

VOLUME NO. 37

OPINION NO. 145

SCHOOL BOARDS - Voter registration necessary for eligibility as trustee; eligibility refers to qualifications to hold the office rather than qualifications to be elected; REVISED CODES OF MONTANA , 1947 - Sections 75-5913, 75-6410. MONTANA CONSTITUTION, 1972 - Art. IV, section 2, section 4.

- HELD: 1. A person must be registered to vote in the school district to be eligible for the office of school trustee.
2. "Eligibility" as used in section 75-5913, R.C.M. 1947, refers to the qualifications required of a school trustee to hold the office, not the qualifications to be elected.

24 May 1978

Robert J. Funk, Esq.
Garfield County Attorney
Garfield County Courthouse
Circle, Montana 59215

Dear Mr. Funk:

You have requested my opinion concerning a person's eligibility to hold the office of school trustee. You have asked the following questions:

1. Whether a person must be registered to vote in a school district in order to be eligible for the office of school trustee?
2. Whether "eligibility," as used in section 75-5913, R.C.M. 1947, refers to the qualifications to be elected to the office or whether it addresses the qualifications to hold the office?

The factual situation presented in your request is that a successful write-in candidate had not registered to vote thirty days prior to the election, although he had registered to vote by the time of the election.

Your first question has been addressed by a previous attorney general's opinion concluding that a person was not precluded from holding the office of school trustee by not registering to vote, because registration was not part of the

qualifications of an elector. 21 OP. ATT'Y GEN. NO. 179 at 243 (1946). That opinion was based upon case law interpreting the Montana Constitution of 1889, which stated that a person was eligible to vote if he or she was a citizen of the United States and a resident of this state for one year preceding the election, and was twenty-one years of age or more. Art. IX, section 2, 1889 Constitution of Montana.

The 1972 Constitution of Montana, however, differs by specifically making registration a necessary part of the qualifications of an elector. Art. IV, section 2 of the 1972 Montana Constitution defines "qualified elector" as follows:

Any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court. (Emphasis added.)

Art. IV, section 4 of the 1972 Montana Constitution then provides:

Any qualified elector is eligible to any public office as otherwise provided in this constitution. The legislature may provide additional qualifications but no person convicted of a felony shall be eligible to hold office until his final discharge from state supervision.

Consequently, the registration requirements as provided by the Legislature, as well as the residency requirements, are now a part of the qualifications of an elector.

As for the statutory qualifications of a school trustee Section 75-5913, R.C.M. 1947, states in part:

Any person qualified to vote in a district under the provisions of section 75-6410 shall be eligible for the office of trustee.

Section 75-6410, then states in part:

(1) Except as provided in subsections (2) and (3), each person is entitled to vote at school elections if he has all of the following qualifications:

(a) He has registered to vote with the county registrar as a resident in the school district in which he resides and proposes to vote in the manner provided by the general state election laws except in regard to the closure of elector registration as provided in 75-6413.

... (Emphasis added.)

Therefore, a person is required to register to vote in a school district to be eligible for the office of school trustee. This overrules 21 OP. ATT'Y GEN. NO. 179 at 243 (1946). See also 35 OP. ATT'Y GEN. NO. 91 (1974).

Your second question has been addressed by the Montana Supreme Court in State ex rel. Flynn v. Ellis, 110 Mont. 43, 98 P.2d 879 (1940), wherein the Court stated at p.49:

The courts do not agree as to the time at which the eligibility or qualifications of a person for public office must be determined. The question has arisen most frequently under statutory or constitutional provisions using the word "eligible" in connection with certain qualifications or disqualifications for public office. One line of authorities holds that the time of election is the proper time to test whether a person is qualified or eligible, and that it is immaterial that a person then disqualified removes the disqualifications before actually entering on the duties of the office.... But the weight of authority appears to be that where the word "eligibility" is used in connection with an office, and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold the office, rather than the qualifications to be elected to the office. Hence a disqualification existing at the time of election may be removed before induction into office, or before the term of office to which such person is elected begins. (Emphasis added.)

The statutes cited by Flynn, as referring to qualifications to be elected to an office, contained the explanatory phrases "at the time of election" or "when elected." The statute construed by Flynn did not contain these explanatory phrases, and merely stated "eligible to the office of county superintendent of schools...." Flynn held that such statutory language referred to the qualifications to hold

the office, rather than qualifications to be elected to the office.

Section 75-5913, as did the statute in Flynn, lacks any explanatory words indicating that "eligible" is used with reference to the time of election. Thus, the word "eligible," as used in 75-5913, has reference to qualifications to hold the office, and any disqualification existing at the time of the election may be removed before the term of office begins. In answer to your second question it is sufficient for the school trustee to be a qualified elector by the time he assumes office.

THEREFORE, IT IS MY OPINION:

1. A person must be registered to vote in the school district to be eligible for the office of school trustee.
2. "Eligibility" as used in section 75-5913, R.C.M. 1947, refers to the qualifications required of a school trustee to hold the office, not the qualifications to be elected.

Very truly yours,

MIKE GREELY
Attorney General