

To: Legislative Study Committee on the definition of "Domicile" for voter registration purposes.
Representative Richard B. Drisko Chair

From: Anne M. Edwards Associate Attorney General
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Re: Domicile – RSA 654:1, :2

The Attorney General's Office is responsible for enforcement of New Hampshire's election laws. RSA 7:6-c, RSA 666:8 and RSA 664:18. Pursuant to this responsibility in the recent past we have had occasion to address two complaints related to domicile.

#1 Durham – Several voters registered to vote on election day and shortly thereafter requested to have their names removed from the voter checklist. On October 25, 2001 the Attorney General's Office was first alerted to these questionable voter registrations that occurred November 11, 2000. Questions regarding the legality of these voter registrations was prompted by the voters sending written requests to the Durham town officials requesting that the voters' names be removed from Durham's voter checklist. Several of the written requests included comments by the voters suggesting that they were not "residents" of Durham, had "temporarily changed" their residence for the purpose of voting or had "wrongly" registered to vote in Durham.

Under current New Hampshire law this office would prosecute an individual who fraudulently registered to vote under RSA 641:3, the "Unsworn Falsification" statute. To convict an individual of the misdemeanor of unsworn falsification the State would have to prove beyond a reasonable doubt that:

1. The suspect knowingly made a written statement.
2. That statement was false.
3. At the moment when he/she made that statement the author of that statement did not believe the statement was true.
4. The statement was made on a form bearing a notification authorized by law to the effect that false statements made therein are punishable.

The statute of limitations for misdemeanors is one year.

The statute also provides that "[n]o person shall be guilty under this section if he retracts the falsification before it becomes manifest that the falsification was or would be exposed." RSA 641:3, III.

In conducting an investigation, our office focused on whether these voters had, in effect, knowingly or purposely lied about where their legal domicile was.

"The determinant of one's domicile is a question of factual physical presence incorporating an intention to reside for an indefinite period. This domicile is the voter's residence to which, upon temporary absence, he has the intention of returning. This domicile is that place in which he dwells on a continuing basis for a significant portion of each year." RSA 654:1, I.

The conclusion of the investigation into these Durham election day registrations is that each individual we interviewed had established a physical presence in Durham and at the moment when he/she signed the voter registration card, intended to reside in Durham for an indefinite period of time. Each spent a significant portion of at least the previous year dwelling in Durham. Each had at the moment he/she registered to vote, in varying degrees, uncertainty about where he/she would go upon graduation. Most had not ruled out further studies at UNH and/or settling in Durham. Based on the facts presented, this office concluded that insufficient evidence existed to support a finding beyond a reasonable doubt that any one of these individuals was knowingly lying when he/she signed the voter registration card, in part saying that he/she permanent established domicile is at the Durham address he/she had written on the form. Furthermore, there was insufficient evidence to support a finding that the statement he/she had a domicile in Durham was, in fact, false.

Having reached that conclusion, no further analysis was required. It may, however, be helpful for the committee to consider other issues. The one year statute of limitations meant that in most, although not all, cases, the statute had run on November 7, 2001. We were unable to locate and interview all the identified parties. We complete several interviews after November 7, 2001. The provision in RSA 641:3, III providing that if the individual reveals the falsehood before it is discovered may also have prevented successful prosecution. Even had a court reached the conclusion that the assertion of domicile in Durham was false, and that these voters knew it was false at the moment when they made the statement, in each of these cases it was the suspect revealing their ties to other communities which brought their potential misconduct to the State's attention. Stated in other words, even had the facts supported prosecution, the untimely notification to our office and the statute of limitations may have prevented prosecution. Similarly, the exception for those who turn themselves in may have precluded convictions.

Finally, as to these Durham voters, most did not have a sophisticated understanding of the legal meaning of the phrase "permanent established domicile." Even though they volunteered that they in some sense, actually lived in some other town and in some cases other states, when asked the dispositive questions: where their physical presence was on and immediately previous to election day, where they dwelled during the most significant portion of the previous years, and what intentions they had as to residing in Durham, their answers were consistent with a legal conclusion that they were

domiciled in Durham. Most of the voters interviewed decided to vote at the prompting of organized get-out-the-vote efforts affiliated with national candidate campaigns. The volunteers operating the get-out-the-vote efforts provided free rides and varying degrees of advice on the appropriateness and process of voting. More than one voter indicated that they described their circumstances to an election official and were reassured that they had the privilege of registering and voting.

RSA 666:1, General Penalty, provides that "[a]ny person guilty of an offense against any provision of the laws relating to elections for which no penalty is specified shall be guilty of a violation if a natural person or guilty of a misdemeanor if any other person." While it may be possible for this office to use this statute to address violations related to the domicile and voter registration statutes, it is easier to prosecute misconduct where the law assigns specific consequences as a part of the statute.

Part First Article 11 of the New Hampshire Constitution in part provides "No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery, or any willful violation of the elections laws of this state or of the United States; but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such crimes." Therefore, the consequence of being convicted of a misdemeanor or felony, which constitutes "willful violation of the election laws," is lifetime loss of the right to vote, unless the right to vote is reinstated by the Supreme Court.

Should this committee consider revisions to the domicile and voter registration laws that include making further provisions related to the consequences of fraudulent or improper registration we would encourage consideration of establishing a mechanism for civil penalties for violations of the election laws. An individual who votes twice or who purposely lies in order to vote in a jurisdiction where he has no basis to claim domicile may be properly convicted of a crime, thereby losing the right to vote, possibly forever. Whether this same sanction is appropriate for an 18 year old, trying to vote for the first time, who fails to take the time and make the effort to understand terms like "domicile" is a question for the legislature. We respectfully suggest that some mechanism for a less harsh sanction, for example a civil fine, may be more commensurate with deterring such misconduct while promoting participation in our democracy.

#2 – New Hampton. This investigation addressed the issue of a voter who had an established domicile in New Hampton, moved from New Hampton with no intention of returning, but who may have never established a new domicile. Our investigation closure letter is attached. It discusses the statutes and some recent case law.

Court Decisions related to domicile for voting purposes

The following excerpts from court cases related to domicile may provide helpful insight into how courts address the issue of domicile. If any committee members would like to read the entire cases we would be happy to assist your staff in obtaining copies of the cited cases.

"In this State, 'domicile' is defined differently for voting purposes than for other purposes of the law. See RSA 21:6, :6-a; Laws 1981, 261:2." *Every v. Supervisors of the Madison Checklist*, 124 N.H. 824, 827 (1984). A copy of this case is attached.

"The statute does not provide clear guidance in cases involving multiple residences." *Id.*

The *Every* case involved a school teacher from Boston who had established a domicile in Massachusetts and maintained a house in Madison, N.H. At some point Mr. Every decided to establish his New Hampshire home as his voting domicile.

While the plaintiff must show that he has 'abandoned' his domicile in Cambridge, *Chase v. Chase*, 66 N.H. 588, 592 (1891), this does not mean (as defendants argue) that he must have abandoned his physical place of residence there. The question is, rather, whether Mr. Every in 1982 intended to make Madison his domicile; i.e., 'his principal residence . . . or the one place he thinks of as home.' *Kerby v. Charlestown*, 78 N.H. 301, 303 (1916).

Id. at 827-28.

Important evidence will be reflected in the amount of time that is spent at each of the residences and the purpose for which the time is spent. . . . The individual's relationship to the community in which each home is located and the extent of one's participation in the community affairs often evince the individual's attitude toward that dwelling place and is [sic] significant evidence for the identification of the principal home.

Id. at 828. (citing E. Scoles and P Hay, Conflict of Laws § 4.21, at 182 (1984).

In the case of *Hart v. Batchelder*, 104 N.H. 132 (1962) the New Hampshire Supreme Court upheld the decision of a Superior Court Judge that let five people who had been residing outside the town of Ellsworth for at least six months keep their names on the checklist where the court found the absence was temporary and that each, in good faith, intended to return. The court characterized this as a unique case and the evidence supporting domicile in Ellsworth as "extremely thin."

"The word 'intention' as used in this statute has been interpreted to mean that a 'doubtful, vague and equivocal purpose to return does not prove the fact of 'intention' as used in the statute. . . ." *Id.* at 133 (citing *Felker v. Henderson*, 78 N.H. 509, 512 (1917)).

"An assertion by a party that he regards a certain town as his home is entitled to great weight on the issue of his intention but it must be weighed against his actions; it is not conclusive and the Presiding Justice is not obliged to believe it." *Id.* (citing *McGee v. Bragg*, 94 N.H. 349, 352 (1947)).

New Hampshire once had a durational residence requirement. That statute, the former RSA 54:8 was struck down by *Chapman v. Foote*, 112 N.H. 298 (1972). The New Hampshire Supreme Court decision relied in part on a United States Supreme Court decision, *Dunn v. Blumstein*, 405 U.S. 330 (1972). *See also Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972) (federal district court decision striking a New Hampshire statutory requirement that required a permanent or indefinite intention to stay in one place as a qualification for registering and voting because the requirement did not serve any compelling state interest and offended the equal protection clause).

Federal courts and the courts of other states are split on whether a state may impose some additional questions on groups likely to include transients, requiring them to show something in addition to physical presence in the community in order to meet a neutral test of residence for purposes of voting. *See Auerbach v. Rettaliata*, 765 F.2d 350 (2nd Cir. 1985).

Conclusion

The right to vote is a fundamental constitutional right, provided with significant constitutional protection. A scheme of laws regulating who can register to vote and where they can vote likely needs to provide everyone some place where they are entitled to vote, albeit, not necessarily in New Hampshire. Courts analyzing regulatory schemes and, in particular, how domicile is defined will often look at the purpose of the regulatory scheme. They will look at the statute and its legislative history to identify what state interests are being protected and often they will weigh those state interests against the interest of the citizen in voting. The state interest in preventing fraud, preventing individuals from voting twice or from voting in jurisdictions where they have no basis at all for claiming domicile, are usually recognized as important interests. While the courts have recognized some other state interests, they have not always been given the same weight as the interest in preventing fraud. It is usually helpful to the Attorney General's office in defending the constitutionality of a statute and in some situations in prosecuting cases, for the legislative history to clearly express the state interests that the statute is intended to protect. To the extent that this committee recommends changes to this area of the elections laws, including in your report a statement of what state interests the changes will advance would be helpful.

Thank you for the opportunity to address the committee.