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October 28, 2008

Miranda Mullen, Director
Morgan County Board of Elections
155 E. Main St., Rm. 157
McConnelsville, Ohio 43756

RE: Tie vote on whether Richard D. Welch is an elector of Morgan County

Dear Ms. Mullen:

On September 29, 2008, the Morgan County Board of Elections reached a tie vote on the question of whether Richard D. Welch is a qualified elector of Morgan County. My analysis and decision are outlined below.

Background

Welch currently serves as Morgan County prosecuting attorney, having been elected at the 2000 general election and re-elected at the 2004 general election. Welch filed a declaration of candidacy and nominating petition to run as Morgan County prosecuting attorney in the 2008 Republican primary election. Welch is currently deployed with the U.S. military serving in Iraq. In his absence, assistant Morgan County prosecuting attorney Amy Graham is serving as acting prosecuting attorney.

On November 4, 2007, Michael Tigner, an elector of Morgan County affiliated with the Republican Party, filed a protest against Welch's candidacy asserting that Welch is not qualified to be a candidate for prosecuting attorney because he is not a resident of Morgan County.

On January 22, 2008, the Morgan County Board of Elections received a letter from Welch withdrawing from the race for prosecuting attorney. The board unanimously voted to accept his withdrawal on January 23, 2008.

Although Welch withdrew from the election, Tigner's protest also raised the issue of Welch's status as an elector of Morgan County. The Morgan County Board of Elections held a hearing regarding Welch's status as an elector of Morgan County on January 23, 2008. Welch was unable to attend the hearing because of his military deployment. Dan Padden, Guernsey County prosecuting attorney, was appointed as special prosecutor to represent the board of elections

due to the conflict of interest of acting prosecuting attorney Graham being an employee of Welch. The board of elections voted 3-1 to cancel Welch's voter registration at the end of the January 23, 2008 hearing. However, based upon a request by Welch submitted through his legal counsel, the board later reconsidered its decision and on February 26, 2008, voted to stay the matter pursuant to the Servicemembers Civil Relief Act (50 App. U.S.C. 522) until Welch was available to participate in the hearing.

The hearing was rescheduled for September 2, 2008. Welch attended the hearing and was represented by Attorney Andrew N. Yosowitz of the law firm of Isaac, Brant, Ledman & Teetor, LLP. Tigner appeared pro se. Guernsey County Prosecuting Attorney Padden represented the Morgan County Board of Elections as special prosecutor. Welch and Tigner testified at the hearing, and Tigner was permitted to question Welch and to make a closing statement in support of his protest.

On September 29, 2008, the Morgan County Board of Elections held a special meeting to consider Welch's status as an elector of Morgan County. The board of elections first voted unanimously to remove the stay that was issued on February 26, 2008. Then, Board Member Mary Anna Wallace then made the following motion: "We will reaffirm that based on the original findings, he (Welch) is not a qualified elector of Morgan County." The motion was seconded by Board Member Azcal Wilson. Board Members Wallace and A. Wilson voted in favor of the motion, while Board Chair James B. Wilson and Board Member J. Louise Pennock voted against the motion, resulting in a tie vote. In accordance with R.C. 3501.11(X) and with the procedures outlined in the Ohio Election Official Manual, the Morgan County Board of Elections submitted the tie vote to me on October 3, 2008. My analysis and decision are outlined below.

Discussion

The tie vote of the Morgan County Board of Elections concerns whether Richard D. Welch is a qualified elector of Morgan County. The statute providing the rules for determining the residence qualifications of an Ohio elector is R.C. 3503.02. The relevant portions of R.C. 3503.02 to this matter are:

All registrars and judges of elections, in determining the residence of a person offering to register or vote, shall be governed by the following rules:

(A) That place shall be considered the residence of a person in which the person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.

(B) A person shall not be considered to have lost the person's residence who leaves the person's home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.

* * *

(D) The place where the family of a married person resides shall be considered to be the person's place of residence; except that when the spouses have separated and live apart, the place where such a spouse resides the length of time required to entitle a person to vote shall be considered to be the spouse's place of residence.

* * *

(F) Except as otherwise provided in division (G) of this section, if a person removes from this state and continuously resides outside this state for a period of four years or more, the person shall be considered to have lost the person's residence in this state, notwithstanding the fact that the person may entertain an intention to return at some future period.

(G) If a person removes from this state to engage in the services of the United States government, the person shall not be considered to have lost the person's residence in this state during the period of such service, and likewise should the person enter the employment of the state, the place where such person resided at the time of the person's removal shall be considered to be the person's place of residence.

Welch and Tigner were the only witnesses to testify at the hearing. The board provided a transcript¹ of the protest hearing. The following undisputed evidence was presented at the hearing regarding the relevant factors of R.C. 3503.03:

Welch owns a home at 108 Liberty Avenue in McConnelsville, Morgan County, Ohio. Tr. 23. He and his wife purchased the home from his parents in 1991 or 1992. Tr. 25. He operated his law practice from the McConnelsville home starting in 1991, and he and his wife moved into the McConnelsville home in 1994. Tr. 25-26. They lived in the home and operated his law practice out of the home until 2001. Tr. 26. After he was elected Morgan County prosecuting attorney, he closed his law practice in 2001. Tr. 26.

In May 1999, Welch purchased a house in Belpre, Washington County, Ohio as an investment property. Tr. 26. They attend church in Parkersburg, West Virginia, and they would spend some weekends at the Belpre home related to their church activities. Tr. 27. However, their primary residence was the McConnelsville home. Tr. 27-28.

After being elected prosecuting attorney and closing his law practice, Welch decided to renovate the McConnelsville home extensively. Tr. 28-29. The renovation was supposed to take a year, from the fall of 2002, until approximately the end of summer or fall 2003. Tr. 30. Construction began in 2002, and they moved out of the McConnelsville home due to the construction in the spring of 2003, prior to May 2003. Tr. 31, 61. They did not move into another home in Morgan County; instead, they moved into the Belpre (Washington County) home for financial reasons. Tr. 31. Problems developed with the contractor that resulted in the renovation being delayed. Tr. 33-35.

¹ References to the transcript of the September 2, 2008 protest hearing are referred to by the abbreviation "Tr." and the page number in the transcript.

Welch is a Colonel in the U.S. Army and a special services officer with approximately 36 years of military service. Tr. 36-37. On September 26, 2003, Welch received notice that he was being mobilized to active duty with the U.S. military and that he had to report to Ft. Hood, Texas on October 5, 2003. Tr. 35. Although he set up a plan to finance and complete the work that had to be done to the McConnelsville home, the contractor did not complete the work and eventually abandoned the project. Tr. 35-38. When Welch came home for leave in December 2004, the house was gutted and uninhabitable, and the contractor could not be located. Tr. 39-41.

In July 2005, Welch returned from active duty in Iraq for two weeks before being sent to the Army War College in Pennsylvania for ten months. Tr. 44-45. He attended the Army War College until June 2006. Tr. 45. At that point, he returned to Ohio and was living at the Belpre home because the McConnelsville home was uninhabitable when he returned. Tr. 45. He obtained new financing and hired a new contractor to complete the renovation starting in September 2005. Tr. 44.

Welch returned to his position as Morgan County prosecuting attorney in June 2006, but by the end of 2006, he learned that he would be redeployed to active duty in Iraq again. Tr. 47. He was redeployed to Iraq in February 2007, and as of the hearing date, Welch was still serving on active duty with the U.S. military under his current deployment. Tr. 47.

The Belpre home was listed for sale in February 2007, before Welch left for Iraq again. Tr. 48. Mr. and Mrs. Welch are selling the Belpre house to help pay for the renovation of the McConnelsville house. Tr. 49. In February 2008, Mr. Welch's wife began moving things back into the McConnelsville house. Tr. 48. Welch testified that his wife has close friends in the Vietnamese-American community in the Parkersburg, West Virginia/Belpre, Ohio area but that she will be happy to move back to McConnelsville if he is there. Tr. 59.

Welch testified that he and his wife had always intended to return to the McConnelsville home and that he considers it his legal residence. Tr. 55-56, 63. They have invested approximately \$150,000 in the McConnelsville home, and it is not finished yet. Tr. 52. He indicated that had he not been redeployed to active military service, he could have moved forward with a new contractor more quickly. Tr. 54-55. He considers his absence from Morgan County as temporary and has spent a considerable amount of money to get back to Morgan County as quickly as possible. Tr. 67. He spent the night before the hearing at the McConnelsville home. Tr. 23.

When these facts are applied to the relevant rules for determining residence under R.C. 3503.02 (listed above), it is clear that Mr. Welch and his wife left Morgan County in the Spring of 2003, and moved to their other home in Washington County while the McConnelsville house was being renovated. Although Welch testified that they started moving things back into the McConnelsville house at different points, from his testimony, the only date certain that he stayed in the McConnelsville house between the spring of 2003 and the date of the hearing (September 2, 2008) was the night before the hearing.

However, the inquiry under R.C. 3503.02 requires more than a mere surface examination of how long Welch has lived outside Morgan County. R.C. 3503.02 (B) specifically permits an elector to leave the county for temporary purposes and to retain his or her status as an elector of the county as long as the person intends to return. If an absence from the state equals four years or more of continuous absence, then the person loses his or her status as an elector regardless of intent under R.C. 3503.02(F). Moreover, the period of absence due to Welch's military service cannot be counted against him under R.C. 3503.02(G).

When the periods of Welch's active duty military service are subtracted, the undisputed evidence reveals that Welch has only lived outside of Morgan County for approximately fourteen months (from May 2003, through October 5, 2003, and from June 2006, until February, 2007). Neither R.C. 3503.02 nor the case law interpreting the current statute provide a definition of what constitutes a "temporary" absence. Prior to the 1971 amendment to R.C. 3503.03 in Amended Senate Bill 460, the statute defined "temporary purposes" as permitting "a period of absence not in excess of three years." See, e.g. *State ex rel. Lakes v. Young* (1954), 161 Ohio St. 341, 343 (citing the definition of "temporary purposes" in the former version of R.C. 3503.02). Under R.C. 3503.03(F), a temporary absence cannot amount to four years or more of continuous absence from the state. Thus, Welch's total absence from Morgan County of fourteen months qualifies as a temporary absence.

It is also undisputed that Welch always intended to return to Morgan County after the renovations to the McConnellsville home are completed. They have invested approximately \$150,000 in the McConnellsville home and hired a new contractor to take over the renovation when the prior contractor abandoned the project. Additionally, Welch placed the Belpre home for sale before his latest deployment to Iraq, and he and his wife have moved some of their possessions back to the McConnellsville home on several occasions. Moreover, there is no evidence that Welch intends to remain in Washington County.

The only other factor to consider in the residence determination is the residence of Welch's wife under R.C. 3503.02(D), which provides that the place where the family of a married person resides "shall be considered to be the person's place of residence." However, courts have held that R.C. 3503.02(D) cannot be applied to create an irrebuttable presumption of residence. *Bell v. Markino* (C.A.6, 2004), 367 F.3d 588, 593. The undisputed testimony from the hearing was that Welch's wife left Morgan County to move into the Belpre home in 2003, while the McConnellsville home was being renovated. Mrs. Welch could not return to the McConnellsville home while it was uninhabitable, but she began moving items back to the McConnellsville home after the new contractor began working on the house in 2005. Welch testified that she has been splitting her time between the Belpre home and the McConnellsville home. Mrs. Welch was not called as a witness, and her status as an elector of Morgan County was not an issue before the board of elections. Thus, there is insufficient evidence to draw any conclusion regarding Welch's residence based upon his wife's residence.

Because Welch's total period of absence from Morgan County excluding his active duty military service amounts to a temporary absence, because he testified he has maintained an intent to return to Morgan County, and because he has taken numerous actions that support his intent to return to Morgan County, I conclude that Mr. Welch is a qualified elector of Morgan County.

Decision

For the foregoing reasons, I vote with Board Chair J. Wilson and Board Member Pennock AGAINST the motion to reaffirm the finding that Welch is not a qualified elector of Morgan County. Accordingly, the motion fails. Because Welch has already submitted a valid application for an absentee ballot as an armed services voter pursuant to R.C. 3511.02 and Advisory 2008-29 and because the time for him to return his absentee ballot is short, the Morgan County Board of Elections is hereby instructed to issue Welch an absentee ballot immediately in accordance with Advisory 2008-29.

Sincerely,



Jennifer Brunner