

Opinion No. 44-4549

July 18, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mrs. Cecilia Tafoya Cleveland, Secretary of State, Santa Fe, New Mexico

We are in receipt of your letter of July 17, 1944, in which you ask our opinion as to whether or not a soldier who has lived in the State of New Mexico a year, not outside the camp or post at which he is stationed, can register to vote as a resident of the State of New Mexico even though he had not lived in this state prior to being sent here by the army. The answer to this question will depend upon the particular circumstances involved in each case. However, I will attempt to set up the general principals involved.

First of all, if a soldier is living in an army camp the jurisdiction to which has been ceded by the State of New Mexico to the Federal Government pursuant to Clause 17, Section 8, Art. 1 of the Federal Constitution, he cannot qualify to register or vote since he will not be considered a resident of the State of New Mexico. The leading case on this subject is *Lowe vs. Lowe*, 150 Md. 592, 133 Atlantic 729, 46 A.L.R. 983, which case is cited at length with the approval in *Tenorio vs. Tenorio*. The situation outlined above exists as to persons residing on the Fort Bayard and Fort Wingate military reservations since by Sec. 8-207 exclusive jurisdiction to these two military reservations is ceded to the United States.

If a soldier is living in a camp the jurisdiction to which has not been ceded to the United States, he may acquire residence in New Mexico if he intends to make New Mexico his permanent place of abode. However, the courts when confronted with such questions usually require some evidence other than his mere statement to substantiate his claim since he does not go to the place where he is assigned voluntarily and since he will be required to leave in the event of further orders. On this question the author of 28 C.J.S. 28 says "the domicile of a soldier or sailor in service usually remains unchanged, domicile being neither gained nor lost by being temporarily stationed in line of duty at a particular place but a new domicile may be acquired if fact and intent concur."

To the same effect see *Percy vs. Percy* 188 Cal. 765, 207 Pac. 369, where the court said, "The right of a soldier to acquire a legal residence in the locality to which he has been assigned cannot be doubted."

To the same effect see *Trigg vs. Trigg* (Mo.) 41 S. W. 2d 583.

In view of what has been said above, it is my opinion that a soldier stationed within the State of New Mexico, when not living in an army camp the jurisdiction to which has been ceded to the United States, may become a qualified resident of the state sufficient to entitle him to register and vote. It is further my opinion that whether or not such

soldier has acquired such residence is a question of fact that must be determined separately in each individual case.

One additional question occurs to me and that is whether or not in any event the county clerk has the right or the duty to refuse to accept a properly executed affidavit of registration. Sec. 56-217 of the 1941 Compilation provides in part: "The county clerks **shall** receive affidavits of registration at all times except that they shall close registrations, etc." Nowhere do I find provision made authorizing the county clerk to make an investigation concerning the right of the registrant to register or to refuse to accept such registration certificate. Instead, provision is made by Sec. 56-219 for the Board of Registration to cancel affidavits and by Sec. 56-231 for the county chairman to present petitions to the district court to purge the registration lists. Further, the execution of a false affidavit is made a criminal offense by Sec. 56-242.

In view of this situation, it would appear to me that it is not the duty of the county clerk in any event to determine who are and who are not qualified to register.

Trusting the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General