

Opinion No. 61-45

June 1, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Philip T. Manly, Attorney, State Judicial System Study Committee, 201 State Capitol, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. May a justice of the peace reside in a precinct other than that from which he was elected and in which he maintains his office or courtroom?
2. If question number one is answered in the negative, what proceeding is necessary to remove such justice or to create a vacancy?

CONCLUSION

1. No, unless the precinct wherein the justice lives and was elected lies wholly or partially within the corporate limits of a city or town having a population in excess of two thousand inhabitants.
2. See analysis.

OPINION

ANALYSIS

In regard to your first question, this office had occasion to express itself on a similar matter in Opinion No. 60-10, dated January 21, 1960. We there referred to Section 36-2-8, N.M.S.A., 1953 Comp., which sets forth the territorial limits of jurisdiction of justices of the peace as well as residence requirements. This section provides that the jurisdiction of the justice shall be coextensive with the limits of the county in which he was elected. However, it further provides that the justice **shall reside and hold his office in the precinct for which he was elected.** An exception to this latter requirement is made where the justice's precinct lies wholly or partially within the corporate limits of a city or town having a population of more than two thousand inhabitants as shown by the last United States census.

While, as you stated, your request for an opinion is for the guidance of the State Judicial System Study Committee, the one specific fact situation which you related involves a justice of the peace in an unincorporated community with less than two thousand

inhabitants. As we understand it, this particular justice of the peace actually lives in a precinct other than the one from which he was elected and in which he holds court.

Whether this justice is exceeding his jurisdiction turns upon the meaning of the term "reside" as used in Section 36-2-8, supra. If it means actual place of abode, it appears that he is exceeding his jurisdiction. If reside is synonymous with domicile, the element of subjective intent is present, and thus it would require a court determination on the question of whether he is domiciled in the precinct from which he was elected and where he holds court.

Pronouncements by our Supreme Court, as well as opinions from this office, have not always been harmonious on the questions of whether "reside" and "residence" are synonymous with "domicile". This is understandable when we take into consideration the fact that the definition of the terms may vary depending upon the purpose of the statute wherein the terms appear. See Attorney General Opinion No. 60-27.

As our Supreme Court stated in **State ex rel. Magee v. Williams**, 57 N.M. 588, 592, 261 P. 2d 131:

"To interpret the sense in which such a term 'reside' is used, we should look to the objective or purpose of the statute in which the term is employed. A man can have only one place of residence for voting purposes and certain other purposes, but there is no reason why, within the meaning of the above sections of the constitution, he may not have more than one place to reside in."

Testing the term "reside" as used in Section 36-2-8, supra, in the light of this particular statute's purpose, we think the following statement in **People v. Owers**, 29 Colo. 535, 69 Pac. 515, 518, is quite appropriate:

"The word 'reside' may, and sometimes does, have different meanings in the same or different articles or sections of a constitution or statute; **but the direction here that a district judge shall reside within his district manifestly was not for his convenience, but for the benefit of the people, whose servant he is.** Doubtless one, if not the only, object of the section was to compel the officer to maintain his residence where litigants might expeditiously, and with as little expense as possible, have access to him for the transaction of official business. Bearing this in mind, it is quite clear that 'residence' here means an actual, as distinguished from a legal or constructive residence or (its equivalent) domicile . . ." (Emphasis added).

It should also be noted that if the term "reside" as used in Section 36-2-8, supra, is defined in accordance with the test set forth in **State ex rel. Magee v. Williams**, supra, i.e., "there must be the fact of abode and the intention of remaining", the particular justice to whom you referred does not qualify thereunder. The fact of abode (actual residence) is lacking.

Sections 36-2-8 through 36-2-10, N.M.S.A., 1953 Comp., set forth the jurisdictional limits of justices of the peace. We feel, therefore, that the recent case of **Wallace v. Wallace**, 63 N.M. 414, 320 P. 2d 1020, involving a jurisdictional question, should be mentioned. In that case, the parties to a divorce action under the "serviceman's statute" had resided in this State for one year, but neither had domicile in New Mexico. Quite clearly, in this jurisdictional context, our Supreme Court recognized that residence is not synonymous with domicile. Nor do we think the term "reside" as used in Section 36-2-8, supra, is synonymous with domicile. We believe that what is meant by the term as used therein is actual place of abode.

Whether such a limitation offends Article V, Section 13, and/or Article VII, Section 2, of the New Mexico Constitution, we do not presume to say. See **Gibbany v. Ford**, 29 N.M. 621, 225 Pac 577.

Consequently, if a justice of the peace **actually lives** in a precinct other than the one from which he was elected and in which he holds court, he is violating Section 36-2-9, N.M.S.A., 1953 Comp., and his decisions are null and void. Sections 36-2-9 and 36-2-10, N.M.S.A., 1953 Comp.

Your second question involves the procedure to be utilized in vacating the office or removing a justice of the peace who has exceeded his jurisdictional limits or has failed to comply with the residence requirements imposed by Section 36-2-8, supra.

There is an elaborate statutory procedure for suspending and removing local officers. Section 5-3-3, et seq., N.M.S.A., 1953 Comp. The removal procedures outlined therein are exclusive. Section 5-3-31, N.M.S.A., 1953 Comp. The grounds for such removal are set forth in Section 5-3-4, N.M.S.A., 1953 Comp., and it requires a rather artificial interpretation of this section to conclude that failure to comply with the residence requirement of Section 32-2-8, supra, constitutes a ground for removal thereunder.

We recognize that Section 36-2-10, supra, does provide for removal of justices of the peace who are convicted for trying cases "beyond the limits of their precinct". In our view, however, there is an alternative remedy that can be utilized in such instances, not by way of a removal action but by a determination that the office is vacant.

Section 5-3-1, N.M.S.A., 1953 Comp., provides that a precinct office becomes vacant when there is a "failure of the officer to qualify as provided by law". We believe that when a justice of the peace in an unincorporated community of less than two thousand inhabitants resides in one precinct and holds his court and was elected in another precinct, at that point he fails to qualify as provided by law. And since it is the duty of the Board of County Commissioners to fill vacancies created by reason of death, resignation, **or otherwise** (Section 5-3-2, N.M.S.A., 1953 Comp.), this mandatory duty makes it incumbent upon the Board to determine, at least in the first instance, whether a vacancy has occurred. See Opinion of the Attorney General No. 5327, 1951-1952, and Opinion No. 59-34.

Our conclusion is fortified by the provisions of Section 36-1-8, N.M.S.A., 1953 Comp., requiring that in the event a justice of the peace dies, resigns **or removes out of the precinct for which he may be elected** or his term of office be in any manner terminated, all records and documents relating to official business are to be delivered to the nearest justice of the peace in the same county. This indicates to us a legislative intent to create a vacancy by operation of law when one of the above-mentioned contingencies occurs. The Board of County Commissioners then determines that a vacancy exists and fills the vacancy by appointment. Section 5-3-2, supra.

To summarize briefly, a justice of the peace in an unincorporated community of less than two thousand inhabitants must actually maintain his place of abode in the precinct from which he was elected and in which he maintains his court. A vacancy in the office of justice of the peace is created by operation of law when a justice of the peace in an unincorporated community of less than two thousand inhabitants moves his actual place of abode from the precinct from which he was elected and in which he holds his court. Upon such a determination by the Board of County Commissioners, the Board should fill the vacancy.

To the extent that this opinion is inconsistent with Opinion No. 6445 (1956), the latter is overruled.