

1986 Ky. Op. Atty. Gen. 2-46, Ky. OAG 85-41,
1985 WL 193225 (Ky.A.G.)

*1 Office of the Attorney General

Commonwealth of Kentucky

OAG 85-41

February 19, 1985

Mr. Dale M. Morris
Larue County Attorney
Hodgenville, Kentucky 42748

Dear Mr. Morris:

Larue County has a county water district which is administered by a board appointed with approval of the fiscal court. See [KRS 74.010 65.810](#) and [74.012](#).

We assume that the water district lies wholly in Larue County. The water district is administered by a board of commissioners, which members are appointed by the county judge executive with the approval of the fiscal court. [KRS 74.020 \(1\)\(a\)](#).

At present, one member of that board is residing in an adjoining county. You wrote this about that member:

“At the request of the fiscal court I contacted this board member concerning his residence and received his response which indicates that he was temporarily residing out of the county because of domestic problems but that for all practical purposes he considered himself a permanent resident of Larue County since his house and farm are located here. He indicated that he had discussed this with the water board attorney and that said attorney advised him that he could remain on the board until his permanent residential status finally is established.”

Under the above named conditions you ask whether

that individual can legally remain a member of the water board. You are wondering what criteria the county could use in determining the residence issue. You also raise the question as to the liability of the fiscal court where the board takes action on some matter and it is invalidated because of a residence disqualification.

[KRS 74.020\(1\)\(a\)](#) expressly provides that members of the board shall be residents of the district. We are bound by the literal language of [KRS 74.020\(1\)\(a\)](#). [H. O. Hurley Co. v. Martin, 267 Ky. 182, 101 S.W.2d 657 \(1937\)](#).

The central question is whether this board member is a resident of the water district, as provided in [KRS 74.020\(1\)\(a\)](#).

While the term “resident” or “residence” can have various meanings, depending upon statutory provisions and statutory context, in the absence of a statutory definition applicable to KRS Chapter 74, the word “resident”, as it appears in [KRS 74.020\(1\)\(a\)](#), logically refers to legal residence. Legal residence consists of actual residence at a place, coupled with the intent to remain at such place. [Nunn v. Hamilton, 233 Ky. 663, 26 S.W.2d 526 \(1930\)](#) 530. Thus a person's legal residence is dependent upon two major factors: (1) the intent of the individual to remain at such place; and (2) factual evidence of actual residence at a place. The word reside or resident, as a qualification for holding some public office, is considered to be equivalent to legal domicile, as distinguished from the place of actual abode. [Elam v. Maggard, 165 Ky. 733, 178 S.W. 1065 \(1915\)](#) 1066. Thus, as the court observed in [Elam v. Maggard](#), where one has an actual domicile, and departs from it temporarily intending to return, it will remain his legal domicile for all purposes.

CONCLUSIONS

*2 (1) The board member's residence qualification hinges upon where his legal residence is. As we said, legal residence consists of actual residence at

a place, coupled with the intent to remain at such place. That total concept of legal residence is equated with legal domicile. As we said, where one has had an actual domicile, and departs from it temporarily, intending to return, it will remain his legal domicile for all purposes. However, because of the element of intent, a subjective matter that intertwines with objective reality, this office is not organized and equipped to determine the answer to whether the board member has his legal residence in the water district. Only the courts can make that determination, if it is properly questioned. Obviously, under the express terms of [KRS 74.020\(1\)\(a\)](#), in order to be a valid board member, his legal residence must be in the water district for which he was appointed.

In 20 C.J.S., Counties, § 101, page 898, it is stated that an investigation or inquiry by the appointing officers as to the qualification of the appointee is not necessary where not required by statute. Under [KRS 74.020\(1\)\(a\)](#), it is our view that the county judge executive and the other members of fiscal court must use their sound judgment, based upon a reasonable examination into the board member's residence qualification, including a discussion with the board member, in continuing or not continuing his appointment. As we said, above, only the courts can finally determine this issue.

Now, let us consider the question as to fiscal court liability where some action of the water district board may be invalidated because of this member's disqualification to hold office.

An officer de facto is to be distinguished from a mere usurper or one not having some color of title to the office. In fact, an officer de facto is one whose title is not good in point of law but who is in fact in the unobstructed possession of an office and is discharging those duties in full view of the public in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. [Schoffield v. Hebel, 301 Ky. 358, 192 S.W.2d 84 \(1946\)](#) 86. Here, the person in question, even if he were not found to be a legal resident of the water district, is a de facto officer so long as he

is occupying that de jure office. Significantly, his acts as a de facto officer are valid as to third parties. He cannot himself acquire rights, such as compensation, based upon his defective title (assuming that it is defective). [Cottingim v. Stewart, 283 Ky. 615, 142 S.W.2d 171 \(1940\)](#) 176. See also [Lile v. City of Powderly, Ky.App., 612 S.W.2d 762 \(1981\)](#) 764. Moreover, where one becomes ineligible after he takes office, he acts as a de facto officer until ousted, unless he resigns. See [Com. Ex Rel. Breckinridge v. Winstead, Ky., 430 S.W.2d 647 \(1968\)](#) 649.

The basic answer to question No. 2 is that this board member in question is at least a de facto officer until he is ousted or until he resigns. Since his acts, in voting with the other board members, is valid as to third parties, there can be no invalidation of a board action because of his disqualification, even if he is disqualified. Thus any liability of fiscal court in his continuing on the board, under the above assumptions, is a matter which does not arise.

Sincerely,
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Attorney General

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