

Opinion No. 71-119

November 30, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Lenton Malry State Representative 2900 Hyder, S.E. Albuquerque, New Mexico

QUESTIONS

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May an eighteen to twenty year old student establish a residence different from that of his parents for voting purposes?

CONCLUSION

Yes, but see analysis.

OPINION

{*181} **ANALYSIS**

Article VII, Sec. 1 of the New Mexico Constitution provides:

Every citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, and persons convicted of a felonious or infamous crime unless restored to political rights, shall be qualified to vote at all elections for public officers. The legislature may enact laws providing for absentee voting by qualified electors. All school elections shall be held at different times from other elections.

The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections, and guard against the abuse of elective franchise. Not more than two members of the board of registration, and not more than two judges of election shall belong to the same political party at the time of their appointment. (As amended November 7, 1967).

This constitutional provision was implemented by Section 3-1-6, NMSA, 1953 Comp. in which the legislature specified the criteria to be used in determining one's residence for voting purposes as follows:

For the purpose of determining residence for voting, the place of residence is governed by the following rules:

A. The residence of a person is that place in which his habitation is fixed, and to which, whenever he is absent, he has the intention to return.

B. The place where a man's family resides is presumed to be his place of residence, but a man who takes up or continues his abode with the intention of remaining at a place other than where his family resides is a resident where he abides.

C. A change of residence is made only by the act of removal joined with the intent to remain in another place. There can be only one residence.

D. A person does not gain or lose residence solely by reason of his presence or absence while employed in the service of the United States or of this state, or while a student at an institution of learning, or who is kept in an institution at public expense, or while confined in a public prison or while residing upon an Indian or military reservation.

E. No member of the armed forces of the United States, his spouse or his dependent is a resident of this state solely by reason of being stationed in this state.

E. A person does not lose his residence if he leaves his home and goes to another country, state or place within this state for temporary purposes only and with the intention of returning.

{*182} G. A person does not gain a residence in a place to which he comes for temporary purposes only.

H. A person loses his residence in this state if he votes in another state in an election requiring residence in that state, and has not upon his return regained his residence in this state under the provisions of the Constitution of New Mexico.

I. "Residence" is computed by not including the day on which the person's residence commences and by including the day of the election.

J. A person does not acquire or lose residence by marriage only.

In order to answer your question, we must consider several matters which relate directly to it.

Foremost among these matters is the Twenty-sixth Amendment to the United States Constitution which became effective June 30, 1971. Section 1 of this Amendment provides:

The right of citizens of the United States, who are eighteen years of age or older, to vote **shall not be** denied or **abridged** by the United States or **by any state on account of age**. (emphasis added)

The application of this amendment to your question is realized by the following quotations from the Senate Judiciary Committee:

If citizens under 21 years are prohibited from establishing a residence of their own for voting purposes while citizens over 21 years are not, then, in a very real sense, voting rights are being denied to those under 21 because of their age. The clear language of this Amendment, together with its legislative history, indicates that this result would violate the letter and spirit of the Amendment.

Moreover, forcing young voters to undertake special burdens -- obtaining absentee ballots or traveling to one centralized location in each city for example -- in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result and the election procedures that create it are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young . . . Senate Judicial Committee, S. Rep. No. 92-96, 92nd Cong., 1st Sess., [Report accompanying S.J. Res. 7 (1971)].

Thus, it is our opinion that the adoption of the Twenty-sixth Amendment has pre-empted state control of the field of voting age requirements, and 18 to 20 year olds are eligible to vote in New Mexico elections notwithstanding Art. VII, Sec. 1 of the New Mexico Constitution.

Next, it is to be noted that the United States Supreme Court has zealously guarded one's right to vote because ". . . the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges." **Evans v. Cornman**, 398 U.S. 419 (1970).

Likewise, the Supreme Court has applied the Equal Protection Clause of the Fourteenth Amendment to prohibit unjustified discrimination between classes of voters. See **Harper v. Virginia Board of Elections**, 383 U.S. 663 (1966) in which the court stated:

[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

All this is not to say, however, that New Mexico must accept everyone who seeks to register to vote. On the contrary the Supreme Court has acknowledged that a state may take reasonable steps to see that applicants are in fact bona fide residents of the county which they seek to vote. See **Carrington v. Rash**, 380 U.S. 89 (1965) in which the Supreme Court stated:

We stress -- and this is the theme to be reiterated -- that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But

if {*183} they are in fact residents, with the intention of making Texas their home indefinitely, they as all other qualified residents, have a right to an equal opportunity for political representation.

While **Carrington** dealt with military personnel and their right to vote, we think it is equally applicable to students. Therefore, it is important to note that the Supreme Court rejected Texas' defenses of having ". . . a legitimate interest in immunizing its elections from the concentrated balloting of military personnel [students], whose collective voice may overwhelm a small local civilian community . . ." and ". . . a valid interest in protecting the franchise by infiltration by transients, and it [could] reasonably assume that those servicemen who [fell] within the exclusion [would] be within the state for only a short period of time." In addition to rejecting Texas' claims for the reasons quoted above, the Supreme Court also held that: "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."

Consequently, we conclude that the adoption of the Twenty-sixth Amendment has had the further effect of emancipating the eighteen to twenty year old voter for purposes of establishing his residence for voting purposes. Therefore, it is our opinion that students -- even those who absent themselves from the State during the summer -- see **Crownover v. Crownover**, 58 N.M. 597 (1954) -- who live in dormitories, fraternity or sorority houses, or in their own apartments, be they fully self-sufficient or entirely reliant upon their parents have the right to register and vote in the community where they attend school, provided the applicant "is a citizen of the United States, has resided in New Mexico for one year, in the county ninety days, and in the precinct in which he offers to vote thirty days next preceding the election." Art. VII, Section 1, New Mexico Constitution. Please note, however, this durational residency requirement is not applicable to elections held pursuant to the "Federal Voting Rights Compliance Act." See Attorney General Opinion 71-68 (issued July 15, 1971).

In making this determination, it is well to note 25 Am. Jur. 2d, Elections, § 72 (p. 764), which states:

. . . a residence for voting purposes may be acquired when the student's attendance at school is accompanied by an intent to make that place his new home, and where the student's actions and conduct manifest such an intent, the courts recognize his right to vote from his college residence, constitutional or statutory provisions on residence of students notwithstanding. Similarly, as a general rule, a residence for voting purposes may be acquired where a student attending school or college has no intention of returning home, but is not certain as to the place of his future residence . . .

In determining the student applicant's right to register, the registrar will have to make a case by case determination if the student is eligible as a resident. We anticipate the major trouble spots will arise under Sections 3-1-6(f) and (g), NMSA, **supra**, and the use of the terms for "temporary purposes only." We do not read this language to exclude students. To hold otherwise would flaunt the federal decisions cited above, and result in a denial of the Equal Protection Clause of the Fourteenth Amendment.

Therefore, we suggest as a practical matter that the registrar ask all those applying to register for some form of identification containing their residence address. If inconsistencies appear with respect to name or residence which the registrar believe should be explored, he could then make further inquiries along the following lines:

1. Is the applicant willing to take the oath that he is in fact a resident, (note that supplying false informations to the registrar is a fourth degree felony, 3-20-6 to 3-20-8, NMSA (1953 Comp.);
2. Has the applicant registered or voted elsewhere;
3. At what place is he best known in and to the community;
4. Where does the applicant pay taxes and what address did he list as his residence on his tax returns;
5. How frequently does the applicant return to his domicile of origin;
- {*184} 6. Where does the applicant keep his personal possessions;
7. If applicant has a car, where is it registered;
8. During the past year, has the applicant claimed any other place of residence for any reason;
9. Where does applicant keep his bank account;
10. What is the address on applicant's motor vehicle operator's license?

This list is not exhaustive of the factors which may be considered, and **there is no requirement that the answers to all or any particular number of the questions be affirmative** for an applicant to establish his residency. In the final analysis, the question of residency is a matter of judgment in applying the above stated judicially approved definitions based on all the individual facts and circumstances, but they must be applied uniformly to students and nonstudents alike.

Finally it will be noted that this opinion is in accord with the two most recent cases which have arisen under the students' right to register and vote in the community where they attend college. See **Jolicoeur v. Mihaly**, 96 Cal. Rptr. 697 (1971), and **Wilkins v. Bentley**, 189 N.W.2d 423 (Mich. Sup. Ct., 1971).

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