STATE LEGISLATURE: SEATING OF MEMBERS under M.S. 1969, §3.02 and 3.05: ELECTION CONTESTS: RIGHT TO VOTE - Minn. Const., art. IV, §3; M.S. 1969, § 209.10. Valid certificate of election is prima facie evidence of right to be sworn and seated; duly seated member may vote on all matters before that body except for election contest vote and matters directly related thereto, pursuant to contest brought under provisions of § 209.10.

December 31, 1970

280E
(Cr.Ref. 280
and 280L-1)

Senator Stanley W. Holmquist
Room 238
State Capitol
Saint Paul, Minnesota 55101

OFC

Dear Senator Holmquist:

You have presented the following factual situation:

A citizen has received sixty percent of the votes cast for the office of State Senator, and he has been duly issued a certificate of election. He is a defendant in a corrupt practices lawsuit that will ultimately be determined by the Senate.

You have asked me the following questions:

1) May the citizen take the oath of office and participate in the legislative process?

2) May he vote on organizational matters even if challenged?

1. Minnesota Statutes 1969, §3.02 provides:

> EVIDENCE OF MEMBERSHIP. For all purposes of organization of either house of the legislature, a certificate of election thereto, duly executed by the auditor of the proper county, or by the secretary of state when the member is elected from more than one county, shall be prima facie evidence of the right to membership of the person therein named. (Emphasis added.)

The concept of a bona fide certificate of election, duly issued by the proper authority, as being prima facie evidence

of the result of the election and the right to hold office has consistently been upheld by the Minnesota Supreme Court. Berg v. Veit, 136 Minn. 443, 162 N.W. 522 (1917); Atherton v. Sherwood, 15 Minn. 221 (Gil. 172) (1870); State ex rel Biggs v. Churchill, 15 Minn. 455 (Gil. 369) (1870); Crowell v. Lambert, 10 Minn. 369 (Gil. 295) (1865).

M.S. 1969, §3.05, provides the manner in which the legislative houses shall be orga

> At noon of the [illegible]nted for the convening of the legislature, the members thereof shall meet in their respective chambers. The lieutenant governor shall call the senate to order; and the secretary of state, the house of representatives. In the absence of either of these officers, the oldest member present shall act in his place. The person so acting shall appoint, from the members present, a clerk pro tem, who shall call the legislative districts in the order of their numbers; and as each is called, the persons claiming to be members therefrom shall present their certificates to be filed. All whose certificates are so presented shall then stand and be sworn. (Emphasis added.)

There is no authority in either M.S. 1969, §3.02, or §3.05 to suggest that a person holding a certificate of election can be prevented from tendering such certificate and from being sworn. As to all of the procedures to be followed, the word "shall" appears, making those procedures mandatory, due to the definition of that word in M.S. 1969, §645.44, Subd. 16.

Thus, the person holding such a certificate is entitled, upon qualifying, to possession of the office. Allen v. Robinson, 17 Minn. 113 (Gil. 90) (1871); Crowell v. Lambert, supra. The court in Crowell dealing with the office of Probate Judge in Ramsey County, stated:

> The person holding the certificate is, . . . prima facie the officer, and therefore, prima facie entitled to the insignia and records of the office.
>
> We do not deem it necessary to point out the inconvenience, resulting in some cases in a total denial of justice, which would follow if a party situated as the plaintiff is in this case were compelled to await the result of the election contest provided for by statute -- a contest which might be prolonged until the end of the term for which he was elected had expired. 10 Minn. 369, (Gil. 295, 301).

The rule is universally recognized that the holder of a certificate of election is entitled to the office until the final determination of the election contest.

The general rule is stated in 26 Am. Jur. 2d Elections, §305:

> . . . [A certificate of election] entitles the recipient to take the office, as against an incumbent whose term has expired, notwithstanding the pendency of a proceeding to contest the election instituted by the incumbent or another. He has a right to exercise the functions of the office until the true result of the election is determined in the manner authorized by law, or until the certificate is set aside in an appropriate proceeding. In other words, the certificate confers a temporary right subject to destruction by an adverse decision of a tribunal having jurisdiction in the matter.

A typical case enunciating the rule is Campbell v. Hunt, 162 P. 882 (1917), involving the right of the victor of the Governor's race to

take office. The Arizona Supreme Court stated:

> . . . The acts of the secretary of state under the constitutional provision in canvassing the returns, declaring the result thereof and delivering to plaintiff a certificate of election gives plaintiff a prima facie right to be admitted temporarily to the office until reversed or set aside by a court of proper jurisdiction in appropriate proceedings, provided only that plaintiff is not shown to be disqualified under the law from holding the office of Governor.

162 P. at 886.

For a complete list of the jurisdictions containing similar cases, see the Annotation found at 81 ALR 620.

The requirement of seating a duly elected and qualified member of a legislative body was underscored in the famous case of Powell v. McCormack, 395 U.S. 486 (1969). Adam Clayton Powell was duly elected from the 18th Congressional District in New York to serve in the House of Represenatives for the 90th Congress. On the day of convening the 90th Congress, Powell was asked to step aside while the oath was administered to the other members-elect, and he apparently did so voluntarily. After the oath was administered to the other members, a committee was appointed to determine Powell's eligibility to hold the office. The House ultimately voted to exclude Powell.

The Supreme Court, in a lengthy opinion, determined that since Powell was duly elected by the voters of his district and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.

In response to question one, I therefore conclude that the citizen has the unquestioned right to take the oath of office and participate in the legislative process, until and unless the Senate ultimately votes to set aside the certificate, pursuant to Minn. Const. Art. IV, Sec.3 and M.S. 1969, §209.10.

2. Once the oath has been administered and the Senate convened, questions relative to the election returns and the eligibility of its own members may then be considered pursuant to M.S. 1969, §209.10, under the paramount authority of Art. IV, §3. Phillips v. Ericson, 248 Minn. 452, 80 N.W. 2d 513 (1957). Then and then only may the Senate consider questions relative to the "eligibility of its own members" as provided in Art. IV, §3, because until the taking of the oath, there are no "members" whose eligibility may be considered, only those "claiming to be members" under the color of a certificate of election which affords the putative members the prima facie right to membership. M.S. 1969, §3.02.

Subdivision 2 of §209.10 sets forth the procedures to be followed in the resolution of a contest of a legislative office. It is provided in (d) thereof that:

> The vote upon the contest shall be viva voce, . . . and a majority of the votes given shall decide; but no party to the contest shall vote upon any question relative thereto; . . . (Emphasis added.)

The scope of the language "relative thereto" is not defined in M.S. 1969, §209.10. In the context of that statute, however, it must be taken to mean the vote on the contest itself and any parliamentary procedures bearing directly on the contest.

Further, nothing contained in M.S. 1969, §209.10(2)(d) indicates that "relative thereto" limits a duly qualified member of the Senate from otherwise participating fully in the conduct of the business of that body. Indeed, M.S. 1969, §209.10 would have no effect on the conduct of any business of the Senate until the matter of a contest was duly brought before it.

M.S. 1969, §209.10 is the only statutory limitation found that in any way restricts the power of a seated member from exercising the right to vote and §209.10 restricts that right only "upon any question relative thereto," meaning directly relative to the election contest itself.

It therefore follows that even if challenged, the seated member has the right to vote on all other matters properly before the Senate including organizational matters and specifically including membership on the elections committee, which is formed prior to the time the Senate considers the election contest itself, and therefore prior to the time the statutory limitation takes effect.

To restrict the right of a seated member to vote on any matter other than a matter directly related to his own election contest,

would operate to deprive his district of proper representation in the legislative process. This is especially true where §209.10 does not provide a time limitation for the vote on the election contest. That vote possibly could not come until the end of the session. It would thus be grossly inequitable to deprive the district of representation on any matter, depending on the uncertain time of the election contest.

In response to your second question, the Senator may vote on all matters pertinent to the conduct of the business of the Senate, except in a proceeding where his right to hold the office is directly in issue; namely, the vote on the election contest pursuant to M.S. 1969, §209.10.

Yours very truly,

DOUGLAS M. HEAD
Attorney General

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