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ATTORNEY GENERAL OPINION NO. 89- 51

The Honorable Joan Wagnon
State Representative, Fifty-Fifth District
1606 Boswell
Topeka, Kansas 66604

Mr. Kenneth P. Hackler
Washburn University Counsel
Board of Regents
400 S.W. 8th, Suite 609
Topeka, Kansas 66612

Re: Cities of the First Class--Municipal Universities--Board of Regents; Composition; Appointment; Qualifications; Resignations; Vacancies

Synopsis: Under the provisions of K.S.A. 1988 Supp. 13-13a04, a person appointed to the office of district member of the Washburn University Board of Regents must be a resident of the senatorial district which he or she is appointed to represent. Residence in that district must continue throughout the term of office, and voluntary failure of a person to maintain such residency results in such person's disqualification to hold the office of district member of the Washburn University Board of Regents and creates a vacancy therein. Cited herein: K.S.A. 1988 Supp. 13-13a04, K.S.A. 77-201.

* * *

Dear Representative Wagnon and Mr. Hackler:

You request our opinion as to whether a mayoral appointee to the Washburn University Board of Regents from a specific senatorial district must resign the position if the regent no longer lives in the district from which he was appointed. You indicate that your inquiry arises from the fact that Regent Marvin Schulteis was appointed to represent the 18th Senatorial District, but no longer lives in that district.

K.S.A. 1988 Supp. 13-13a04 prescribes the qualifications of members of the Board of Regents of a municipal university, with subsection (a)(1) providing as follows:

> "Four members shall be appointed by the mayor with the approval of the governing body of the city in which the university is located and shall hold office as provided in K.S.A. 13-13a05 and amendments thereto. Members appointed under this provision shall be residents of the city in which the university is located, one from each of the three districts from which state senators are elected by residents of the city, and one from the city at large."

Pursuant to the above-quoted statute, in order to be qualified to assume the duties of district member of the Washburn University Board of Regents, a person must be a resident of the senatorial district which he or she is appointed to represent.[1] Moreover, we believe that such residency requirement is a continuing, as well as a preliminary qualification for the office. This conclusion is supported by decisions of the Kansas Supreme Court and other authorities.

In State, ex rel., v. Stice, 186 Kan. 69 (1960), a judge of a court of common pleas was disbarred after his election. The Court interpreted the statutory requirement that such judge be admitted to practice law at the time of his election as a continuing qualification, and not just a prerequisite for election to the position. Id. at 74, 75. The Court found that to hold otherwise "would lead to an absurdity." Id. at 74.

In Bankers Service Life Inc. Co. v. Sullivan, 188 Kan. 783 (1961), the Court held that a foreign insurance company had to

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[1]See K.S.A. 77-201, Twenty-Third for a definition of the term "residency."

meet statutory requirements not only at the time it began doing business in Kansas, but at all times it continued to do business in this state. Referring to Stice, the court said:

> "[O]nce a standard or requirement is met by a person, or other local entity,to do what the applicant seeks to do, such standard or requirement must continue so long as that act which is permitted thereby is carried on in the state." Id. at 790, 791.

The Court held further that it was the voluntary action by the insurance company that destroyed its qualification to continue to do business in Kansas. Id. at 791.

According to the Annotation found at 88 A.L.R. 812 (1934):

> "The fact that the candidate is qualified at the time of his election is not sufficient to entitle him to hold the office, if at the time of the commencement of the term of office, or during the continuance of the term, he ceases to be qualified. Eligibility to public office is of a continuing nature, and must subsist at the commencement of the term and during the occupancy of the office." Id. at 828.

Other states agree with this interpretation. In State ex rel. v. Donworth, 127 Mo.App. 377, 105 S.W. 1055 (1907), an elected city alderman had moved voluntarily from the ward he had been elected to represent to another ward in the same city. One of the statutory qualifications for the office was residence in the ward from which elected. The Court held that the statutory requirements were preliminary as well as continuing, stating that:

> "[C]hange of residence to another ward disqualifies him to represent the ward by which he was chosen and forfeits his right to the office." Id. at 380.

In its analysis of the problem, the Court indicated that the purpose of having an alderman live within the district he represents was twofold: First, he would be familiar with its

needs, and, second, his interests would be identical with the interests of the ward community.

> "It is true that the aldermen act for the welfare of the city generally and pass ordinances which relate to the entire city; but it is also true that they represent in an especial manner their particular wards. It is well known that in the disbursement of city funds for lighting, fire protection, water, street improvements and many other matters, rivalries and disputes often arise between the sections of a city, and it is important that a particular section be represented in the municipal assembly by its own residents. It is for this reason, we think that the Legislature provided for representation by residents of the wards and election by their qualified voters." Id. at 380, 381.

In Donworth, the defense proposed that the qualification was merely preliminary and not continuing. The Court exposed the dangers of such a position:

> "Several incongruities arise if we accept the reasoning of defendant's counsel. If a person elected alderman is a resident of the ward on the day of the election, but immediately moves into another ward, he could serve his two years' term. And if all the aldermen of a city should happen to move into one ward during their respective terms of office, they would still constitute the board of aldermen. Such contingencies are opposed to the policy of the statute, which policy is to require aldermen to be residents of the ward not only when elected but during their terms of office." Id. at 382.

In Commonwealth ex rel. v. Yeakel, 13 Pa. Co. Ct. 615 (1893), a Pennsylvania court decided that an elected member of the town council who had moved from the ward from which he was elected to another ward in the same borough had thereby forfeited his right to office. The Court said:

> "It seems to us that it is clearly the purpose of the law that councilmen should represent ward constituencies, and as a corollary . . . it would follow that they must be residents of the ward which they represent. The policy of the law has ever been that those who are to be the electors of any district or municipal subdivision, to fill representative offices confined to those districts, shall be themselves electors of those districts.
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> "It is clearly the policy of law as well as the legislative intent to give to each ward in a municipal legislative body equal representation from among the residents of that ward in order that there may be no unjust discrimination in either legislation or appropriations against any of the several wards constituting any borough. If this is true, then when a councilman divests himself of citizenship in any ward, he divests himself of office. Were it not so, instead of having the condition which is clearly the legislative purpose to maintain, we might have, by a series of removals, every member of council living in one and the same ward, leaving every other ward in the municipality without representation.
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> "It seems to us that it is clearly the intent of the legislature to provide against any such contingency by the creation of ward representation." Id. at 616-617.

The more recent case of State v. Bohannon, 421 P.2d 877 (1966), maintained these principles. The case involved a member of a State Board of Public Welfare who had been charged with and admitted committing a felony. The Court held that this misconduct disqualified the incumbent for the office:

> "'The general rule with respect to a public official is that eligibility to hold office is of a continuing nature and must exist not only at the commencement of the term but during the occupancy of the

> office. Some of the courts of other states hold that the date of election or appointment is the time to test eligibility to hold office. But most of the courts hold that even though a candidate is qualified at the time of his election this is not sufficient to entitle him to qualify and continue to hold office, if, at the commencement of the term, or during the continuance of the incumbency, he ceases to be qualified.' Valle v. Pressman, 229 Md. 591, 185 A.2d 368, 377.
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> "The principle has been accepted and applied under varying situations that where a constitution or statute creates a qualification for an office the subsequent loss of the qualification constitutes valid grounds for removal of the officer." Id. at 881-882.

The Arizona court cited the Stice case, supra, as supporting its decision.

Further amplification of the rules enunciated in the above cases is set forth at 63A Am.Jur.2d, Public Officers and Employees §145:

> "The cases generally hold that when residency is a prerequisite to a given office, a change of residence vacates that office, absent a legislative expression to the contrary. Accordingly, if an officer is required by law to be a resident of the particular district or political subdivision in which he holds office, a vacancy, which may be filled by appointment, will be created if the officer ceases to live in such district or subdivision." (Citations omitted.)

Based on the foregoing, we are of the opinion that residency in the senatorial district from which a member is appointed is a continuing qualification, and that once such residency requirement is no longer met due to the member voluntarily moving from such district, he is disqualified from continuing in office. Such disqualification creates a vacancy in the

office of district member of the Washburn University Board of Regents, because the office is no longer supplied in the manner provided by law with an incumbent legally qualified to hold such office. See Barrett v. Duff, 114 Kan. 220, 232 (1923), and Leek v. Theis , 217 Kan. 784, 790 (1975).

Very truly yours,

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