



Municipal Technical Advisory Service INSTITUTE FOR PUBLIC SERVICE

February 21, 2002 (updated 8/18/17 by E. Hodge)

Dear City Manager:

You have the following question: Does the law require that students at the University automatically be qualified as a resident of the City for voter registration purposes?

In my opinion, the answer is no. The principles and factors that are supposed to apply to the question of whether a person is a resident for the purposes of voter registration are contained in Tennessee Code Annotated, ' 2-2-122. I have been told that from a practical standpoint, when some college students in Tennessee apply for voter registration at the location they are students, and sign the affidavit of legal residence on the registration form prescribed by Tennessee Code Annotated, ' 2-2-116, the election registrar does not inquire beyond the face of the affidavit. However, it is clear that Tennessee Code Annotated, ' ' 2-2-120, 2-2-122, and 2-2-116, do not contemplate that the affidavit necessarily be conclusive

Here, let me advise you also direct your question to the Tennessee Election Commission in the Office of the Tennessee Secretary of State. I have checked the promulgated state rules and regulations on election procedures and find not dealing with your question, but the Commission may have issued policies that bear on the question.

Tennessee Code Annotated, ' 2-2-122 contains the principles and factors that county election commissions are supposed to apply to determine whether an application for voter registration qualifies as a resident within the meaning of the Tennessee election code. (I have enclosed a copy of that statute for your perusal). Those principles and factors center around the intent of the applicant for registration to make the place of his registration his residence. With respect to the effect of the presence of a student in a city where the college is located on his or her *present intention* to make that place his or her residence, Tennessee Code Annotated, ' 2-2-122(7), says:

A person does not gain or lose residence solely by reason of the person's 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 while kept in an institution at public expense, or while confined in a public prison or while living on a military reservation...

Under that statute a student's presence at the University in and of itself does not make him or her a resident of your city. It is his or her intention to make that place his or her residence that creates the residency.

Tennessee Code Annotated, ' 2-2-116 prescribes the registration form to be used for voter registration. At the end of that form is the following affidavit which the applicant for registration signs:

I, being duly sworn on oath (or affirmation) declare that the above address is my legal residence and that I plan to remain at such residence for an undetermined period of time and say that to the best of my knowledge and belief all of the foregoing statements made by me are true.

Tennessee Code Annotated, ' 2-2-120, declares that:

The administrator of elections shall determine, from the registrant's answers to the questions on the permanent registration record *and other questions if necessary*, whether the registrant is entitled to register. If the administrator determines that the registrant is entitled to register, the administrator shall declare the registrant a registered voter.

Surprisingly, there are no cases in Tennessee in which the application of the above statutory scheme has been an issue with respect to college students. However, the application of similar laws to college students has been an issue in other states. It appears that the heavy weight of authority in those states is that statutes which (like Tennessee Code Annotated, ' 2-2-122(7)) makes a college student's presence at the location of his or her college neutral for the purposes of determining residency for voting registration purposes, are constitutional, and that there is a rebuttable presumption that a student is *not* a resident of the location of his or her college. [See 44 ALR3d 797, *Voting^BResidence of Students*.]

Two cases pertinent to Tennessee, and involving prisoners' attempts to change their residence, appear to follow that heavy weight of authority, and are instructive of the law that probably applies to college students. Tate v. Collins, 622 F. Supp. 1409 (W.D. Tenn. 1985), involves the clarification of the Court's earlier consent order, which provided that:

The registrant's right to register shall be determined in accordance with the provisions of Tennessee Code Annotated, sections 2-2-120^B2-2-122. A registrant presently incarcerated in a jail, workhouse, prison or other penal institution shall be presumed to legally reside at his last free-world residence prior to his conviction unless a contrary intent is shown pursuant to Tennessee Code Annotated sections 2-2-102-2-2-122. [At 1410]

In its clarification of the consent order, the Court established procedures that allowed election commissions to look beyond the affidavit contained in the permanent record of registration prescribed in Tennessee Code Annotated, ' 2-2-116, to corroborate the intent of the prisoners to establish residency in Davidson County, the extent of the corroboration required to depend upon a number of factors peculiar to prisoners.

In support of the corroboration requirement, the Court in Tate v. Collins pointed to Auerbach v. Rettaliata, 765 F.2d 350, 353-355 (2d Cir.1985), Collins

for the proposition that, ^ΔThe Second Circuit has held in the area of student voting that a state will not run afoul of equal protection clause by conducting a more 'searching inquiry' of the factual circumstances of recognizable categories of persons who present 'special problems' in determining residence. [At 1412]. In Auerbach a New York statute provided (as does Tennessee Code Annotated, ' 2-2-122) that a person did not gain or lose a residence by reason of being a student at any institution of learning. But the New York statute went considerably beyond Tennessee Code Annotated, ' 2-2-122 in prescribing what election registrars could consider in determining the residency of a college student: In addition to the applicant's expressed intent:

....his conduct and all attendant surrounding circumstances relating thereto....the applicant's financial independence, business pursuits, employment, income sources, residence for income tax purposes, age, marital status, residence of parents, spouse and children, if any, leaseholds, site of personal and real property owned by the applicant, motor vehicle and other personal property registration, and such other factors that it may reasonably deem necessary to determine the qualification of an applicant to vote in an election district within its jurisdiction. [At 352]

The Court upheld that statute against a number of challenges. The state had a legitimate interest in ferreting out persons whose claim of residency is not bona fide. "There is nothing," said the Court, "constitutionally impermissible in New York's having thus enumerated certain categories of persons who, despite their physical presence may lack the intention required for voting, persons who, in the Supreme Court's words, 'present specialized problems in determining residence. '" [Citations omitted.] [At 355]

Stifel v. Hopkins, 477 F.2d 1116 (6th Cir. 1977) is particularly relevant to Tennessee because it is a 6th U.S. Circuit Court of Appeals case, and Tennessee is in the 6th Circuit. There a prisoner, who conceded that he was a resident of Ohio, but who was incarcerated in a federal prison in Pennsylvania under a life sentence, attempted to change his residency from Ohio to Pennsylvania for diversity of citizenship purposes. He supported his attempt with an affidavit stating his intention to remain in Pennsylvania indefinitely. The federal district court rejected his attempt to change his citizenship, and accorded his affidavit no weight.

On appeal to the 6th Circuit, the Court held that the prisoner was not barred from attempting to show that he had changed his citizenship from Ohio to Pennsylvania. But what was required of the prisoner to demonstrate his intent to change his residency from Ohio to Pennsylvania?

We recognize the importance of considering physical or legal compulsion in determining whether domicile is gained or lost, but we limit the application of involuntary presence to its operation as a presumption ordinarily requiring more than unsubstantiated declarations to rebut....In making this factual determination, the

[district] court should accord weight to appellant's declarations of intentions, but in the circumstances of this case the physical facts pertaining to appellant's incarceration and to the conduct of his personal affairs assume perhaps a greater than usual significance because appellant's statements of intention cannot bear on his initial relocation to Pennsylvania. The court should consider factors such as the possibility of parole for appellant, the manner in which appellant has ordered his personal and business transactions, and any other factors that are relevant to corroboration of appellant's statements. These factors must be weighed along with the policies and purposes underlying federal diversity jurisdiction to determine whether appellant has overcome the presumption that he has maintained his former domicile. [At 126-127]

Two things in that language stand out with respect to a prisoner's change in residency:

1. The prisoner's affidavit of intent to change his residency should have been accorded some weight.
2. The affidavit required corroboration by other evidence of intent.

In outlining the law governing the right of particular groups (servicemen, people who need medical treatment, refugees and fugitives, students and teachers, government employees) to change their residency to places where they are compelled by circumstances to be, the Court said this:

The foregoing examples warrant two observations. First the bare fact that a person has been 'compelled' to relocate within a particular jurisdiction does not ordinarily prevent him from becoming domiciled therein, *although courts are justifiably concerned with substantiating declared intentions*. Second, persons are 'compelled' to relocate by a variety of circumstances, ranging from pursuit of employment, to therapeutic dictates for illness; *from the desire to attend educational or vocational institutions* to the demands of the sovereign...[At 1124]

That language stands for the proposition that among those classes of people who are "compelled" to relocate are students, and that where persons who are "compelled" to relocate wish to change their residencies, "the courts are justifiably concerned with substantiating declared intentions."

It should be pointed out here that Stifel v. Hopkins involved a prisoner's change in residency for diversity of citizenship purposes rather than for the purposes of voter registration, but Tate v. Collins declared that there was no distinction in those purposes with respect to the

right of the state to require some corroboration of a prisoner's declaration of intent of residency. Indeed, as seen above, Stifel v. Hopkins itself analyzed the various groups of persons subject to some sort of compulsion to relocate, and whose relocation created special problems for voter registration purposes.

I have gone around in a circle. I started with Tennessee Code Annotated, ' ' 2-2-122, 2-2-116, and 2-2-120, and can only come back to them. The cases cited herein seem to lead in the same circle. The residency of college students is determined by those statutes. Tennessee Code Annotated, ' 2-2-122(7) provides that the mere presence of a student in the location of his or her college is not by itself sufficient for him or her to lose, or to gain, his or her residency. That statute appears to place a legally permissible burden on the college student to produce evidence of his or her present intent that the location of his or her college is his or her residence. The student can produce at least some such evidence by signing the affidavit on the permanent registration record prescribed by Tennessee Code Annotated, ' 2-2-116. However, that affidavit is not necessarily conclusive. The administrator of elections has the duty in Tennessee Code Annotated, ' 2-2-120 to determine, "from the registrant's answers to the questions on the permanent registration record, and other questions, if necessary" if the applicant is a resident. Tennessee Code Annotated, ' 2-2-122 contains the principles and factors that go into making such determinations.

I have not mentioned to this point that under Tennessee Code Annotated, ' 2-2-125 where the election registrar rejects a student's attempted registration, the administrator of elections must notify the student that he or she can appeal the rejection to the election commission. The Court in Auerbach v. Rettaliata responded to the plaintiff's argument that the statute under which election officials were allowed to ask voter registration applicants even more searching questions than are listed in Tennessee Code Annotated, ' 6-2-122, gave those officials too much discretion, by declaring that the election board was governed by those factors, and that the election board's decisions were subject to judicial review.

Sincerely,

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