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November 6, 1989

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, West Virginia 25305

Dear Secretary Hechler:

This is in response to your letter of August 30, 1989, wherein you requested our opinion with regard to the following:

1. Since Chapter 1, Article 2, Section 2 (31) of the West Virginia Code, 1931, as amended, requires that "* * * not less than one delegate be nominated, elected, or appointed who is a resident of any single county within the thirty-first delegate district", if the sole delegate elected from Taylor County moves to Marion County, does his position become vacant?; and

2. Can the incumbent delegate from Taylor County who moves his residence to Marion County run for the House of Delegates in 1990 as a resident of Marion County?

Residency is the key issue in your inquiry. Article 6, Section 12 of the Constitution of West Virginia reads as follows:

"No person shall be a senator or delegate who has not for one year next preceding his election, been a resident within the district or county from which he is elected; and if a senator or delegate remove from the district or county for which he was elected, his seat shall be thereby vacated."

Since the incumbent ran for office in the 31st Delegate District as a resident of Taylor County, thus fulfilling the requirement in W. Va. Code § 1-2-2(31), his residency becomes pivotal with regard to his term of office.

W. Va. Code § 3-10-5 provides, in pertinent part:

"Any vacancy in the office of state senator or member of the House of Delegates shall be filled by appointment by the governor, in each instance from a list of three legally qualified persons submitted by the party executive committee of the delegate district in the case of a member of the House of Delegates, * * * of the party with which the person holding the office immediately preceding the vacancy was affiliated, and of the county * * * in which he resided at the time of his election or appointment * * *." (Emphasis added.)

In reading Article 6, Section 12 of the Constitution and W. Va. Code § 3-10-5 in pari materia, it would appear that since the incumbent was elected as a resident of Taylor County within the 31st Delegate District, and since he was the only delegate elected from Taylor County, that actual residence must be maintained during his term of office, and should he move from Taylor County to Marion County during his term of office, his delegate seat shall be deemed vacated.

As for running for office in 1990, when the incumbent delegate moves from Taylor County to Marion County (the only two counties in the 31st Delegate District), the time of the move is crucial. As expressed earlier, Article 6, Section 12 of the Constitution of West Virginia requires a one-year residency in the district or county from which he is elected next preceding the [general] election. The next general election will be held on Tuesday, November 6, 1990.

The constitutional residency requirement was thoroughly reviewed by the West Virginia Supreme Court of Appeals in the case of White v. Manchin, et al., ___ W. Va. ___, 318 S.E.2d 470 (1984). There, one candidate contended that senators do not have to actually reside in the senatorial district they represent, but they need only reside in a county of which a portion is within the senatorial district. Another candidate contended that senators do not have to actually reside in the county they represent pursuant to Article VI, Section 4 of the West Virginia Constitution, but they need only reside in the senatorial district.

The court rejected both interpretations. With regard to the first candidate, the court held that although he had been a resident of a county, a portion of which was in the senatorial

district from which the candidate desired to run, he had not been a one-year resident of the particular senatorial district. With the second candidate, the court held that although he had been a one-year resident of the senatorial district from which he desired to run, he had not been a one-year resident of the county within that senatorial district which he would represent.

Therefore, the White case establishes the requirement that when either the Constitution or a state statute requires a certain number of representatives from a county within a political district, whether delegate district or senatorial district, that number of candidates must have been (a) resident(s) of the county and the political district for at least one year next preceding the general election.

This is very important. Using the 31st Delegate District as an example, W. Va. Code § 1-2-2(31) reads as follows:

"The counties of Marion and Taylor shall constitute the thirty-first delegate district and shall elect four delegates; Provided, That not less than one delegate may be nominated, elected or appointed who is a resident of any single county within the thirty-first delegate district".

Reading this statute and the White case together, we conclude that although the law allows for four delegates, at least one delegate must have been a resident of Taylor County and one must have been a resident of Marion County for at least one year next preceding the general election. Hence, two delegates must establish county residency in addition to district residency and the other two delegates need only establish district residency for the one-year period. As an illustration, let's suppose the following results at the general election:

TABLE #1
HYPOTHETICAL RESULTS OF
GENERAL ELECTION
31st Delegate District

<u>CANDIDATE</u>	<u>TIME</u>	<u>COUNTY RESIDENCE</u>	<u>NUMBER OF VOTES</u>
A	1 yr +	Taylor	900
B	1 yr +	Taylor	800
C	1 yr +	Marion	700
D	1 yr +	Taylor	600
E	1 yr +	Marion	500

Assuming all candidates have been residents of the 31st Delegate District for one year preceding the general election, Candidates A and C will win the two required delegate seats, and Candidates B and D will win the two "at-large" seats. Thus, the representation from the 31st Delegate District would be comprised of three representatives from Taylor County and one representative from Marion County.

Now referring to the following, a different result will obtain:

TABLE #2

<u>CANDIDATE</u>	<u>TIME</u>	<u>COUNTY RESIDENCE</u>	<u>NUMBER OF VOTES</u>
A	(6 mos)	Taylor	900
B	1 yr +	Taylor	800
C	(6 mos)	Marion	700
D	(6 mos)	Taylor	600
E	1 yr +	Marion	500

Again, assuming all candidates have been residents of the 31st Delegate District for one year, Candidates B and E will be elected due to the one-year county residency requirement, and Candidates A and C will be elected to the two "at-large" seats due to the highest number of votes received.

Thus, the formula for the 31st Delegate District is:

One representative from Marion County who has lived within the District and the County for one year next preceding the general election;

One representative from Taylor County who has lived within the District and the County for one year next preceding the general election;

Two representatives who have resided within the District for one year next preceding the general election regardless of the time they have resided in any particular county within the district.

Based upon the above and the constitutional residency requirement as interpreted by our Supreme Court in the White case, our answers are as follows:

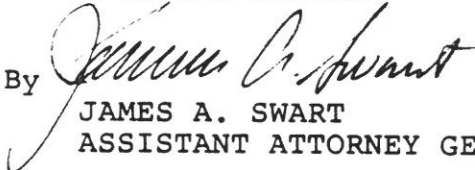
(1) If the duly elected delegate from the 31st district who resides in Taylor County chooses to move his residence to Marion County, he thereby vacates his office and a successor from Taylor County would be appointed; and

(2) The delegate who moves from Taylor County to Marion County is qualified to run for the House of Delegates as an "at-large" candidate as long as he or she has resided in the 31st Delegate District for one year next preceding the general election, but he or she shall not qualify as one of the two required delegates from the 31st Delegate District residing in either Taylor or Marion County since he or she had not resided in Marion County for one year next preceding the general election.

I trust that the above will be of assistance to you.

Very truly yours,

ROGER W. TOMPKINS
ATTORNEY GENERAL

By 
JAMES A. SWART
ASSISTANT ATTORNEY GENERAL

RWT/JAS/cln