

OFFICIAL OPINION NO. 76-38, Residency requirement for county commissioner to finish term in office

April 6, 1976

Mrs. Lucille Fairbanks
County Auditor
Ziebach County Courthouse
Dupree, South Dakota 57623

OFFICIAL OPINION NO. 76-38

Residency requirement for county commissioner to finish term in office

Dear Mrs. Fairbanks:

You have requested an opinion based on the following factual situation:

County has a commissioner whose term will expire this December 31st who has sold his ranch in the next county, with no payment due until next year. He will be moving into the adjoining county, just a mile over the county line, sometime in June. He has lived in Ziebach County approximately thirty years.

We feel that because of his knowledge and experience he would still do a good job for the remaining months of his term and would have the interest of the county at heart, even though he officially owns no property in the county.

The specific question you ask is whether the commissioner may legally serve out the balance of his term.

The statute to be interpreted is SDCL 3-4-1, which provides in part:

Every office shall become vacant on the happening of anyone of the following events before the expiration of the term of such office:

. . . .

(5) His ceasing to be a *resident* of the state, district, county, township, or precinct in which the duties of his office are to be exercised or for which he may have been elected;
(emphasis added)

In Memorandum Opinion 75-24 from this office I concluded that residency is a factual determination to be made in each case by applying the following statutory definition:

12-1-4. For the purpose of this article, "residence" shall be the place in which a person has fixed his habitation and to which, whenever he is absent, he has made the intention of returning.

A person who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence.

A person shall be considered to have gained a residence in any county or city of this state in which he actually lives, providing such person has no present intention to remove himself therefrom.

Also, at 1921-22 AGR 256, a similar factual situation involving a state's attorney was decided as follows:

Section 7007 of the Revised Code of 1919 (now SDCL 3-4-1) provides that every office shall become vacant upon the incumbent ceasing to be a resident of the county in which the duties of his office are to be exercised, or for which he may have been elected. The matter of residence is one of intention, as indicated and determined from all the facts and circumstances in this case, including the removal of the state's attorney's family and personal property and his leaving to join them, are such as fairly indicate that he, has left Campbell County with the intention of making his residence elsewhere and of abandoning Campbell County as his place of residence, this office is clearly vacant

Therefore, it is my opinion that the commissioner in question will cease to be a "resident" of <st1:plaziebach< font=""> County</st1:plaziebach<> at such time as he physically moves out of the county, and is ineligible at that time to continue in office. His obvious intent is to permanently leave Ziebach County and acquire residence elsewhere. The facts do not lend themselves to so broad an interpretation of the law as to hold that the commissioner continues to be a resident of Ziebach County. For your further clarification I

am enclosing a photocopy of Memorandum Opinion No. 75-24.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL

WJJ:LLV:dh