the board of state canvassers has declared to have received the highest vote for such office. *Neb. Rev. Stat.* § 32-1040. Once the Secretary of State delivers the certificate of election to the winning candidate, he becomes an incumbent. December 4, 2000, is the day the board of state canvassers meet. It is anticipated that the candidate in question will receive a certificate of election.

POSSIBLE REMEDIES

The next question to answer is how to challenge an incumbent's eligibility to hold the office of director.

1. Request voluntary withdrawal. The Board may conduct an investigation into the eligibility of an incumbent. If the Board determines that he or she is ineligible, it may request the incumbent to voluntarily withdraw from office. If the candidate agrees to withdraw, he or she should execute a declination of the office. Although there is no statutory procedure for the withdrawal after a candidate receives a certificate of election, there is a procedure for withdrawing before the primary and general elections. Compare, *Neb. Rev. Stat.* § 32-622-623 (which provides for the filing of a declination before the primary and general elections). I see no reason why the same procedure cannot be followed after a candidate receives a certificate of election and becomes an incumbent. The signed declination should be duly acknowledged and filed with the Secretary of State, which is the filing office for directors of public power districts. *Neb. Rev. Stat.* § 32-607.

2. Refuse to administer the oath of office. A PPD Board may refuse to administer the oath of office to an incumbent, if it determines that the incumbent is ineligible to hold office. *Neb. Rev. Stat.* § 32-602(3) provides that "[t]he governing body of the political subdivision swearing in the officer shall determine whether the person meets all the requirements prior to swearing in the officer."

Neb. Rev. Stat. § 70-616 provides that "[b]efore entering upon the duties of the office, every member elected to membership on the board of directors shall take and subscribe to an oath to support the Constitution of the United States and the Constitution of the State of Nebraska, and faithfully and impartially to perform the duties of his office, which oath shall be filed in the office of the Secretary of State." *Neb. Rev. Stat.* § 70-602(2) requires a person filing for office to meet the constitutional and statutory requirements of the office for which he or she

is filing. If the board determines, after an investigation, that the incumbent is ineligible to hold office, it may refuse to administer the oath of office. In that case, the Board should notify the Secretary of State that the Board has refused to administer the oath of office because it found, after an investigation, that the incumbent is ineligible to hold the office.

3. **Vacancy in office.** If the incumbent withdraws or the Board determines that the incumbent is not eligible to hold office and refuses to give him the oath of office, it would appear that a vacancy in that office has been created. *Neb. Rev. Stat.* § 32-560 provides that “[e]very elective office shall be vacant . . . upon the happening of any one of the following events at any time before the expiration of the term of such office: (7) Failure of a candidate elected to an office to qualify for such office.” Nevertheless, before the vacancy in office can be filed, there must be a determination by the Secretary of State, pursuant to *Neb. Rev. Stat.* § 32-626(2), whether the registered voters had reasonable notice.

4. **Secretary of State determination.** Once it has been determined that the incumbent is not eligible to hold the office, the Secretary of State is required to determine whether the voters had reasonable notice at the time of the election of the disability of the winning candidate pursuant to *Neb. Rev. Stat.* § 32-626(2). If the voters had reasonable notice, then the candidate who received the next highest number of votes, if he received not less than 35 % of the total votes and the number of persons to be nominated is not greater than 2, and not less than 10% when the number of persons to be nominated is greater than 2, will be declared elected. If the voters did not have reasonable notice, then the vacancy is filled as prescribed by law.

5. **Filing the Vacancy.** *Neb. Rev. Stat.* § 70-615(2) provides that in the event of a vacancy occurs on the board of a PPD, the board fills the vacancy unless a PPD has within their chartered territory 25 or more cities and villages. In districts having 25 or more cities and villages, the vacancy on the Board is filled by the Governor.

6. **Election contest.** An incumbent’s election to an elective office may be contested under *Neb. Rev. Stat.* § 32-1101(2) “if the incumbent was not eligible to the office at the time of the election.” An incumbent is defined under the Act as “the person whom the canvassers or the courts declare elected to an elective office or who has been appointed to an elective office.” *Neb. Rev. Stat.* § 32-111. However, it appears that only a candidate running for the same office as the incumbent may utilize this statutory remedy. See *Landgren v. Hamilton*, 133 Neb. 668, 276 N.W. 659 (1937) (the right conferred by statute on a candidate for public office to contest the election of his apparently successful rival is a special statutory proceeding); *Wilson v. Matson*, 110 Neb. 630, 194 N.W. 735 (1923).

7. **Quo Warranto.** It appears that the statutory remedy of Quo Warranto is not available to contest an incumbent’s qualifications to hold office prior to his assuming public office. *Neb. Rev. Stat.* § 25-21,121 (Reissue 1995) provides that “[a]n information may be filed against any person unlawfully holding or exercising any public office . . .” See *Johnson v. Hagemeister*, 161 Neb. 475, 73 N.W.2d 625 (1955)(remedy is provided to try title to public office). Since the incumbent is not holding or exercising any public office at this time, the remedy is not available.

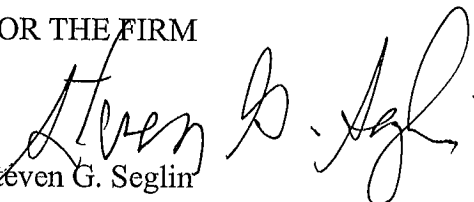
CONCLUSION

If the incumbent withdraws and files a declination with the Secretary of State, or the Board refuses to administer the oath of office to the incumbent, then a vacancy in the office has occurred. In that event, the Secretary of State is required to determine whether the voters had reasonable notice of the candidate's ineligibility. If the Secretary of State finds that the voters had reasonable notice of the ineligibility of the candidate, then the next highest voter will fill the vacancy pursuant to *Neb. Rev. Stat. § 32-626(2)*. If the Secretary of State determines that the voters did not have reasonable notice, then the Board or the Governor may fill the vacancy pursuant to *Neb. Rev. Stat. § 70-615(2)*.

If you have any questions or comments, I would be pleased to discuss them with you.

Sincerely,

FOR THE FIRM


Steven G. Seglin

cc: Bruce Smith by fax – 308-324-5525