

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

**GERALD HARVEY,**

**Challenger/Petitioner,**

v.

**JAMES FRANK AUSTIN, JR.,**

**Candidate/Respondent.**

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**Docket No.:**  
**OSAH-SECSTATE-CE-1638942-11-Miller**



FILED  
OSAH

APR 20 2016

**INITIAL DECISION**

**For Challenger/Petitioner:**

Gerald Harvey  
*Pro Se*

  
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Kevin Westray, Legal Assistant

**For Candidate/Respondent:**

James Frank Austin, Jr.  
*Pro Se*

**I. Summary of Proceedings**

The Petitioner, Gerald Harvey, brought this action challenging the qualifications of the Respondent, James Frank Austin, Jr., to be a candidate for Georgia House of Representatives District 142. More specifically, the Petitioner contends that the Respondent does not meet the constitutional and statutory residency requirements for House candidates because the Respondent will not have been a legal resident of House District 142 for at least one year immediately preceding the general election scheduled for November 8, 2016, as required by Article III, Section II, Paragraph III(b) of the Georgia Constitution and O.C.G.A. § 28-2-1(b).

The hearing took place on April 12, 2016, before the undersigned administrative law judge of the Office of State Administrative Hearings. After consideration of the evidence and the arguments of the parties, and for the reasons set forth below, the Court concludes that the

Respondent does not meet the residency requirements established by Georgia law and is not qualified to be a candidate for House District 142.

## **II. Findings of Fact**

1.

The Respondent is a candidate for the Democratic nomination for Georgia House of Representatives District 142. On March 17, 2016, the Petitioner, a registered voter and eligible elector in House District 142,<sup>1</sup> filed a challenge with the Secretary of State regarding the Respondent's qualifications, and specifically the duration of his residency in the district. (Testimony of James Frank Austin, Jr. and Gerald Harvey; OSAH Form 1 and attachments.)

2.

The Respondent and his wife, Sheila R. Austin, own two homes in Macon, Georgia: one located within District 142, at 5464 Bethesda Avenue ("Bethesda Avenue"); and another located outside District 142, at 121 Horseshoe Bend Court ("Horseshoe Bend Court"). The Austins were married in 2006. Although they remain married, they have lived apart intermittently due to marital difficulties and are currently separated. (Testimony of Mr. Austin; Exhibits P-2, P-3, R-2, R-3, R-4, R-5, R-6.)

3.

Mrs. Austin, formerly known as Sheila R. Williams, originally purchased the Bethesda Avenue home in 2001. The Respondent began living there with her sometime in 2004, before they were married. On July 27, 2007, Mrs. Austin transferred the deed to the Bethesda Avenue home from herself alone to the Respondent and herself, jointly, as husband and wife. (Testimony of Mr. Austin; Exhibits P-2, R-6.)

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<sup>1</sup> The Petitioner is also a candidate for the Democratic nomination for House District 142. (Testimony of Mr. Harvey.)

4.

The Respondent testified that he and Mrs. Austin bought the Horseshoe Bend Court home in 2007, when they were having marital problems. At that time, according to the Respondent, he continued to live in the Bethesda Avenue home, while Mrs. Austin moved into the Horseshoe Bend Court home. According to property tax records, however, the Austins actually purchased the Horseshoe Bend Court home on August 7, 2006. It therefore appears to the Court that the purchase of the Horseshoe Bend Court home coincided with the Austins' marriage, rather than with any subsequent marital difficulties they may have experienced. (Testimony of Mr. Austin; Exhibits P-2, R-6.)

5.

The Respondent further testified that although he went "back and forth" with his wife and may have, at times, "stayed" with her at the Horseshoe Bend Court property, the Bethesda Avenue property remained his home. The circumstantial evidence, however, indicates that when the Austins purchased the Horseshoe Bend Court property, the Respondent intended to – and did – make that property his primary residence. For example, the Austins claimed a homestead exemption on the Horseshoe Bend Court home,<sup>2</sup> and the Respondent used it as his mailing address.<sup>3</sup> The Respondent also updated his driver's license to reflect the Horseshoe Bend Court address and registered to vote in Jones County, where the Horseshoe Bend Court home is located. (Testimony of Mr. Austin and Mr. Harvey; Exhibits P-2, P-3.)

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<sup>2</sup> The Respondent testified that he and Mrs. Austin claimed a homestead exemption on the Horseshoe Bend Court home only because it was more valuable and provided a greater tax benefit than a homestead exemption on the Bethesda Avenue home. However, the Court finds that the Austins claimed a homestead exemption on the Horseshoe Bend Court home because they actually resided there. The Horseshoe Bend Court home is newer and larger than the Bethesda Avenue home, and it is also located in a safer neighborhood. It is not surprising, then, that they chose to live there. (Testimony of Mr. Austin; Exhibits P-2, P-3.)

<sup>3</sup> In fact, as of March 30, 2016, the Macon/Bibb County Board of Tax Assessors continued to list the Horseshoe Bend Court address as the mailing address for the Bethesda Avenue home. (Exhibit P-2.)

6.

In 2012, the Respondent founded the Austin Center for Community Development (“Austin Center”), a nonprofit organization working to improve the Village Green community, where the Bethesda Avenue home is located. The Austin Center recruits volunteers and organizes activities such as neighborhood clean-ups, community gardens, health fairs, tutoring, and GED programs. The Austin Center is funded with grants, and the Respondent earns only a small salary for his work there. Currently, he also works full-time for Royal Lawn Care, a job he has held since January 2016. (Testimony of Mr. Austin; Exhibits R-11, R-12, R-13.)

7.

When asked to provide more specific details regarding his living arrangements during the past year, the Respondent testified that he has resided exclusively at the Bethesda Avenue home since 2014. In support of this testimony, he presented the following evidence:

- The Affidavit of Koi Janelle Herring,<sup>4</sup> which states that Ms. Herring has lived at the Bethesda Avenue home with the Respondent since December 2014 (Exhibit R-1);
- The Note, Security Deed, Family Rider, Closing Attorney’s Affidavit, and Warranty Deed for the July 2007 real estate transaction regarding the Bethesda Avenue home (Exhibits R-2, R-3, R-4, R-5, R-6);
- His 2013, 2014, and 2015 Georgia state tax returns, which list the Bethesda Avenue home as his address (Exhibits R-7, R-8, R-9);
- His pay stubs for two two-week pay periods in January and February 2016, which list the Bethesda Avenue home as his address (Exhibit R-10);
- Three newspaper articles documenting his community service work in the Village Green community in recent years (Exhibits R-11, R-12, R-13);

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<sup>4</sup> Ms. Herring did not testify at the hearing and was not subject to cross examination. Consequently, the Court was unable to evaluate her credibility. According to the Respondent, he invited Ms. Herring to live with him because she is a friend who needed a place to stay. (Testimony of Mr. Austin.)

- A mortgage escrow statement for the Bethesda Avenue home dated March 24, 2016, which is addressed to both Mrs. Austin and the Respondent at the Bethesda Avenue address (Exhibit R-14); and
- His voter registration card, which indicates that he registered to vote at the Bethesda Avenue address on February 29, 2016 (Exhibit R-15).

The Respondent owns a 1999 Chevrolet vehicle, but he does not know its registration address. He currently uses a post office box to receive most of his mail. He attends church at Beulahland Bible Baptist Church, which is located in District 142. (Testimony of Mr. Austin.)

8.

The evidence presented by the Respondent was not persuasive, for several reasons. First, the Bethesda Avenue home was without water service for more than eleven months out of the past year.<sup>5</sup> The Respondent testified that he lived in the Bethesda Avenue home during this time period, despite the lack of water – and, at times, other utilities – because he was experiencing financial hardship. However, this testimony is utterly lacking in credibility. Human beings simply cannot live without water, and the Respondent had no reason to attempt to do so, given his access to the Horseshoe Bend Court home and its utility services. (Testimony of Mr. Austin and Mr. Harvey; Exhibit P-1.)

9.

Second, the available documentary evidence<sup>6</sup> suggests that the Respondent did not resume living in the Bethesda Avenue home until sometime during the first three months of 2016. He did not update the address on his driver's license until January 2016, and the pay stubs

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<sup>5</sup> The Macon Water Authority disconnected the water service on April 1, 2015, at the request of the account holder, Shanda M. Iverson. The record contains no evidence regarding the identity of Ms. Iverson or her relationship, if any, to the Respondent. The service was restored at Ms. Herring's request on March 11, 2016. (Testimony of Mr. Austin and Mr. Harvey; Exhibit P-1.)

<sup>6</sup> It should be noted that the available documentary evidence was quite limited and consisted only of the exhibits discussed herein.

he presented are from January and February 2016. Similarly, he registered to vote at the Bethesda Avenue address on February 29, 2016; prior to that date, he remained registered to vote in Jones County. The water service at the Bethesda Avenue home was not restored until March 11, 2016,<sup>7</sup> and the single piece of mail to the Bethesda Avenue home that the Respondent offered into evidence bears a date of March 24, 2016. The Respondent's community service work, while admirable, does not establish that he resides in or near the Village Green community. (Testimony of Mr. Austin; Exhibits R-10, R-14, R-15.)

10.

Third, the Respondent's testimony was frequently vague and evasive. For instance, he was unable to recall the dates or duration of his separations from Mrs. Austin, or even the date of their marriage. He also testified that it was "possible" that he had leased the Bethesda Avenue home, although he was unable to recall the specifics of any leasing arrangements. Similarly, when he was asked when the water had been turned off at the Bethesda Avenue home, he initially stated that house had "always had some plumbing problems." Later, he admitted that there was no water at the home "for a while," when he lacked the funds to pay all of his bills. Notwithstanding this admission, his testimony left the false impression that the service interruption had been intermittent, rather than sustained for a period of nearly a year. (Testimony of Mr. Austin.)

11.

Based on the evidence presented at the hearing, the Court concludes that the Respondent was a resident of the Bethesda Avenue home from 2004 to August 2006; that he changed his residence to the Horseshoe Bend Court home in August 2006, when he and Mrs. Austin

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<sup>7</sup> Although the Respondent contends that financial difficulties left him unable to pay for water service, his pay stub for the pay period ending on February 5, 2016, showed that his year-to-date gross wages had already exceeded \$5,000.00. (Testimony of Mr. Austin; Exhibit R-10.)

purchased the property; that he formed the intent to return to live in the Bethesda Avenue home in January 2016, when he provided that address to his employer and updated his driver's license; and that he physically resumed living in the Bethesda Avenue home on or near March 11, 2016, the date that the water service was restored.

### III. Conclusions of Law

1.

This matter is governed by the Georgia Constitution and the Georgia Election Code, O.C.G.A. § 21-2-1, et seq. Every candidate for state office must meet all of the constitutional and statutory requirements for holding the office sought by the candidate. O.C.G.A. § 21-2-5(a).

2.

Any qualified elector from the district in which a candidate is seeking election may challenge the candidate's qualifications to hold office. O.C.G.A. § 21-2-5(b). Thus, the Petitioner was authorized to challenge the Respondent's residency qualifications.

3.

The Georgia Constitution provides that “[a]t the time of their election, the members of the House of Representatives . . . shall have been legal residents of the territory embraced within the district from which elected for at least one year.” GA. CONST., Art. III, § II, Par. III(b); see also O.C.G.A. § 28-2-1(b). This year-long residency requirement looks backward from the date of the general election. Id.; see Cox v. Barber, 275 Ga. 415, 416 (2002).

4.

Under Haynes v. Wells, 273 Ga. 106 (2000), the burden of proof is on the Respondent to establish his eligibility for office:

[T]he statutes place the affirmative obligation on Haynes [the challenged candidate] to establish his qualification 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.

Haynes, 273 Ga. at 108-109. In this case, then, the Respondent was required to prove both that he is a current resident of House District 142 and that he has been a resident of House District 142 since at least November 8, 2015, one year prior to the date of the upcoming general election. The standard of proof on all issues is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

5.

To resolve issues related to the Respondent's residency, the Court looks to both statutory and common law. Under O.C.G.A. § 21-2-217(a)(1), "residence" is defined as "that place in which such person's habitation is fixed, without any present intention of removing therefrom." Although the terms "residence" and "domicile" are not generally synonymous, they have the same meaning for purposes of the Georgia Election Code. O.C.G.A. § 21-2-2(32); Dozier v. Baker, 283 Ga. 543, 543-544 (2008); Handel v. Powell, 284 Ga. 550, 550 (2008); Smiley v. Davenport, 139 Ga. App. 753, 755-56 (1976). To establish residency, an individual must demonstrate both a physical presence and an intent to make the particular location his or her home. Smiley, 139 Ga. App. at 757.

6.

The Georgia General Assembly has enacted a set of standards, found at O.C.G.A. § 21-2-217, for determining the residency of individuals wishing to run for elected office. These standards guide the Court in its consideration of this matter. The statute provides, *inter alia*, that a person changes his or her residency within the state by moving to another location with the intention of making that place the person's residence; 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 certain evidence indicating where a person resides – such as where the person receives a significant amount of mail or has declared a homestead exemption – may be considered. O.C.G.A. § 21-2-217(a).

7.

A candidate can demonstrate his or her intent to acquire a new residence in a multitude of ways, including voter registration, voting history, homestead exemption,<sup>8</sup> vehicle registrations, purchase of real property, payment of utilities and property taxes, jury service, income tax returns, campaign disclosure reports, declaration of candidacy and qualifying affidavit, church attendance, and receipt of personal and business mail. Dozier, 283 Ga. at 544. The relevant issue is whether the candidate intended to establish a new residence, without regard to his or her motive for doing so. Id. at 545.

8.

The address used by an individual for voting purposes is particularly persuasive evidence of domicile. Dozier, 283 Ga. at 544.

9.

The domicile of a candidate’s spouse is not presumed to be the domicile of the candidate, even where the candidate uses and pays expenses for the spouse’s home. Dozier, 283 Ga. at 544; O.C.G.A. § 21-2-217(a)(7). Further, “[n]o definite amount of time spent in a place is essential to make that place a home.” Smiley, 139 Ga. App. at 757 (cit. omitted). Even spending a majority of time, including sleeping, at another residence is not decisive evidence of domicile. Dozier, 283 Ga. at 544; Williams v. Williams, 191 Ga. 437, 440 (1940).

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<sup>8</sup> The location where an individual maintains a homestead exemption, while significant, is not dispositive evidence of the individual’s domicile; instead, the Court must weigh all applicable factors contained in O.C.G.A. § 21-2-217. Handel, 284 Ga. at 554.

In this case, the Respondent bears the affirmative burden to demonstrate that he resides in House District 142 and that he has resided there since at least November 8, 2015. The Respondent did not meet his burden. As detailed in the Findings of Fact, above, the evidence that he presented was sufficient to establish that he currently lives at the Bethesda Avenue address, which is located in House District 142, and that he has lived there since March 11, 2016. However, the Respondent did not carry his burden to show that he lived in House District 142 between November 8, 2015, and March 11, 2016.

#### IV. Decision

For the reasons stated above, the Court finds that the Respondent is not qualified to be a candidate for Georgia House of Representatives District 142. Accordingly, it is hereby **ORDERED** that his name shall be removed from the ballot.

**SO ORDERED**, this 20<sup>th</sup> day of April, 2016.

  
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**KRISTIN L. MILLER**  
**Administrative Law Judge**

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

GERALD HARVEY,	:	
Challenger,	:	Docket No.: OSAH-SECSTATE-CE-1638942-
v.	:	11-Miller
	:	
JAMES FRANK AUSTIN, JR.,	:	
Candidate.	:	

**NOTICE OF INITIAL DECISION**

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

**FILING A MOTION WITH THE JUDGE AT OSAH**

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such motion may or may not toll the time for filing an application for agency review.** See O. C.G.A. §§ 50-13-19 and 50-13-20.1.

Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk  
Office of State Administrative Hearings  
Attn.: Kevin Westray, [kwestray@osah.ga.gov](mailto:kwestray@osah.ga.gov)  
225 Peachtree Street, NE, South Tower, Suite 400  
Atlanta, Georgia 30303-1534

**APPLICATION FOR AGENCY REVIEW**

An application for Agency Review must be filed within thirty (30) days after service of this Initial Decision. O.C.G.A. §§ 50-13-17 and 50-13-41. A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Office of Secretary of State  
Attn: Elections Division  
1104 West Tower  
2 Martin Luther King Jr. Drive  
Atlanta, Georgia 30334

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. §§ 50-13-17 and 50-13-41. In certain cases, an Initial Decision may become Final and therefore not subject to review either by agency provision or the provisions of O.C.G.A. § 50-13-17(c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G. A. § 50-13-19(b).