

ELECTIONS:
CANDIDATES:
COUNTY TREASURER:

Section 54.040, RSMo. 1959, does not prohibit a deputy county clerk of a second class county from being eligible to the office of treasurer of said county when such individual has resigned

as deputy county clerk prior to the primary election at which candidates were nominated for the office of treasurer.

OPINION NO. 350

September 5, 1968



Honorable Robert P. Warden
Prosecuting Attorney
Jasper County Court House
Joplin, Missouri 64801

Dear Mr. Warden:

This is in response to your opinion request in which you asked whether a person who holds a position of a deputy county clerk of a second class county is eligible to the office of treasurer of said county when such person resigns from the office of deputy county clerk prior to the primary election at which candidates were nominated for the office of treasurer.

Your question requires an interpretation of Section 54.040, RSMo. 1959, which states in full as follows:

"No sheriff, marshall, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

The general provisions relative to the office of county clerk are stated in Chapter 51, RSMo. 1959. Section 51.440, RSMo. 1959, provides for the appointment and compensation of deputies of class two counties.

In turning to the application of the provisions of Section 54.040 to the question involving the eligibility of the deputy county clerk who has vacated the office prior to the primary election, we note that the Missouri Supreme Court has thus far rendered two decisions interpreting that section.

In State v. Dunn, 209 S. W. 110 (1919), the Supreme Court of Missouri considered the meaning of the word "eligible" in connection with a deputy collector of the City of St. Louis who resigned his office after the election and before taking the office of treasurer. It was the holding of the court that the definition of "eligible" depended upon the context and on the subject, and in that particular instance the court stated that the legislature intended that a collector was incapable of being chosen treasurer. The court continued

and found a general incompatibility between the two offices and held that the deputy collector was on the same footing as his chief. Accordingly, they awarded the writ of ouster. The concurring opinion found that the term "eligible" when used in the statutes or the constitution without contextual qualification or modificatory terms, refers to the legal capacity to hold an office at the time of election or appointment thereto of the person designated. The concurring opinion also found that the right and title to an office is determined by a valid election or appointment thereto and hence the qualification of the person chosen or appointed must exist at the time of the accrual of his right and title.

In a later case, State v. Moore, 152 S. W. 2d 86 (1941), the Supreme Court considered the section under question and whether a township collector was included within the prohibition of the statute making a collector ineligible to the office of county treasurer. The court distinguished the township form of government and concluded that the statute referred to a county collector only and not to a township collector. While there is other dictum in the case that would give rise to some speculation as to its possible application to the instant problem, we consider it only dictum that is not substantially related to the question in this opinion, or for that matter to that case which was under consideration.

As stated in Ballentine's Law Dictionary Second Edition (1948) at page 427, generally "eligible" does not mean eligible to be elected to the office at the date of the appointment or the election, but capable of holding the office at the commencement of the term. The person elected or appointed to an office may not have the legal capacity or fitness for the office at the time of his election or appointment, and yet he may become qualified before the term begins.

However, the meaning of the word "eligible" must be determined by the context as stated in Dunn.

Further, the Moore case stated that we should observe that the statutes prescribing requirements of eligibility to an elective office must be given a liberal construction. This is so because in our democratic form of government the greatest possible freedom of choice in the selection of their officers is a natural right of the people, and this right must be zealously guarded by the courts.

We understand that the deputy county clerk resigned from his office as deputy prior to the primary election. We consider State v. Dunn, supra, as authority, and the context of that case indicates that the question of eligibility is determined at the time the party is chosen treasurer. In view of this construction given by Dunn, and in light of the liberal construction concept of Moore, we hold that the deputy county clerk, under the circumstances presented, is eligible to the office of county treasurer, having vacated the office of deputy county clerk prior to the primary election.

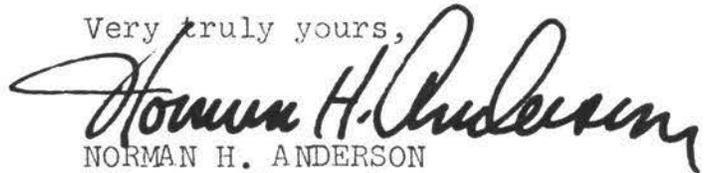
Honorable Robert P. Warden -

CONCLUSION

It is the opinion of this office that Section 54.040, RSMo. 1959, does not prohibit a deputy county clerk of a second class county from being eligible to the office of treasurer of said county when such individual has resigned as deputy county clerk prior to the primary election at which candidates were nominated for the office of treasurer.

This opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

JCK:ss