

**IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

WILLIAM HEATH JR and WILLIAM
HOUSTON,
Challengers/Petitioners,

v.

WILLIAM CARRUTH,
Candidate/Respondent.

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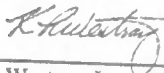


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INITIAL DECISION

I. INTRODUCTION


Kevin Westray, Legal Assistant

Pursuant to O.C.G.A. § 21-2-5(b), Challengers/Petitioners (hereinafter “Petitioners”) challenge Respondent’s qualifications to be a candidate for the Georgia State Senate in District 31. The undersigned held a hearing in this matter on July 3, 2012 and the record closed on July 9, 2012.¹ For the reasons indicated below, the undersigned Administrative Law Judge rejects Petitioners’ challenge and determines that Respondent **is qualified** to be a candidate for State Senate District 31.

II. FINDINGS OF FACT

A. Residency

1.

Respondent has filed a Declaration of a Notice of Candidacy and Affidavit seeking to qualify as a candidate for election in Georgia State Senate District 31. Petitioners first challenge

¹ At the close of Petitioners’ presentation, Respondent moved for Involuntary Dismissal pursuant to GA. COMP. R. & REGS. § 616-1-2-.35. The undersigned reserved ruling on the Motion. After due consideration, the undersigned denies the Motion. *See Haynes v. Wells*, 273 Ga. 106 (2000) (holding that the burden of proof rests upon the candidate to establish his eligibility for office).

Respondent's qualifications based on residency, maintaining that Respondent resides outside of Senate District 31 in a home located at 1400 Paul Akin Road in Dallas, Georgia (hereinafter "the Paul Akin Property"). Petitioners complain that Respondent will not have been a legal resident of Senate District 31 for one year prior to the date of the general election and therefore is disqualified from seeking that office under Georgia law. (Testimony of William Heath Jr.).

2.

On or about October 11, 2011, Respondent and his wife, Laura Carruth, purchased real property located at 625 Willow Pointe Drive, Dallas, Georgia (hereinafter "the Willow Pointe Property"). The Willow Pointe Property is located within Senate District 31, and Respondent purchased it with the specific intent of running for public office in Senate District 31. The property is also two houses away from Respondent's mother's home. Respondent's mother is 84 years old. (Testimony of Respondent; Exhibits R-1; R-2).

3.

Prior to moving to the Willow Pointe Property, the Carruth family resided at the Paul Akin Property, a short distance away. The Paul Akin Property is not in Senate District 31. Respondent and his wife owned this property jointly, until July 15, 2008, when Respondent assigned all of his interest in the Paul Akin Property to his wife via a quitclaim deed. On December 19, 2008, Mrs. Carruth transferred her interest in the Paul Akin Property to the Laura A. Carruth Residence Trust, of which Respondent is the Trustee. (Testimony of Respondent; Exhibits R-11; R-12).

4.

After purchasing the Willow Pointe Property, Respondent and his wife furnished the property and purchased appliances to use in the property. In October of 2011, the Carruths also executed

contracts for various utilities and services. Specifically, the Carruths established electrical utility service, natural gas service, waste disposal services, water and sewer utilities, and cable service for the Willow Pointe Property. Evidence submitted at the hearing demonstrate that the rates of use of these services have fluctuated over time, indicating varying amounts of usage. (Testimony of Respondent; Exhibits R-4; R-5; R-6; R-7; R-8).

5.

On October 31, 2011, Respondent changed his voter registration using the Willow Pointe Property as his residence. Respondent voted at his newly assigned precinct on March 6, 2012.² Respondent also attends Church in Senate District 31, and his business office is located within this District. He receives most of his significant mail in Senate District 31. (Testimony of Respondent; Exhibit R-3).

6.

The Petitioners maintain that Respondent and his family still reside at the Paul Akin Property, which is outside of Senate District 31. Petitioners look to the fact that the Paul Akin Property is approximately 5,000 square feet, while the Willow Pointe Property only is approximately 2,400 square feet. Petitioners further note that the Paul Akin Property received a homestead exemption as of January 1, 2012. (Testimony of Respondent; Testimony of William Heath).

7.

Senator Heath, one of the Petitioners in this action, lives in Bremen, Georgia. He currently represents Senate District 31. Senator Heath has driven by the Paul Akin Property and determined that the lights and power appear to be working. He also observed that photographs posted to Facebook demonstrate that the Carruth family used this property during Christmas

² Exhibit R-3 lists Respondent's voting location as Hope Church on 1970 Marietta Hwy, Dallas. The District combination is listed as 209 and, curiously, the Senate District is noted as 30.

2011 and on several other occasions. (Testimony of William Heath; Testimony of Respondent; Exhibits P-1; P-3; P-4; P-5; P-6; P-8; P-9; P-10; P-12).

8.

Respondent acknowledges that the Carruth family uses the Paul Akin Property as a vacation residence. They spend several nights a month at this residence and generally leave the lights on most evenings for security purposes. Respondent also acknowledges a homestead exemption was received for this property. Upon receiving the notice, Respondent, as Trustee of the Laura A. Carruth Residence Trust, wrote to the Paulding County Board of Tax Assessors to disclaim the homestead exemption, noting “[p]lease be advised that as of – prior to January 1, 2012, the property no longer served as the primary residence of its occupants, and as such the homestead exemption should be removed for the 2012 tax year.” (Testimony of Respondent; Exhibit R-14).

B. Public Funds

9.

Petitioners also assert that Respondent is the illegal holder of public funds, and is thus ineligible to hold office. In 2007, Respondent obtained a line of credit with Silverton Bank, N.A., f/k/a Bankers Bank, N.A. (hereinafter “Silverton Bank”). The Federal Deposit Insurance Corporation (hereinafter “FDIC”) was subsequently appointed as receiver to take over the operations of Silverton Bank. At the time the FDIC was appointed as receiver to manage operations of Silverton Bank, Respondent was current on his obligation to the bank. (Testimony of Respondent).

10.

Respondent never drew on his line of credit while Silverton Bank was in FDIC receivership, and Respondent has not borrowed money from the FDIC. The FDIC subsequently initiated collection efforts to collect the balance of a loan made to William Carruth and Laura Carruth. On April 26, 2012, the United States District Court for the Northern District of Georgia issued a default judgment in the amount of \$2,351,6661.86 in favor of the FDIC and against the Carruths. The Carruths did not timely appeal the judgment, and thus it is final. Although Respondent and his wife are negotiating the debt, at the time of the hearing the debt had not been satisfied. (Testimony of Respondent; Exhibits P-13; P-14).

III. CONCLUSIONS OF LAW

1.

The pertinent law governing this matter is the Georgia Election Code, O.C.G.A. § 21-2-1 *et seq.*

2.

Every candidate for state office who files a notice of candidacy shall meet all the constitutional and statutory requirements for holding the office sought by that candidate. O.C.G.A. § 21-2-5(a).

3.

The Georgia Supreme Court has placed the affirmative obligation on the candidate to establish his qualification for office. Therefore, the entire burden is placed upon the candidate to affirmatively establish his eligibility for office. *Haynes*, 273 Ga. at 108-109.

4.

The Georgia Constitution provides that Senate candidates must be legal residents of the district from which elected for at least one year. Ga. Const. Art. III, § II, Para. III(a). The Georgia Constitution also provides that “No person...who is the holder of public funds illegally shall be eligible to hold any office or appointment of honor or trust in this state.” Ga. Const. Art. II, § II, Para. III.³

5.

Pursuant to Code Section 21-2-5(b), either the Secretary of State or a qualified elector residing in a state legislative district may challenge a candidate’s qualifications to hold office. Petitioners challenge Respondent’s qualifications on two grounds, contending that he will not have been a legal resident of the territory embraced within the district from which elected for at least one year and that he is the illegal holder of public funds.

6.

“The residence of any person shall be held to be in that place in which such person’s habitation is fixed, without any present intention of removing therefrom.” O.C.G.A. § 21-2-217(a)(1). “Residence” means domicile. O.C.G.A. § 21-2-2(32). To establish domicile, parties must demonstrate a physical presence and intent to make that place home. *Smiley v. Davenport*, 139 Ga. App. 753, 757-758 (1976). There is no bright-line test to determine domicile as “[n]o definite amount of time spent in a place is essential to make that place a home.” *Id.* at 757 (citation omitted).

³ O.C.G.A. § 45-2-1(2) renders ineligible “holders or receivers of public money of this state [.]”

7.

Petitioners maintain Respondent is ineligible to run because of the homestead exemption assigned to the Paul Akin Property, which is strong probative evidence of residence. O.C.G.A. § 21-2-217(14). Moreover, they point to evidence that the Carruth family spends time at the Paul Akin Property, moved from this larger residence to a much smaller residence within Senate District 31, and leaves the lights and power on at the Paul Akin Property.

8.

Georgia Code Section 21-2-217(a) sets forth fifteen factors to be considered in determining the residency of a candidate for public office. Consideration may be given to such factors and “any other evidence that indicates where the person resides.” O.C.G.A. § 21-2-217(a)(15). No single factor can be given greater weight than another. *See Handel v. Powell*, 284 Ga. 550 (2008). Notwithstanding the evidence presented by Petitioners, Respondent has presented persuasive evidence that he moved to Senate District 31 with an intent to make the Willow Pointe Property his home in October of 2011. Respondent and his family reside in the Willow Pointe Property, purchased furniture for the property, and receive multiple utility services at the property. Respondent receives mail and attends church within the district. He changed the address of his voter registration to the Willow Pointe Property, and has voted in an election using this registration. Moreover, Respondent has attempted to cancel the homestead exemption for the Paul Akin Property.

9.

Although Petitioners point to Respondent’s celebration of Christmas and other occasions at the Paul Akin Property, “[i]f a person leaves the place of his domicile temporarily, or for a particular purpose, and does not take up an actual residence elsewhere *with the avowed intention of making*

a change in his domicile, [the person] will not be considered as having changed his domicile.” *Haggard v. Graham*, 142 Ga. App. 498, 501 (1977) (decided under former Code 1933, § 34-103) (citing *Williams v. Williams*, 226 Ga. 734 (1970)). The evidence presented at the hearing indicates any absences from Senate District 31 were temporary in nature and inconsistent with a change in domicile. A consideration of the totality of the evidence supports Respondent’s testimony that he lives in the Willow Pointe Property and has done so since October of 2011.

10.

The enabling legislation of the FDIC endows it with dual roles: (i) governmental regulator of federally-insured financial institutions, and (ii) receiver of failed institutions. In the latter role, it stands in the shoes of the bankrupt institution, acting as a private party vindicating private interests. 12 U.S.C. § 1811 (2006) (establishing the FDIC); *see also* 12 U.S.C. § 1822 (2006) (describing role of FDIC as receiver of failed institutions); *see* 12 U.S.C. § 1821(d) (2006) (“The [FDIC] shall, as conservator or receiver . . . succeed to all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder . . . or director of such institution.”); *see also United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) (“Although the RTC [predecessor to the FDIC] was created by the Government, it has a non-governmental function in the initial stages of reorganization of a financial institution.”).

11.

Respondent incurred his debt to Silverton Bank, a private entity. In time, the FDIC became Silverton Bank’s receiver. When the FDIC acts as a receiver, it stands in the position of the insolvent bank. *See Kelley v. First Westroads Bank*, 840 F.2d 554, 559 (8th Cir. 1988) (“In short the FDIC [as receiver] stands in the position of the insolvent bank.”); *FDIC v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) (“It has been held that when FDIC acts as a receiver and

liquidating agent for a failed bank, as it did here, it merely ‘stands in the shoes of the insolvent bank.’”). Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity, the government's activities are analogous to those of a private concern. This distinction has been used by courts to justify estoppel of the government in a number of different situations. *See id.* (FDIC subject to estoppel when it acts in its corporate capacity and performs essentially the same function as a private bank). Moreover, “the FDIC is not an integral part of the governmental mechanism but is rather a separate legal entity serving essentially a proprietary ... function.” *Lapeadula & Villani, Inc. v. United States*, 563 F. Supp. 782, 784 (S.D.N.Y. 1983). Accordingly, a debt to the FDIC in the instant case does not involve public funds, and therefore there is no bar Respondent’s candidacy.

IV. DECISION

Based upon the above Findings of Fact and Conclusions of Law, Respondent **is qualified** to be a candidate for State Senate District 31.

SO ORDERED THIS 10th day of July, 2012.



RONIT WALKER
Administrative Law Judge