

Opinion No. 46-4936

August 6, 1946

BY: C. C. McCULLOH, Attorney General

TO: Robert C. McConnell Assistant District Attorney Fifth Judicial District Roswell, New Mexico

{*260} We are in receipt of your letter of August 2, 1946 in which you ask two questions relating to elections. Your first question is as follows:

"Section 56-215, as amended in 1945, provides that any elector prior to thirty days preceding an election who changes his precinct within the county may 'or his or her spouse may' apply for transfer of precinct registration. I believe that it was the intention of the legislature that husband or wife could apply for said transfer for either or both parties. However, the wording is not as clear as it might be. I, of course, feel sure that they could not change registration for any other member of the family."

Section 56-215, as amended, provides in part:

"Any elector who prior to 30 days preceding an election changes his place of residence from one precinct to another {*261} within the county in which registered, may, or his or her spouse may at any time up to 30 days before an election, make application for transfer of such application * * *."

Webster defines "spouse" as: "Either one of a married couple." Therefore, it is clear that this section permits the husband to transfer the registration of the wife or the wife to transfer the registration of the husband and does not authorize either the husband or wife to transfer the registration of any other member of the family.

In your second question you state that questions have arisen in connection with the right of persons residing on the airbase to vote. It is my understanding that title to the airbase is vested in the United States. By Section 8-202 and 8-203, the State of New Mexico ceded jurisdiction to the United States over all of the land acquired by the Federal Government for purposes of the Government. Such ceding of jurisdiction is authorized by Article 1, Section 8, Clause 17 of the Constitution of the United States. Further, pursuant to an act of Congress, the Federal Government has accepted jurisdiction to all military reservations by notifying the Governor of the State.

In view of these circumstances, persons residing on the Roswell airbase are not residents of the state of New Mexico. Their status is much the same as persons residing in Washington, D. C. The author in 20 C. J. 74, says:

"Since land which has been ceded by the state to the United States for the use of some department of the general government, without any reservation of jurisdiction except the

right to serve civil and criminal process thereon, ceases to be a part of the state, such land cannot become a voting residence in the state in which it is situated, until it is receded to the state by Congress. But the mere fact that a person is in the service of the United States on a government reservation will not deprive him of his right to vote in the place where he has a legal residence."

The most recent case on this subject is *Herken v. Glynn*, 151 Kans. 855, 101 P. 2d 946 which reviews the entire question in detail.

Thus, in order for any soldier living on the base to vote, he must previously have been a resident of the State, County and precinct for the required length of time. In your letter you state that many soldiers at the base, in order to register, stated that they intended to live in Roswell following their discharge. You ask whether this bald statement is sufficient to establish residence.

While residence is primarily a question of intention, two things must concur: Some overt act, that is to say, an actual place of abode, and secondly, an intention to make that abode the permanent residence.

The author in 20 C.J. 68, says:

"The term 'residence' as used in constitutional and statutory provisions, relating to the qualifications of electors, is synonymous with 'home' or 'domicile', denoting a permanent dwelling place to which the party when absent intends to return. While one cannot by intention alone fix his dwelling place, yet the fact of residence for the purpose of voting, depends largely on the intention of the person offering to vote. * * * Hence, the right to vote in a certain precinct requires the concurrence of two things, the act of residing coupled with the intention to do so."

It is therefore my opinion that persons stationed at the airbase, unless they have actually resided in Roswell for the prescribed length of time with the appropriate intention are not qualified to vote. Of course, each case must be determined on its own facts. The problem with soldiers is more difficult because the courts in fact presume that a soldier stationed at an army {262} post does not intend to make that place his residence. The reason given by the courts is that soldiers go to the place where they are assigned and when re-assigned, move on. They, therefore, require the proof of some fact indicating an intention to make that place their residence in addition to the soldier's statement that he intends to reside there.

By ROBERT W. WARD,

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