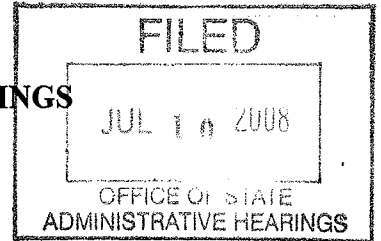


IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS

STATE OF GEORGIA



IAN O'BRIEN,
Challenger,

v.

KEITH GROSS,
Candidate.

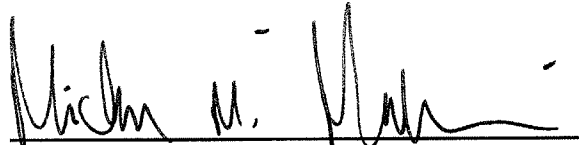
:
:
:
:
:
:
:

Docket No.: OSAH-SECSTATE-CE-0829726-
60-Malihi

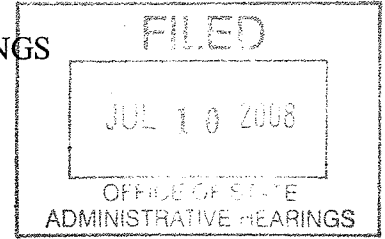
ORDER FOR SEALING OF PRIVATE INFORMATION
CONTAINED IN THE RECORD

At the request of the parties, it is hereby ordered that all hearing exhibits be and shall remain SEALED until such time as it becomes necessary to open the records by an appropriate appellate agency or court for review of issues raised in this controversy.

This 10th day of July, 2008.


MICHAEL M. MALIHI, JUDGE

OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



IAN O'BRIEN, :
Petitioner, :
v. :
KEITH GROSS, :
Respondent. :

DOCKET NUMBER:
OSAH-SECSTATE-CE-0829726-60
MALIHI

DECISION

Petitioner challenges Respondent's qualification to be a candidate for House District 80. More specifically, Petitioner contends that Respondent has not been a legal resident of House District 80 for at least one year, and a citizen of Georgia for at least two years. A hearing was held on June 23, 2008. The record closed on July 3, 2008. Based on the evidence presented, the Court concludes that Respondent is not qualified to be a candidate for House District 80.

FINDINGS OF FACT

1.

On April 28, 2008, Respondent filed a sworn Declaration of Candidacy and Affidavit seeking the Democratic nomination for Georgia House of Representatives District 80. T. 96:2-6; Petitioner's Ex. 22.

2.

In his Declaration of Candidacy and Affidavit, Respondent swore that he had been a resident of Georgia for three years and a resident of House District 80 for one year. T.96:18-97:7; Petitioner's Ex. 22.

3.

On May 14, 2008 Petitioner Ian O'Brien, a registered voter and eligible elector in House District 80, filed a challenge to Respondent's qualifications with the Secretary of State.

T. 137:7-15.

4.

Petitioner asserts that Respondent does not meet the constitutional and statutory residency requirements for candidates for the State House of Representatives because:

(a) Respondent will not have been a citizen of the State of Georgia for at least two years immediately preceding the date of the election – therefore by November 4, 2006 – as required by Article III, Section II, Paragraph III(b) of the Constitution of the State of Georgia; and

(b) Respondent will not have been a legal resident of the territory embraced within Georgia House of Representatives District 80 for at least one year immediately preceding the date of the election – therefore by November 4, 2007 – as required by Article III, Section II, Paragraph III (b) of the Constitution of the State of Georgia. T. 16:4-16.

5.

Respondent was born in Florida on October 19, 1983. T. 138:22-24. Respondent lived in Florida continuously from the time he was born and attended college there through mid-2003.

T. 23:5-23; 138:25-139:23.

6.

Respondent first obtained a Florida Driver's License in February 1999, Petitioner's Ex. 24, and registered to vote in Florida around the time he turned 18 in 2001. T. 36:21-37:3.

7.

After attending college in Florida for awhile, Respondent moved to San Francisco, California and operated a chocolate company in 2003 and 2004. T. 25:10-15.

8.

Respondent testified that he moved to Georgia when his mother did; this was in 2004, between the operation of the chocolate company in California and the purchase of a steakhouse restaurant in the Washington, D.C. area. T. 34:9-35:24.

9.

In 2004, Respondent voted in Florida in the November 2004 presidential election. T. 156:6-23.

10.

Respondent testified that in April or May of 2004, he moved to Conyers, Georgia to live with his mother, T. 48:17-20, and in May 2005, he decided to make Georgia his permanent residence. T. 33:14-34:6; 34:9-22; 96:18-25.

11.

Although Respondent swore on his Declaration of Candidacy, Petitioner's Ex. 22, that he had been a resident of the state of Georgia for three years, he could not say precisely when that residency began. T. 96:18-25.

12.

Respondent maintained his Florida Driver's License throughout 2005, T. 38:7-39:1; he renewed his Florida license in 2006. Petitioner's Ex. 24.

13.

Respondent testified that he had decided to make Georgia his home with his mother; however, he also testified that his mother moved back to Florida around May 2005. T. 35:19-24. Respondent left Georgia to own and operate a steakhouse in Gaithersburg, Maryland, a suburb of Washington, D.C. T. 25:3-9; Petitioner's Exs. 9, 10.

14.

There is no credible evidence that he maintained residency in Georgia while running his business in the Washington, D.C. area.

15.

Respondent received his personal and business bank statements at addresses in Maryland and Washington, D.C. until December 2006. T. 58:6-59:20; Petitioner's Exs. 9, 10. The tax return for 2005 (which he used as late as November 2007 to verify his income) did not list a Georgia address but listed his residence address as 201 E. Diamond Avenue, Gaithersburg, MD, the address of the restaurant. T. 46:11-47:23; Petitioner's Ex. 18, p. 10-11. Respondent testified that he provided "pro forma" tax returns for tax years 2005 and 2006 which had not been filed as supporting documentation to secure an apartment lease. T. 46:11-47:23. Respondent provided a Maryland address on his 2005 "pro forma" return, and a Georgia address on his 2006 "pro forma" return, but never filed those tax returns or any state income taxes for 2005 or 2006. T. 46:11-47:23; 42:19-43:8.

16.

Other evidence also showed that Respondent resided in a Washington, D.C. house at 1435 S Street NW during 2005 and 2006. Although Respondent contended at trial that the Washington, D.C. house was just a place he sometimes stayed with friends including Ben

Cavanaugh, at Cavanaugh's Washington, D.C. home, T. 56:9-57:8; 145:9-14, Respondent had his personal and business bank statements sent to the address at 1435 S Street NW beginning in May 2006 and continuing at least through December, 2006. Petitioner's Exs. 10, 11, 12.

17.

When completing an application for an apartment in November 2007, Respondent listed his address at 1435 S Street NW, Washington D.C. as the address where he resided prior to purchasing a house in Georgia in July 2006. T. 85:13-18; Petitioner's Ex. 18, p. 6.

18.

Cavanaugh and Respondent jointly purchased a house at 9205 Huntcliff Trace in Dunwoody, Fulton County, Georgia in July 2006. T. 73:25-74:9.

19.

Respondent never claimed a homestead exemption on the Huntcliff Trace house. T. 73:18-24.

20.

Respondent did not register his car in Georgia in 2006; although a BMW he jointly owned was registered in Georgia in 2006, T. 109:8-17; Petitioner's Ex.27, he testified that the car belonged to Cavanaugh. T. 154:12-16.

21.

Respondent never applied for or received a Georgia identification card or Georgia Driver's License at any time in 2005 or 2006. T. 38:3-39:1. Respondent maintained his Florida Driver's License in 2006 and renewed that license in September 2006. T. 38:7-39:1; Petitioner's Ex. 24.

22.

Respondent did not register to vote in Georgia in 2006. T. 36:11-17.

23.

Respondent has never been employed by a Georgia employer and has been self-employed since before 2003. T. 27:13-15; 24:10-15.

24.

Respondent did not pay Georgia taxes or file Georgia state income tax returns in 2005 or 2006, T. 46:20-47:23, until after Petitioner served him with a subpoena for a copy of his tax returns in connection with this case. T. 43:1-23; Petitioner's Ex. 5. After he was served with that subpoena, Respondent filed a 2006 Georgia income tax return three days before the hearing in this matter. T. 42:19-43:23.

25.

Respondent prepared his 2006 and 2007 tax returns in order to provide them to the Court on this residency challenge. T. 45:11-22.

26.

Despite having completed and filed the 2006 returns only three days before the June 23, 2008 hearing, Respondent testified at the hearing that he did not know if he paid any Georgia income tax for 2006. T. 43:11-12.

27.

Respondent continued to receive mail, including brokerage statements and his personal and business bank statements, at 1435 S Street NW in Washington, D.C. through December, 2006. T. 57: 3-8; 59:15-21; 61:3-14; 62:3-9. Petitioner's Exs. 8, 10, 11, 12. Respondent received bank statements at addresses outside of Georgia until at least the end of 2006. T. 59:18-21; 61:6-14; 62:3-9; 62:24-63:2; 64:12-15; Petitioner's Exs. 10, 11, 12.

28.

Respondent also received his brokerage statements at addresses outside of Georgia until at least the beginning of 2007. T. 56:6-11. Petitioner's Ex. 8.

29.

In December 2006, Respondent wrote to the closing attorney on the Huntcliff Trace property and requested that a quitclaim deed be prepared to divest his ownership in that property and convey it to Cavanaugh. T. 76:2-18; Petitioner's Ex. 15. Respondent wrote, "We'd spoken previously about removing my name from the title of the property at 9205 Huntcliff Trace, *considering that I have no interest in the property at all at this point.*" Petitioner's Ex.15, p. 001272 (emphasis added).

30.

In January 2007, Respondent did quitclaim all of his interest in the 9205 Huntcliff Trace address to Cavanaugh, the joint owner of the property. T. 76:19-23; Petitioner's Ex. 15, p. 001274.

31.

Respondent currently owns no property in Georgia and has owned no interest in property in Georgia since January 2007. T. 71:19-72:4.

32.

Respondent produced no evidence of receiving personal mail at the Huntcliff Trace address or any other address in Georgia between January 2007 and July 2007 and did not produce any other evidence of having a Georgia address during that period. When asked where his personal bank statements were sent during that period, Respondent responded: "Don't know." T. 80: 11-14.

33.

Respondent produced no statements mailed to him at any Georgia address or any other contact with Georgia from the time he quitclaimed his interest in the Huntcliff address in January 2007 until May 2007, when he applied for a Georgia Driver's License. T. 55:5-13; 57:15-22; 59:18-21; 61:6-14; 62:3-9; 62:24-63:2; 64:12-15.

34.

Although Respondent filed a federal tax return for 2007 three days before the hearing, Respondent did not file a Georgia state income tax return for 2007. Petitioner's Ex. 6. Respondent testified that he did not pay Georgia taxes for 2007 or file a Georgia tax return for 2007 because he did not owe any Georgia taxes. T. 44:6-45:10.

35.

Respondent did not register his car in Georgia in 2007. Petitioner's Exs. 28, 29, 30.

36.

On April 25, 2007, Respondent applied for a Florida identification card, certifying by his signature that the information on the application form was correct. Petitioner's Ex. 23; T. 97:16-20; 99:15-22. On the application form, Respondent verified that as of that date – April 25, 2007 – he was a Florida resident. Petitioner's Ex. 23; T. 98:18-100:2. Respondent gave his home address in Florida as 8824 S. McCann Road, Panama City, Florida, which is his mother's house. Petitioner's Ex. 23; T. 35:4-15. Even though there were options to do so, he did not list any out-of-state or temporary addresses on the form. T. 99:23-100:2; Petitioner's Ex. 23.

37.

On May 3, 2007, Respondent applied for a Georgia Driver's License for the very first time. T. 104:13-105:8.

38.

Respondent could not say whether he surrendered his Florida identification card when he applied for a Georgia Driver's License. T. 41:4-6. However, Florida records show that both his Florida identification card and Florida Driver's License are still valid. Petitioner's Ex. 24.

39.

Respondent remained registered to vote in Florida until he first registered to vote in Georgia on November 7, 2007. T. 155:22-156:5. He first voted in Georgia in the February 5, 2008 Presidential Preference Primary. T. 156:6-8.

40.

Respondent swore on his Declaration of Candidacy and Affidavit that he had been a resident of House District 80 for one year. T. 97:1-3. He testified that by that statement, he meant he will have resided in the district for one year from the date of the election, or November 4, 2007. T. 97:1-3.

41.

The evidence showed that in late October 2007, Respondent began attempting to purchase a condominium at The Enclave at Briarcliff, a mixed condominium and apartment development located in House District 80. Petitioner's Ex. 16; T. 78:5-20.

42.

On November 2, 2007, after Respondent was unsuccessful in his attempts to purchase a condominium at The Enclave, he talked to the Community Director Barbara Troiani about renting a unit instead. T. 80:15-81:10. Respondent informed Ms. Troiani that his move-in date was very important. T. 117:9-17. Respondent was aware that one of the residency requirements

for running for House District 80 required him to live in the district on November 3, 2007, T. 80:20-23, which was the next day.

43.

Respondent filled out an application for an apartment on November 2, 2006. Petitioner's Ex. 18, pp. 6-7.

44.

On Saturday, November 3, 2007, Ms. Troiani gave Respondent the keys to Unit 4303. T. 127:9-17.

45.

Respondent did not register to vote in the district at issue (or in Georgia at all) until November 7, 2007. T. 155:22-156:8.

46.

Respondent testified that he did not possess personal financial statements for the years 2006, 2007, and 2008, T. 68:9-14, but subsequently testified that he did produce a personal financial statement to the State Ethics Commission in 2008. T. 68:15-18.

47.

Respondent testified that information provided in an online statement, published on the Internet on May 16, 2008, was correct, T. 33:19-22, but subsequently testified that certain information in the statement was incorrect, such as the estimation of how long he had possessed a Georgia Driver's License. T. 39:5-16.

48.

Respondent blamed a former employer for the continued use of the trademarked term Realtor, in reference to him, T. 92:23-93:1, but continued to use the term on his personal website. Petitioner's Ex. 3.

49.

Respondent did not present evidence of the ownership of a home and payment of taxes for a continuous period during the constitutional residency period of two years in the state.

50.

Respondent did not present evidence of payment of utilities in his name in Georgia for a continuous period during the constitutional residency period of two years in the state.

51.

There is no evidence of Respondent ever having a homestead exemption in Georgia.

52.

Respondent did not present evidence of vehicle registrations in Georgia for a continuous period of the two-year constitutional period.

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 have been "citizens of the state for at least two years." GA. CONST., Art. 3, Sec. 2, Par. 3(b). In

order to qualify as a citizen of the state of Georgia, an individual must be a citizen of the United States and resident of the State of Georgia. GA. CONST., Art. 1, Sec. 1, Par. 7.

3.

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).

4.

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).

5.

In this case, Petitioner, a qualified elector in House District 80, contends that Respondent has not been a resident of Georgia for two years and that he has not been a resident of House District 80 for one year.

6.

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.

7.

Therefore, Respondent must prove both that (a) he has been a citizen of the state of Georgia since at least November 4, 2006 and (b) he has been a resident of House District 80 since at least November 4, 2007 in order to be qualified to run for the House of Representatives.

8.

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

9.

In resolving the issues of whether Respondent has been a resident of Georgia for two years and a resident of House District 80 for one year, the Court looks to both statutory and common law regarding residency.

10.

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).

11.

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).

12.

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).

13.

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.

14.

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).

15.

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.

16.

In this case, Respondent first has the affirmative burden to demonstrate that he has been a Georgia resident for two years. Respondent has failed to meet this burden.

17.

Two witnesses testified at the hearing, namely Respondent and Ms. Barbara Troiani, the Community Director for the Enclave at Briarcliff, located in House District 80. The Court finds the testimony of Ms. Troiani to be credible. She recalled renting the apartment unit to Respondent on November 3, 2007. She met Respondent in person and gave him the key to the unit.

18.

The Court, however, is troubled by the otherwise uncorroborated testimony of Respondent himself about his residency in the State of Georgia for the time period required by the Constitution of the State of Georgia. In resolving the issue of Respondent's residency, the Court has considered the documentary evidence and the credibility of Respondent's testimony. The Court considered Respondent's manner of testifying, his intelligence, his means and opportunity of knowing the facts to which he testified, the nature of the facts to which he testified, the probability or improbability of his testimony, his interest or want of interest and his personal credibility.¹ The preponderance of the credible evidence is that Respondent did not establish the two-year residency requirement of GA. CONST., Art. 3, Sec. 2, Par. 3(b).

Respondent's testimony consisted of many questionable concerns, namely the following: Respondent was evasive and unable to specify the date he formed the intent to make Georgia his

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).

state of residence.² Respondent testified that he moved to Georgia in 2005 to live with his mother. He stated that he considered his home to be where his mother resided, but conceded that his mother moved back to Florida in 2005. Respondent testified that he may have obtained a Georgia Driver's License in 2005 when he actually maintained his Florida Driver's License throughout 2005 and 2006, renewed his Florida Driver's License in 2006, and maintained the Florida Driver's License until May 2007 when he obtained his first Georgia Driver's License. More importantly, Respondent certified that he was a resident of Florida and had a Florida home address in April 2007 when he applied for a Florida identification card.³

Respondent did not know whether he paid any Georgia income tax for 2006, even though he testified that he filed his Georgia income tax return three days before the date of this hearing. Respondent testified that he did not have personal financial statements for the years at issue in this case, but later admitted he had recently provided this information to the State Ethics Commission.

² For example, the following is an excerpt from the official transcript of the hearing:

[Petitioner's Attorney]: Now, in Paragraph 4 you state that you first made Georgia your, quote, permanent residence, unquote, three years ago; is that right?

[Respondent]: That is correct.

[Petitioner's Attorney]: And three years ago from when?

[Respondent]: Three years ago from the date of this statement.

[Petitioner's Attorney]: So about May of 2005; is that correct?

[Respondent]: You may be correct.

[Petitioner's Attorney]: Well, I'm asking you.

[Respondent]: Well –

[Petitioner's Attorney]: It's your statement. You say it was three years ago you decided to make Georgia your permanent residence, and I'm asking you three years ago from when.

[Respondent]: Three years ago – this is May – sure, three years ago in May '06 – May '05.

[Petitioner's Attorney]: So it's your contention that as of May of 2005 you had made Georgia your permanent residence; is that right?

[Respondent]: That's correct.

[Petitioner's Attorney]: Pardon?

[Respondent]: That is correct. T.33:14-34:8

³ *Gibbons v. State*, 248 Ga. 858, 863 (1982) (the trier of fact has the opportunity to observe the witness as he varies or repudiates his former statement, and therefore is entitled to decide whether to believe the present testimony, the prior testimony, or neither).

Respondent testified that information provided in an online statement, published on the Internet and listing Respondent as the author, was correct. However, under cross-examination Respondent admitted that certain information in the statement was incorrect, but did not provide evidence that he had taken any action to correct the false statements. Specifically, Respondent misrepresented that he had a Georgia Driver's License for approximately two years before the date of the article, when he had a Georgia Driver's License for only one year prior. In the online statement and in Respondent's testimony, he blamed a former employer for the improper use of the term Realtor in reference to him on the employer's website. However, Petitioner provided uncontested evidence that Respondent improperly used the term Realtor on his own website.

Respondent managed a business in Washington, D.C. in 2005 through 2006, but was unable to provide specific dates for when he managed and owned this business. Respondent received personal and business mail in Washington D.C. at multiple addresses in 2005 and continuing through December 2006. Respondent was unable to show that he lived in Georgia when he quitclaimed all interest in the Huntcliff Trace property in December 2006. Respondent claimed he did not know where his personal bank statements were mailed during January 2007 through July 2007, a significant period at issue in this case.

19.

The Court finds Respondent's inconsistent testimony coupled with the following facts dispositive in concluding that he does not meet the necessary requirements to establish residency in the State of Georgia: Respondent registered to vote in Florida at the age of 18 and voted in Florida as late as 2004. Respondent did not register to vote in Georgia until November 2007. There is no evidence that Respondent received mail in Georgia, with perhaps one exception, while Petitioner provided evidence of significant mail sent to Respondent at addresses outside

the State of Georgia during the years of interest in this case. During the years at issue, Respondent provided no evidence that he paid rent in Georgia when he did not own a house in the state. Respondent has never claimed a homestead exemption in Georgia. There is no evidence that Respondent had a lease in Georgia or paid any utility or telephone bills in Georgia before November 3, 2007. Accordingly,

DECISION

IT IS HEREBY ORDERED THAT Respondent, Keith Gross, is not qualified to be a candidate for House District 80 and his name shall be removed from the ballot.

THIS 10th DAY OF JULY, 2008.


MICHAEL MALIHI, JUDGE