The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

October 27, 1992

The Honorable Lucille S. Whipper
Member, House of Representatives
Post Office Box 268
Mt. Pleasant, South Carolina 29465

Dear Representative Whipper:

By your letter of October 16, 1992, you have advised that a facility for homeless individuals is located in your House district. Several residents of this facility are registered voters; they listed the address of the shelter on voter registration forms since they have no residence other than this shelter. You had inquired as to the voting eligibility for persons residing in homeless shelters; more specifically, you asked whether these individuals' ballots could be challenged and invalidated due to the fact that they reside in such a facility.

The State Constitution, in Article II, § 3, states that "[e]very citizen possessing the qualifications required by this Constitution and not laboring under the disabilities named in or authorized by it shall be an elector." Article II, § 4 provides that "[e]very citizen of the United States and of this State of the age of eighteen and upwards who is properly registered shall be entitled to vote in the precinct of his residence and not elsewhere ...." The General Assembly is to provide for registration of persons to vote, by Article II, § 8.

The General Assembly has carried out its mandate by adopting election laws such as S.C. Code Ann. § 7-5-120 (1991 Cum. Supp.). That section provides in relevant part:

Every citizen of this State and the United States who:

....

(3) is a resident in the county and in the polling precinct in which the elector offers to vote;

(4) applies for registration; must be registered; ... [with certain disqualifications enumerated].

This statute does not define "residency" for election or voter registration purposes, nor does the State Constitution. It is thus necessary to review judicial authority for guidance as to residency.

Residency is viewed by the courts of this State as a mixed question of fact and law. Clarke v. McCown, 107 S.C. 209, 92 S.E. 479 (1917). "Residence" for voting purposes means "domicile" in this State. Id. One's domicile is "the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning." O'Neill's Estate v. Tuomey Hospital, 254 S.C. 578, 583-84, 176 S.E.2d 527 (1970). Apparently the traditional view of one's domicile or residence has been a house or other permanent type of dwelling place; it is apparent that, given the fundamental nature of the right to vote, courts have relaxed the traditional concept of residence or domicile to avoid disenfranchising a growing segment of the population.

In other jurisdictions, the failure of voter registration officials to accept applications from essentially homeless individuals, who would list their residence as a park, park bench, shelter for the homeless, or the like, or the denial of applications of would-be voters solely on that basis, has been successfully challenged on the ground that such is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Collier v. Menzel, 176 Cal.App.3d 24, 221 Cal.Rptr. 110 (1985); Pitts v. Black, 608 F.Supp. 696 (S. D. N. Y. 1984). Because the right to vote is a fundamental right, any classification (i.e. category of homeless citizens) which would deny this right will be subject to strict scrutiny. Id. The state would be required to show the compelling public interest in utilizing the classification as well as the necessity of using the classification to serve the state's objectives. Id. When a compelling state interest exists, "statutory restrictions on voting must be narrowly tailored to the articulated State interest and the State must show that the interest cannot be served by a means less restrictive of the right to vote." Pitts v. Black, 608 F.Supp. at 709.

In cases involving registration of individuals who do not occupy a traditional home, arguments have been unsuccessfully advanced by the election officials respecting administrative convenience, prevention of voter fraud, protection of the integrity of the electoral process (i.e., by not "importing" voters), identifying an electorate with a stake in the community, and the like. In both Pitts v. Black and Collier v. Menzel, there was no finding that the status of homelessness would raise a presumption that such persons would be more likely to commit voter fraud than any other elector would be. Thus, denial of one's application to register to vote on these bases has been subjected to strict scrutiny, with the individual's right to vote prevailing over these less than compelling state interests or objectives.

As to an individual's residence for voter registration purposes, the court in Fischer v. Stout, 741 P.2d 217 (Alaska 1987) stated: "A residence need only be some specific locale within the district at which habitation can be specifically fixed. Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient." 741 P.2d at 221 (emphasis added). The court in Pitts v. Black stated:

> Homeless individuals identifying a specific location within a political community which they consider their "home base", to which they return regularly, manifest an intent to remain for the present, and a place from which they can receive messages and be contacted, satisfy the more stringent domicile standard and should not be disenfranchised solely because they lack a non-traditional residence.

Id., 608 F.Supp. at 710.

The court in Collier v. Menzel similarly stated:

> ... there is no statutory authority for the proposition that a residence cannot be a place where there are no living facilities. In other words, the old adage, "A man's home is where he makes it," is not statutorily proscribed. We therefore agree with appellants that whether people "sleep under a bush or a tree or in the open air is immaterial regarding their right to vote." The type of place a person calls home has no relevance

> to his/her eligibility to vote if compliance with registration has been achieved, that is, the designation of a fixed habitation, the declaration of an intent to remain at that place and to return to it after temporary absences, and the designation of an address where mail can be received.

Id., 221 Cal. Rptr. at 115. The court continued:

> It can be argued that permitting the "homeless" to vote will impart a sense of responsibility to those people by giving them a political stake in their future and a sense of caring about their community. Unlike other minority groups or disadvantaged persons, the "homeless", by the very nature of their living circumstances, have been unable to exercise any political influence in order to make their particular problems and needs known.
>
> It is patently unjust that society ignores the homeless and yet also denies them the proper avenues to remedy the situation. Even more compelling, the denial of the vote to the "homeless" denies them electoral power. Powerlessness breeds apathy, and apathy is the greatest danger to society.

Id., 221 Cal. Rptr. at 116. The court also pointed out that denial of the opportunity to vote on the basis that one cannot afford housing amounts to using wealth as an electoral standard, a practice also violative of the Equal Protection Clause.

The foregoing is directly responsive to your inquiry concerning voting eligibility for persons residing in homeless shelters. If such an individual meets all qualifications (such as age, citizenship, and the like specified in § 7-5-120), his residence in a homeless shelter (or even a park bench) by itself would not be sufficient grounds to deny him the right to vote. The prospective voter must show, as any prospective voter would, that the homeless shelter (or wherever) is the place he has his true, fixed, permanent home, the place to which he intends to return after an absence.

Of course, as with any applicant for registration, eligibility must be determined on an individual basis. Such applicants must be distinguished from transient persons, persons

who are merely "passing through," or persons imported on a temporary basis who have no intent that the homeless shelter be their residence for any length of time. For those individuals who have indicated the homeless shelter to be their residence and for whom the Voter Registration Board has issued a certificate to vote, it would appear as a practical matter that the Board has made the factual determination that the individuals are considered to be residents of the homeless facility. It is inappropriate for this Office to undertake a review of that fact-finding.

Challenging a voter by poll managers due to the individual not being a registered elector or having become disqualified for some reason is provided for in § 7-13-810 et seq. An elector or poll watcher may, and poll managers must, challenge the voting of one known or suspected not to be a qualified elector. (Electors or poll watchers present their information to the poll managers and do not directly challenge another voter.) Section 7-13-830 requires the poll manager to explain to such an individual the qualifications of an elector and examine him as to his qualifications. If the person insists he is a qualified elector and the challenge is not withdrawn, the person may vote a challenged ballot by following the procedure in § 7-13-830; the challenge is heard following the election and the votes counted (i.e., the envelope unsealed, ballots mingled, and so forth) if the challenge is not sustained.

Because the conclusion to your first question is that, in appropriate cases, homeless individuals may register to vote using a homeless shelter (or even a park bench) as their residence, it is difficult to conclude that the sole fact that an individual's residence is a homeless shelter, without additional information proving the individual's intent to the contrary, could be the basis for challenging a voter's qualifications. Challenging one's qualifications on an individual basis, where someone has knowledge of, or suspects that, qualifications have not been met by a particular voter, would be appropriate. Challenging one's vote and invalidating same merely due to one's homeless status, without more, amounts to the same denial of the right to vote decried in cases such as Pitts v. Black and Collier v. Menzel.

To summarize the foregoing, it is the opinion of this Office that a homeless individual may be registered to vote, using the homeless shelter or facility as his residence, if such is truly that person's residence, as the place to which he returns after a temporary absence. To conclude otherwise would likely be violative of the Equal Protection Clause of the Fourteenth Amendment. While ballots must be challenged on an individual basis, challenging and invalidating a ballot due solely to one's residency

without some evidence of disqualification (i.e., that the individual does not maintain his residence at that address) would likely be constitutionally suspect.[1]

With kind regards, I am

Sincerely,

Patricia D Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions

[1]The foregoing is not intended to suggest that ballots should not be challenged in an appropriate situation or to usurp the authority of the county election commission to determine relevant questions with respect to challenged ballots.