

East, Henry County, McDonough, Georgia (the "Henry County property"). (Testimony of Respondent, T. 182; Exhibit P-15.)

2.

The Rockdale County property is in Senate District 17. The Henry County property does not lie within the district. (Testimony of Respondent, T. 213-14.)

3.

Petitioner is an elector qualified to vote in State Senate District 17. He filed a timely complaint pursuant to O.C.G.A. § 21-2-5(b) with the Secretary of State on May 2, 2006, seeking to disqualify Respondent on the grounds that he will not have been a legal resident of District 17 for one year on the date of the general election. (Testimony of Petitioner, T. 18; Exhibit P-1.)

4.

Respondent and his family lived in a home in Rockdale County, Conyers, Georgia, on Wildwood Court from 1973 until December 2002. He then built a house on the Henry County property. (Testimony of Respondent, T. 178, 213; Testimony of Phyllis Crotts, T. 155.)

5.

When Respondent's term expired in the Senate in 2004, he sold his Wildwood Court home. (Testimony of Respondent, T. 214.)

6.

Respondent's property in Henry County is approximately seven (7) acres and has two separate addresses on Highway 20 East. One address is used for the house and the other is assigned to a basement office Respondent maintains for his realty company. Respondent goes to his office on a daily basis. (Testimony of Respondent, T. 187-88, 195-96.)

7.

Respondent decided in October 2005 to run for State Senate for District 17. He learned from the Secretary of State's Office that he would need to be a resident of the district in which he was running for one year prior to the general election. (Testimony of Respondent, T. 180.)

8.

On November 4, 2005, Respondent and his spouse signed a lease for the Rockdale County property. The lease is for the entire home located on Pembroke Court, but Respondent and the Lessor understood that he was leasing a basement apartment in the home. While the lease provides that Respondent would perform maintenance and repair of the home, he has not performed any of these tasks. The lease was prepared by Respondent and has an expiration date of November 3, 2006. One of the owners of the premises has been a friend with Respondent's family since 1974. Respondent indicated to the owner that he needed to live in Rockdale County because he was going to run for office in the District. (Testimony of Carolyn Davis, T. 96-98, 110, 120; Respondent's Exhibit 5.)

9.

Respondent has paid rent on the Rockdale property by checks bearing his business address in Henry County and with personal checks bearing the home address in Henry County. Respondent has never submitted a check with the Rockdale County address on it. (Testimony of Carolyn Davis, T. 118-19; Respondent's Exhibits 6-9.)

10.

The Rockdale County property was fully furnished when Respondent moved in. Respondent has not moved any furniture to Rockdale County. (Testimony of Carolyn Davis, T. 117.)

11.

The owner of the Rockdale property lives in the home that Respondent leased and does not know how frequent Respondent is present at the home. (Testimony of Carolyn Davis, T. 121.)

12.

Respondent submitted a change of address form dated November 4, 2005 to the U.S. Postal Service changing his mailing address from the Henry County property to the Rockdale County property. (Testimony of Respondent, T. 188; Respondent's Exhibit 12.) His bank statements for November 2005 through April 2006 are addressed to the Henry County home address but forwarded by the Post Office to the Rockdale County address. (Testimony of Respondent, T. 189-190; Respondent's Exhibits 13-18.) Respondent began receiving mail from the Georgia Department of Community Health addressed to the Rockdale County address on December 22, 2005. (Testimony of Respondent, T. 191-92; Respondent's Exhibits 19-24.) In addition, he received insurance statements addressed to the Rockdale County address in January 2006. (Testimony of Respondent, T. 193-94; Respondent's Exhibits 25-26.)

13.

The Chairman of the Rockdale County Board of Elections testified that Respondent signed a voter's registration card for Rockdale County on November 4, 2005. (Testimony of Don Cargill, T. 124-25) Respondent neither completed the questions on the card relating to citizenship or age nor indicate that he was changing his address and providing the previous address. The card is time and date stamped on the back November 10, 2005, 1:42 p.m. The Chairman of the Board of Elections did not know the meaning of the time and date stamp and had no personal knowledge of the filing of Respondent's voter registration card. (Testimony of Don Cargill, T. 130-44; Respondent's Exhibit 99.)

14.

Respondent changed the address for his automobile registration from the Henry County address to the Rockdale County address on March 20, 2006. (Testimony of Respondent, T. 209; Petitioner's Exhibit 14.) He changed his driver's license address to the Rockdale County address on May 5, 2006. Prior to that date, Respondent's driver's license had shown his previous address in Rockdale County on Wildwood Court. (Testimony of Respondent, T. 211; Petitioner's Exhibit 16.)

15.

On March 23, 2006, the Henry County School District received a "Declaration of Intent to Utilize a Home Study Program" for Respondent's son which was signed by Respondent's wife and dated September 1, 2005. Each attendance report contains Respondent's Henry County address. Respondent's wife certified on the Declaration that she would notify the Superintendent of the Henry County School District if her address changed or she discontinued the home school program. Neither Respondent nor his wife provided the School District with notification of their change in address. Attendance reports for the home study program were filed with the Henry County School District from September 2006 to March 2006. Respondent's spouse testified that her son sometimes attends his home study program in Henry County and that they wish for their son to participate in the Explorer's program in the County. (Testimony of Phyllis Crofts, T. 162-63, 171-73; Testimony of Dr. Phyllis Haden, T. 36-38; Petitioner's Exhibit 20.)

16.

In response to the challenge to Respondent's qualifications as a candidate, his wife filed home school attendance reports for September 2005 through May 2006, and a "Declaration of Intent to Utilize a Home Study Program" dated November 1, 2005, with the Rockdale County School District. The home school documentation was received by the School District on May 8, 2006.

Each attendance report contains the address of the Rockdale County property. (Testimony of Phyllis Crofts, T. 163; ALJ Exhibit 1.)

17.

Respondent's Henry County property has not been listed for sale. He has not moved any of the office equipment out of the basement to another office location or to the Rockdale County property. (Testimony of Phyllis Crofts, T. 165, 168-69.)

18.

In September 2005, Respondent had a conversation with the Tax Commissioner of Henry County in which the Commissioner understood that Respondent wished to declare a homestead exemption on his Henry County property. The Commissioner initiated the process of filing for a homestead exemption for Respondent. The completed application for homestead exemption and a receipt were mailed to Respondent with a request for his signature. Respondent never returned the signed application nor did he indicate to the Commissioner in subsequent weekly civic meetings they both attended that he did not wish to exercise his right to the exemption or that he had moved. The Tax Commissioner believed Respondent wished to declare a homestead exemption on the Henry County property until he spoke with Respondent after this challenge was filed. The Tax Commissioner's office continues to record a homestead exemption for Respondent in its official documentation but intends to revise its records to indicate that Respondent has not declared a homestead exemption. (Testimony of Andy Pipkin, T. 71-73, 77-82, 84-87; Petitioner's Exhibit 21; Respondent's Exhibits 1-3.)

19.

Respondent maintains telephone service at the Henry County property for both his office and

the home. He uses his cell phone for telephone service at the Rockdale County property.
(Testimony of Respondent, T. 199.)

20.

The 2006 general election will take place on November 7, 2006. (Stipulation of Parties.)

III.

Conclusions of Law

1.

The burden of proof is upon the party who is asserting or affirming a fact. Accordingly, the burden of proof is upon Petitioner as to whether or not Respondent qualifies as a candidate for State Senate. O.C.G.A. § 24-4-1.

2.

A candidate for State office must meet all constitutional and statutory requirements for holding the office sought by the candidate. O.C.G.A. § 21-2-5(a).

3.

At the time of their election, members of the Georgia Senate "shall have been legal residents of the territory embraced within such district from which elected for at least one year." Ga. Const. Art. III, § II, Para. III. See also, O.C.G.A. § 28-2-1(b).

4.

In addition to meeting the residency requirement, candidates for a party nomination must be an elector of the county of residence and eligible to vote in the primary. O.C.G.A. § 21-2-153(e). "Elector" means any person who possesses all the qualifications for voting prescribed by the State. O.C.G.A. § 21-2-2.

5.

Residence is the place where a "person's habitation is fixed, without any present intention of removing therefrom." O.C.G.A. 21-2-217(1). "Residence" in Georgia for elections purposes is equated with "domicile." O.C.G.A. § 21-2-2(32). To establish domicile, the party must demonstrate physical presence and intend to remain permanently. Mayo v. Ivan Allen-Marshall Company, 51 Ga. App. 250 (1935). See also Smiley v. Davenport, 139 Ga. App. 753, 757-758 (1976); Avery v. Bower, 170 Ga. 202, 206 (1929).

6.

The Georgia Legislature has established a series of rules for determining residency for registering to vote and qualifying as a candidate. These rules guide the Court's consideration of the issues in this matter. O.C.G.A. § 21-2-217.

7.

It is undisputed that Respondent's residence was the Henry County property until November 4, 2005. The Henry County Tax Commissioner's Office recorded a homestead exemption on the Respondent's Henry County property effective January 2006. The residency rules provide that "[t]he specific address in the county or municipality in which a person has declared a homestead exemption, if a homestead exemption has been claimed, shall be deemed the person's residence address." O.C.G.A. §21-2-217(14). Respondent did not sign the documentation provided to him by the Tax Commissioner's Office for the exemption and he testified that he did not wish to declare the exemption as of November 4, 2006. The Court finds that Respondent did not officially "declare" a homestead exemption for the purposes of residency. However, Respondent indicated to the Tax Commissioner his desire to file an exemption in September 2005 and he subsequently failed to dispel this notion with the Commissioner or to tell him that he had moved despite seeing him on an almost

weekly basis at Henry County civic meetings. The Court finds these failures inconsistent with the any desire by Respondent to change his residence or citizenship or to remove himself from Henry County. See O.C.G.A. § 21-2-217(1) – (3).

8.

To the extent that Respondent moved to Rockdale County in November 2005, the preponderance of the evidence indicates it was for temporary purposes only. “A person shall not be considered to have lost such person's residence who leaves such person's home and goes into another state or county or municipality in this state, for temporary purposes only, with the intention of returning, unless such person shall register to vote or perform other acts indicating a desire to change such person's citizenship and residence.” O.C.G.A. 21-2-217(2). The only evidence of anything other than temporary removal to Rockdale County presented to the Court was the lease on the Rockdale County property which expires prior to the general election, a request for the U.S. Postal Service to forward Respondent's mail, and an incomplete application to register to vote.

9.

The lease Respondent signed does not prove Respondent's desire to remove to Rockdale County permanently. Respondent has undertaken no efforts to sell the Henry County property and presented no evidence of his efforts to obtain a permanent residence in Rockdale County. While Respondent contends he intends to sell the home in Henry County, there is no evidence that he has made plans to move his office out of the home to another location or that he has a plan for such a move. He does not have any specific plans for remaining in the District after the expiration of his lease and prior to the election. Respondent does not perform the required maintenance on the house, does not maintain telephone service other than his cell phone there, and did not move furniture to the

Rockdale County property.¹ Tellingly, on his Affidavit of Candidacy, Respondent declared that his home phone number as the one assigned to the property in Henry County.

10.

While Respondent has forwarded his mail with the U.S. Postal Service, he continues to use personal checks with his Henry County address and his bank statements are mailed to the same address. Other mail presented by Respondent had the Rockdale address and yet was dated December 2005 and January 2006 and does not prove his intent to change his residence a year from the date of the general election. He did not change his automobile tag and driver's license until the spring of 2006. The weight of the evidence does not indicate that Respondent took up actual residence in District 17 "One may, for purposes of convenience, maintain a residence at a place not intended as a permanent abode without affecting any change of legal residence." Haggard v. Graham, 142 Ga.App. 498, 501 (1977). See also, Williams v. Williams, 226 Ga. 734 (1970).

11.

Respondent and his family continue to seek the benefits of citizenship in Henry County. Respondent's spouse represented to the Henry County Board of Education until February 2006 that her son resided at the Henry County property and that his home school program was being conducted there. Reports were not filed with the Rockdale County Board of Education until the instant challenge was filed. The Court finds the testimony of Respondent's wife that Respondent and his family had changed their residence to the Rockdale property of limited credibility. Instead, her testimony is further proof of Respondent's failure to effectuate a change in his legal residence.

12.

Respondent himself did not testify that he registered or was eligible to vote in Rockdale

¹ The Court gives limited credibility to the testimony of Respondent's Landlord, Ms. Davis. While she asserts that

County. Instead, he presented a copy of his voter registration card dated November 4, 2006, on which he did not swear or affirm his citizenship or age. The application for registration submitted by Respondent indicates with regard to these questions that “[y]our answer is required under federal law” and are listed as a separate oath on the application. (Respondent’s Exhibit 99.) “If an applicant fails to provide all of the required information on the application for voter registration with the exception of current and valid identification, the board of registrars shall notify the registrant in writing of the missing information. The board of registrars shall not determine eligibility of the applicant until and unless all required information is supplied by the applicant.” O.C.G.A. § 21-2-220(d). The only testimony presented on Respondent’s voter registration was the Chairman of the Rockdale County Board of Elections who did not have personal knowledge of Respondent’s application, could not explain the meaning of the date and time stamp on the card and testified only to the customary practice by the Registrar of which he admitted he was not fully aware. There is insufficient evidence to determine that Respondent is an elector eligible to vote in District 17. In addition, while the card is some evidence of Respondent’s desire to register in Rockdale County, it is counter-balanced by his further failure to declare in response to the specific question on the card that he was changing his address from the Henry County property to the Rockdale County property.

13.

In resolving the issue of Respondent’s qualification as candidate for Senate District 17, the Court has assessed the credibility of the witnesses presented by the parties. O.C.G.A. § 24-9-80. In this regard, the Court considered the witnesses’ manner of testifying, their intelligence, their means and opportunity of knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest and their

she lives in the same home with Respondent, she does not know how often Respondent is at the Rockdale property.

personal credibility. The preponderance of the credible evidence is that Respondent has not removed himself to District 17 with sufficient intent to remain. In addition, Respondent is not presently an eligible voter for District 17 as defined by Georgia law.

IV.

Decision

Respondent is not qualified to be a candidate for Senate District 17.

This 26th day of May 2006.


DAWN R. SMITH
Administrative Law Judge