

**OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

ANISSA JONES, :
 Challenger/Petitioner, :
 : :
v. : :
 : :
JAMES THEODORE BEVERLY III, : :
 : :
 Candidate/Respondent. : :
_____ : :

DOCKET NUMBER:
OSAH-SECSTATE-CE-1136726-60
MALIHI



DECISION

Petitioner challenges Respondent's qualification to be a candidate for House District 139. More specifically, Petitioner contends that Respondent has not been a legal resident of House District 139 for at least one year. A hearing was held on July 11, 2011. Based on the evidence presented, the Court concludes that Respondent is qualified to be a candidate for House District 139.

FINDINGS OF FACT

1.

On June 16, 2011, Respondent filed a sworn Notice of Candidacy and Affidavit seeking the office of Georgia House of Representatives District 139 in the special election to fill the vacancy to be held on July 19, 2011. Court's Ex. 1.

2.

In his Notice of Candidacy and Affidavit, Respondent swore that he had been a resident of Georgia for sixteen years and a resident of House District 139 for one year. Court's Ex. 1.

3.

On June 29, 2011 Petitioner Anissa Jones, a registered voter and eligible elector in House District 139, filed a challenge to Respondent's qualifications with the Secretary of State.

Testimony of Petitioner; Petitioner's Ex. 10.

4.

Petitioner asserts that Respondent does not meet the constitutional and statutory residency requirements for candidates for the State House of Representatives because Respondent will not have been a legal resident of the territory embraced within Georgia House of Representatives District 139 for at least one year immediately preceding the date of the election – therefore by July 19, 2011 – as required by Article III, Section II, Paragraph III (b) of the Constitution of the State of Georgia.

5.

On June 9, 2010, Respondent executed a lease agreement with Dwan Packnett to lease a house located at 1469 Chestnut Street, Macon, Georgia. Testimony of Respondent; Respondent's Ex. 1. The rental term under the lease agreement commences on June 14, 2010 and ends on December 31, 2011. The lease requires a payment of \$1000 per month to be deposited directly into Ms. Packnett's bank account. Respondent's Ex. 1. Ms. Packnett, as landlord, is responsible under the lease agreement for paying all utility bills. Testimony of Respondent; Respondent's Ex. 1. Respondent pays his rent by transferring money into his landlord's account. Testimony of Respondent.

6.

Respondent graduated from Harvard University John F. Kennedy School of Government on May 29, 2010. After graduation, Respondent moved from Massachusetts back to Macon,

Georgia. Respondent moved directly from Massachusetts into the Chestnut Street house on June 14, 2010. Testimony of Respondent.

7.

The Chestnut Street residence is in House District 139. Respondent's Ex. 4.

8.

Respondent lived in a house at 119 Brookefield Drive, Macon, Georgia with his wife and three kids from 2001 to 2009. He and his wife have been legally separated since early 2009, and he had no intention of moving back into the Brookefield Drive residence upon graduation.

Testimony of Respondent.

9.

The home at Brookefield Drive is in House District 136. Testimony of Respondent.

10.

Respondent owns the home at Brookefield Drive in his name. He is responsible for paying the property taxes on the Brookefield Drive home. Respondent applied for a homestead tax exemption in 2008 on that home. Testimony of Respondent; Petitioner's Ex. 2. Respondent currently receives a homestead exemption on the Brookefield Drive property. Testimony of Respondent.

11.

Respondent submitted mail he received at the Chestnut Street address from July 1, 2010 to June 15, 2011. Respondent's Exs. 3, 5, 7, 8, 9, 10. The correspondence includes an envelope from "Temporary Accommodations" postmarked July 1, 2010, Respondent's Ex. 3, an automobile repair invoice from Jackson Automotive dated December 30, 2010, Respondent's Ex. 5, a leadership class invoice from the Greater Macon Chamber of Commerce dated January 19,

2011, Respondent's Ex. 7, an internet and cable bill from Cox Communications dated February 23, 2011, Respondent's Ex. 8, a shipping notice from Barnes & Noble with a shipping date of April 11, 2011, Respondent's Ex. 9, and an internet and cable bill from Cox Communications dated June 15, 2011, Respondent's Ex. 10.

12.

Respondent changed his voter registration address from the Brookefield Drive address to the Chestnut Street address on September 15, 2010. Testimony of Respondent.

13.

Respondent purchased a Mercedes Benz on October 16, 2010. Testimony of Respondent; Petitioner's Ex. 5. The vehicle was registered at the Brookefield Drive address. Testimony of Respondent; Petitioner's Ex. 5. Respondent is the sole owner of the vehicle. Testimony of Respondent; Petitioner's Exs. 6, 7.

14.

Respondent did not receive internet or cable at the Chestnut Street house until early 2011. Testimony of Respondent.

15.

Respondent's wife, Michelle Beverly, testified at the hearing. She and Respondent have been separated for over three years and have no intent of reconciling their marriage. Testimony of Ms. Beverly. She also testified that Respondent did not move back to the house upon graduation, nor did he spend the night there once he moved back to Macon. Respondent moved directly from Massachusetts to the Chestnut Street address. Testimony of Ms. Beverly.

CONCLUSIONS OF LAW

1.

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

2.

At the time of their election, members of the Georgia House of Representatives must also “have been legal residents of the territory embraced within the district from which elected for at least one year.” GA. CONST., Art. 3, Sec. 2, Par. 3(b); O.C.G.A. 28-2-1(b).

3.

The Georgia Election Code provides that a qualified elector from the district in which the candidate is seeking election may challenge the candidate’s qualifications to hold office. O.C.G.A. § 21-2-5(b).

4.

In this case, Petitioner, a qualified elector in House District 139, contends that Respondent has not been a resident of House District 139 for one year.

5.

Under *Haynes v. Wells*, 273 Ga. 106, 538 S.E.2d 430 (2000), the burden of proof is entirely upon Respondent to establish affirmatively his eligibility for office. It is Respondent’s burden to establish that the two residency requirements at issue have been met, not Petitioner’s burden to disprove Respondent’s residency:

Thus, the statutes place the affirmative obligation on Haynes [the challenged candidate] to establish his qualifications for office. Wells [the challenger] is not required to disprove anything regarding Haynes’s eligibility to run for office, as the entire burden is placed upon Haynes to affirmatively establish his

eligibility for office. He failed to make that showing. Hence, his candidacy for the fifth district seat was invalid.

Haynes, 538 S.E.2d at 108-109.

6.

Therefore, Respondent must prove that he has been a resident of House District 139 since at least July 19, 2010 in order to be qualified to run for the House of Representatives.

7.

The standard of proof on all issues is the preponderance of the evidence standard. OSAH Rule 616-1-2-.21(4).

8.

In resolving the issues of whether Respondent has been a resident of House District 139 for one year, the Court looks to both statutory and common law regarding residency.

9.

O.C.G.A. § 21-2-217(a)(1) defines “residence” as “that place in which such person’s habitation is fixed, without any present intention of removing therefrom.” Statutory law also provides that “residence” is a person’s domicile. O.C.G.A. § 21-2-2(32).

10.

Georgia courts have agreed that the term “residence” is interchangeable with the concept of “domicile.” *Dozier v. Baker*, 283 Ga. 543, 543-44 (2008); *Holton v. Hollingsworth*, 270 Ga. 591, 593 (1999); O.C.G.A. § 21-2-2(32).

11.

To establish residency or domicile, parties must demonstrate a physical presence and an intention to remain permanently. *Smiley v. Davenport*, 139 Ga. App. 753, 756-758 (1976).

12.

Determining domicile is a mixed question of law and fact that should be determined by the trial court as a matter of law when the evidence establishes a plain and palpable case. *Dozier*, 283 Ga. at 544.

33.

In O.C.G.A. § 21-2-217, the Georgia General Assembly established a series of rules for determining residency for registration to vote and qualifying as a candidate, which guide the Court in its consideration of this matter. The rules include the mandates that a person's residence is where the person lives and intends to remain; that the removal from a municipality, county or state may be temporary or permanent; that the "mere intention to acquire a new residence, without the fact of removal, shall avail nothing; neither shall the fact of removal without the intention;" and that other evidence indicating where the person resides – such as where the person receives a significant amount of mail – may be considered. O.C.G.A. §§ 21-2-217(a)(9), 21-2-217(a)(15).

4.

A candidate can demonstrate his or her lack of intent to remove from his or her place of habitation through any number of ways, including voter registration, voting history, driver's license, homestead exemption, vehicle registrations, purchase of property, payment of property taxes, service on a jury, income tax returns, campaign disclosure reports, qualifying affidavit to run for office, where the candidate receives personal and business mail, and church attendance. *Dozier*, 283 Ga. at 544.

15.

In this case, Respondent has the affirmative burden to demonstrate that he has been a resident of House District 139 for one year. Respondent has met this burden.

16.

Two witnesses testified at the hearing for the Respondent, namely Respondent and Respondent's wife, Mrs. Michelle Beverly. The Court finds the testimony of Respondent and Mrs. Beverly to be credible. Both Respondent and Mrs. Beverly testified that Respondent has lived in the in House District 139 at the Chestnut Street residence since June 2010. Both Respondent and Mrs. Beverly also testified that Respondent has not resided in the Brookefield Drive home since 2009.

17.

In resolving the issue of Respondent's residency, the Court has considered the documentary evidence and the credibility of Respondent's and Mrs. Beverly's testimony. The Court considered the 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 personal credibility.¹ The Court has no reason to believe that the testimony of Respondent or Mrs. Beverly is not credible.

18.

Although the evidence provided by Respondent was not overwhelming, the Court finds that Respondent has met the minimum burden of proof. Respondent provided a lease agreement for the Chestnut Street residence commencing on June 14, 2010. Respondent also presented a

¹ The credibility of witnesses is within the sole discretion of the trier of fact. In non-jury cases that discretion lies with the judge. See *Mustang Transp., Inc. v. W.W. Lowe & Sons, Inc.*, 123 Ga. App. 350, 352 (1971).

document mailed to him at the Chestnut Street address postmarked July 1, 2010. While Respondent claims a homestead exemption for the Brookefield Drive home, this fact is not dispositive in proving Respondent's residency and is only one factor the Court considered in reviewing the evidence.²

19.

The preponderance of the credible evidence is that Respondent did establish residency in House District 139 for at least one year prior to July 19, 2011. Accordingly,

DECISION

IT IS HEREBY ORDERED THAT Respondent, James Theodore Beverly III, is qualified to be a candidate for House District 139, and his name shall remain on the ballot.

THIS 17 DAY OF JULY, 2011.



MICHAEL MALIHI, JUDGE



² *Handel v. Powell*, 284 Ga. 550, 554-55 (2008) (All 15 rules of O.C.G.A. § 21-2-217 should be considered in determining residency insofar as they are applicable. The homestead exemption is merely one factor in making a residency determination and is not dispositive.).