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NO.
STATE OF NEBRASKA
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JUL 26 1994
DEPT. OF JUSTICE

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DEPUTY ATTORNEYS GENERAL

DATE: July 19, 1994

SUBJECT: Interpretation of Two-Year Residency Requirement as a Prerequisite for Admission to the Nebraska Veterans' Home System

REQUESTED BY: Jonathan F. Sweet
Director, Department of Veterans' Affairs

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

This opinion is written in response to the Department of Veterans' Affairs request for our interpretation of the two-year residency requirement contained within Neb. Rev. Stat. § 80-301(1) (Cum. Supp. 1992). The statute establishes institutions within Nebraska "to provide domiciliary and nursing home care and subsistence," *id.*, to qualified veterans, their spouses, surviving spouses, and surviving parents. In order for a veteran to qualify for admission to a home, the statute requires the following:

> at the time of making an application for admission to one of the homes (a) **the applicant has been a bona fide resident of the State of Nebraska for at least two years,** (b) the applicant has become disabled due to service, old age, or otherwise to an extent that it would prevent such applicant from earning a livelihood, and (c) the applicant's income from all sources is such that such applicant would be dependent wholly or partially upon public charities for support, or the type of care needed is available only at a state institution. . . .

Id. (emphasis added).

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Your two-part inquiry asks 1) whether the two-year residency requirement contained within the statute is constitutional, and 2) what factors should be utilized in making the determination that a veteran is a bona fide Nebraska resident.

Background

The two-year residency requirement now contained within Neb. Rev. Stat. § 80-301(1) has existed since the statute's inception in 1887. *See* Laws 1887, c. 82, § 1, p. 622. As originally enacted, home admission was extended to certain honorably discharged veterans and hospital nurses who satisfied specified criteria. *Id.* One criterion was that the veteran have "entered the army or navy . . . or such hospitals from this state, or . . . at the time of the application for admission to such homes, have been an actual bona fide resident of this state for two years, next preceding such application. . . ." *Id.* Variations of this two-year residency requirement have remained intact even though the statute has been amended on twenty-four occasions throughout its 107-year history. No legislative history is available to illuminate the Nebraska Legislature's basis for establishing the two-year residency requirement.

Standard of Review

Our analysis of Neb. Rev. Stat. § 80-301 must adhere to several rules of statutory construction which have been established by the Nebraska Supreme Court. First, all Nebraska statutes are presumed constitutional, and the party challenging the constitutionality of a statute has the burden of demonstrating that the statute is unconstitutional. ***In re Applications A-16027, et al.***, 242 Neb. 315, 495 N.W.2d 23 (1993). Furthermore, due to the presumption of validity accorded to state laws, all reasonable doubts regarding a challenged statute will be resolved in favor of its constitutionality. *Id.*; ***Jaksha v. State***, 241 Neb. 106, 486 N.W.2d 858 (1992). Finally, "[i]f a statute is subject to more than one construction, one of which would make that act constitutional and the other unconstitutional, [then we, like the Nebraska Supreme Court, are] required to adopt the former." ***Evans v. Metropolitan Utilities Dist. of Omaha***, 187 Neb. 261, 264, 188 N.W.2d 851, 854 (1971).

Analysis

A. Constitutionality Question.

The United States Supreme Court has examined constitutional challenges to a variety of residence requirements which have been enacted by state legislatures. "On several occasions the [Supreme] Court has invalidated requirements that

condition receipt of a benefit on a minimum period of residence within a jurisdiction, but it always has been careful to distinguish such durational residence requirements from bona fide residence requirements." ***Martinez v. Bynum***, 461 U.S. 321, 325 (1983).

Invalid Statutes

The U.S. Supreme Court has generally invalidated state statutes containing "durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the [s]tate." ***Attorney General of New York v. Soto-Lopez***, 476 U.S. 898, 903-04, n. 3 (1986). For example, the Court has ruled the following types of state statutes as unconstitutional:

- law which required an individual to have been a resident of the state for one-year and a resident of a county for three months prior to being eligible to vote (***Dunn v. Blumstein***, 405 U.S. 330 (1972));

- law which denied public welfare benefits to otherwise qualified residents for the reason that they had not resided in the state for one year (***Shapiro v. Thompson***, 394 U.S. 618 (1969));

- laws creating permanent distinctions among residents based upon their arrival in the state after a fixed date (***Hooper v. Bernalillo***, 472 U.S. 612 (1985); ***Zobel v. Williams***, 457 U.S. 55 (1982));

The Court invalidated the statutes in each of the decisions cited above after finding that the state laws at issue had infringed upon a constitutionally protected right to travel. "[F]reedom to travel throughout the United States has long been recognized as a basic right under the [United States] Constitution." ***Dunn***, 405 U.S. at 338 (quoting ***United States v. Guest***, 383 U.S. 745, 758 (1966). Thus, when reviewing a challenged state law, the Court examines "whether the distinction drawn by the [s]tate between older and newer residents burdens the right to migrate." ***Soto-Lopez***, 476 U.S. at 904. If so, then a state bears the heavy burden of demonstrating a compelling reason for enactment of its statute. ***Id.*** The Court has firmly ruled that a state's rationale of "'favoring established residents over new residents,' is constitutionally unacceptable." ***Zobel v. Williams***, 457 U.S. 55 at 65 (quoting ***Vlandis v. Kline***, 412 U.S. 441, 450 (1973)); ***See also Hooper v. Bernalillo***, 472 U.S. at 623 (holding that "[t]he [s]tate may not favor established residents over new residents based on the

view that the [s]tate may take care of 'its own,' if such is defined by prior residence.").

Constitutionally Valid Statutes

In contrast to the Court's determination that durational, fixed date, and fixed point residence requirements are generally unconstitutional is its willingness to uphold state statutes which are deemed to have been enacted as bona fide residence requirements. Thus, the Court has held:

> [a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement . . . does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a [s]tate and to establish residence there. A bona fide residence requirement simply requests that the person *does* establish residence before demanding the services that are restricted to residents.

Martinez v. Bynum, 461 U.S. 321, 328-29 (1983) (emphasis in original); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903-04, n. 3 (1986).

Based on this reasoning, the Court has clearly announced "that not all [statutory] waiting periods are impermissible." *Soto-Lopez*, 476 U.S. at 905. For example, a one-year residency requirement for initiation of divorce proceedings was upheld by the Court in *Sosna v. Iowa*, 419 U.S. 393 (1975). Challengers of the law asserted that the waiting period impermissibly burdened their right to travel. The Court concluded that a state has strong interests in setting forth terms and procedures for marriage and divorce, and that any delay suffered by the one-year requirement was only a temporary one which did not outweigh strong state interests. *Id.* Additionally, in the area of higher education, the Court has "sustained domicile requirements, which incorporate 1-year waiting periods, for resident tuition at state universities." *Soto-Lopez*, 476 U.S. at 905, n.5 (citing *Starns v. Malkerson*, 401 U.S. 985 (1971), summarily aff'g 326 F.Supp. 234 (Minn. 1970)(three-judge court); *Sturgis v. Washington*, 414 U.S. 1057 (1973), summarily aff'g 368 F.Supp. 38 (W.D. Wash.)(three-judge court); *Vlandis v. Kline*, 412 U.S. 441 (1973)). Finally, the Court has validated a law which restricted eligibility for tuition-free public elementary and secondary education only to bona fide state residents. *Martinez v. Bynum*, 461 U.S. 321 (1983).

Our determination as to the validity of the two-year requirement contained within Neb. Rev. Stat. § 80-301(1) rests upon

whether the statute could be construed as a bona fide residence rule under precedent established by the United States Supreme Court. Obviously, if Neb. Rev. Stat. § 80-301(1)(a) is construed as requiring that an applicant veteran be both a bona fide Nebraska resident and a resident for at least two years, then the statute would be deemed to impose an invalid durational restriction upon the veteran. *See Dunn*, 405 U.S. 330; *Shapiro*, 394 U.S. 618. Thus, the only possible construction of Neb. Rev. Stat. § 80-301 which would spare it from constitutional infirmity is a construction in which the two-year requirement is deemed a factor in establishing bona fide residency. Although we doubt the validity of such a construction, we must conclude that the two-year residency requirement contained within Neb. Rev. Stat. § 80-301(1) is not clearly unconstitutional since there may be one possible construction which would make the statute constitutional. *See Evans*, 187 Neb. at 264, 188 N.W.2d at 851. In so concluding, we acknowledge the very likely possibility that a veteran who challenged the constitutionality of this statute in litigation would prevail against the State of Nebraska. The standard of review to which we must adhere in our review, however, precludes us from finding the statute unconstitutional.

B. Residency Test.

Neb. Rev. Stat. § 80-301(1) requires in part that an applicant be a bona fide Nebraska resident for at least two years. Even if the two-year component were to be stricken from the statute as invalid, the Department would continue to be faced with making determinations as to whether a veteran has satisfied the bona fide residence requirement. We now address your request for guidance on this issue.

Our analysis begins by noting that there exists no universal test for establishing Nebraska residency. In three separate statutory areas, the Nebraska Legislature has enacted a specific definition of "residency." In the area of public assistance program eligibility, the Legislature has indicated that

> (1) [t]he term legal settlement for all public assistance programs shall be taken and considered to mean as follows:
>
> Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a legal settlement in such county. Every person who has resided one year continuously within the state, but not in any one county shall have a legal settlement in the county in which he or she has resided six months continuously.

. . .

> (4) A legal settlement in this state shall be terminated and lost by (a) acquiring a new one in another state or by (b) voluntary and uninterrupted absence from this state for the period of one year with intent to abandon residence in Nebraska.

Neb. Rev. Stat. § 68-115 (1990); ***see also*** 1947-48 Rep. Att'y Gen. 466.

A different definition is found in the laws governing elections and the pursuit of initiatives and referenda. In each of these areas, the Legislature has enacted nearly identical definitions: "Residence shall mean that place at which a person has established his <u>or her</u> home, where he <u>or she</u> is habitually present, and to which, when he <u>or she</u> departs, he <u>or she</u> intends to return." Neb. Rev. Stat. § 18-2510.01 (1991) (applicable to initiative and referendum statutes); Neb. Rev. Stat. § 32-107 (1988) (applicable to election law statutes) (emphasis added to provisions of § 18-2510.01 which differ from § 32-107).

As we have previously noted, these definitions are limited specifically in their application to the particular chapters and articles of the Nebraska Revised Statutes in which they appear. 1947-48 Rep. Att'y Gen. at 466-67. In a variety of contexts, however, the Nebraska Supreme Court has analyzed various factors in order to determine whether an individual had satisfied the residence requirements prescribed by these statutes. Although none of the cases are directly related to eligibility for veterans' benefits, the factors developed in the court's analysis may be used as a guide in making determinations as to whether the residency requirement of Neb. Rev. Stat. § 80-301(1) has been satisfied.

In ***State v. Jones***, 202 Neb. 488, 275 N.W.2d 851 (1979), the court examined whether a woman who had been duly elected as Cherry County Commissioner continued to be qualified to serve in that office. Approximately two years after taking office, the commissioner and her husband were forced to move from a ranch they had leased in Cherry County. The commissioner secured an apartment within Cherry County while her husband moved to another home which the couple owned in Grant County. ***Id.*** at 489, 275 N.W.2d at 852. The governing statute required in part that "'[t]he commissioners shall . . . be residents of their respective districts.'" ***Id.*** at 490, 275 N.W.2d at 853 (quoting Neb. Rev. Stat. § 23-150). At issue in the case was whether the commissioner actually resided in her Cherry County apartment or, instead, at her home in Grant County. The court utilized the definition of a "residence" contained within those statutes which govern election law: "'Residence shall mean that place at which a person has established

his home, where he is habitually present, and to which when he departs he intends to return.'" *Id.* at 491, 275 N.W.2d at 853 (quoting Neb. Rev. Stat. § 32-107). After examining several factors, the court determined that the commissioner had ceased to be a resident of Cherry County. *Id.* at 493, 275 N.W.2d at 854. Factors which were utilized by the court in reaching this conclusion included declarations made to others by the commissioner as to the location of her residence; whether vehicles were registered in the applicable jurisdiction; location of the commissioner's voter registration; and location of her spouse's domicile. *Id.* at 492-93, 275 N.W.2d at 853-54.

Similar factors have been utilized by the court in assessing whether the durational residency requirement required for court jurisdiction in divorce proceedings has been satisfied. ***See Huffman v. Huffman***, 232 Neb. 742, 749, 441 N.W.2d 899, 904 (1989) (holding that for purposes of Nebraska divorce statutes, "[r]esidence is the result of or achieved by a person's physical presence and living at a location and does not require an intention to stay permanently in the location."); ***Rector v. Rector***, 224 Neb. 800, 401 N.W.2d 167 (1987) (listing previously mentioned factors in determining residency for divorce purposes and also utilizing the location at which a party conducts his/her banking business as an additional factor for residency consideration).

Examining this issue in the context of public assistance benefits, the question before the court in ***Gosney v. Dep't of Public Welfare***, 206 Neb. 137, 291 N.W.2d 708 (1980), was "how to establish the residency of an incompetent adult." *Id.* at 138, 291 N.W.2d at 711. An application for medical assistance which had been filed with the state on behalf of a twenty-year old incompetent adult was denied "because it was determined that [the applicant] was not a bona fide resident of Nebraska." *Id.* at 139, 291 N.W.2d at 711. "In order to qualify for medical assistance under Nebraska law, a person '[m]ust be a bona fide resident of the State of Nebraska. . . .' The [Department of Public Welfare] found that [the applicant] was 'not a bona fide Nebraska resident because she came to the State of Nebraska for the sole and only purpose of receiving medical assistance.'" *Id.* at 140-41, 291 N.W.2d at 712 (citations omitted). Adopting the analysis utilized by the United States Supreme Court in ***Vlandis v. Kline***, 412 U.S. 441, 453 (1973), the court noted that

> "[i]n reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which whenever he is absent, he has the intention of returning. . . . Each individual case must be decided on its own particular facts. In reviewing a claim, relevant

> criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc."

206 Neb. at 142-43, 291 N.W.2d at 713. The court affirmed denial of benefits to the applicant, basing its holding on the fact that while the applicant was physically present in the state, there was no showing that she intended to make Nebraska her home. ***Id.*** at 146-47, 291 N.W.2d at 714. We caution that subsequent to the court's adoption of the ***Vlandis*** reasoning, it held that "*domicile* and *residence* are not necessarily synonyms and are not always used interchangeably." ***Huffman v. Huffman***, 232 Neb. 742, 749, 441 N.W.2d 899, 904 (1989).

We conclude by noting our court's caution that the term "'[t]o reside' and its corresponding noun *residence* are chameleon-like expressions, which take their color of meaning from the context in which they are found." ***Id.*** We find that a determination as to whether a veteran is a bona fide Nebraska resident is most similar to the determination made by the court in ***Gosney***, and, therefore, that the factors cited in that case may be utilized by the Department.

Resolution of Prior Attorney General Opinions

In developing our response to your inquiry, we researched extensively all of those opinions which have previously been issued regarding Neb. Rev. Stat. § 80-301. On two occasions, we have been asked to address the two-year requirement contained within the statute. In 1953, the Department of Veterans' Affairs sought our opinion as to whether the statute required an applicant for admission to the veterans' home to reside in Nebraska for two full years immediately preceding the date of his application or whether the statute required only that the applicant have been a Nebraska resident for any two-year period. 1953-54 Rep. Att'y Gen. 113. We construed Neb. Rev. Stat. § 80-301 to "require an applicant to have resided in Nebraska for two years immediately preceding the date of his application." ***Id.*** at 114. At the time our opinion was rendered, the United States Supreme Court had not ruled upon the validity of statutory residency requirements. We were not asked to, nor did we, address the constitutionality of the two-year provision in that opinion.

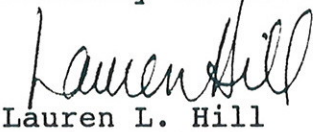
Our second review of Neb. Rev. Stat. § 80-301 occurred in 1975, when we responded to an inquiry from Senator Rasmussen. The senator had introduced LB 595 which, if enacted, would have amended the pertinent portion of § 80-301 to read as follows: "(a) the applicant has been a bona fide resident of the State of Nebraska for at least two years **immediately preceding such application.**" LB

595, § 1 (1975) (emphasis added to language which would have amended § 80-301 and which was the subject of review in our opinion). The conclusion we reached was that the constitutionality of the law "would be most difficult to defend" if the statute were amended as proposed by LB 595. 1975-76 Rep. Att'y Gen. 70 (Opinion No. 63, dated April 17, 1975). Our determination was based upon Supreme Court decisions in three cases which had invalidated various durational residence requirements. ***See Dunn v. Blumstein***, 405 U.S. 330 (1972); ***Graham v. Richardson***, 403 U.S. 365 (1971); ***Memorial Hospital v. Maricopa County***, 415 U.S. 250 (1974). Our opinion indicated that "durational residency requirements have generally been held unconstitutional as violative of a constitutionally protected right to travel among the states and therefore violative as denying these various persons of the equal protection of the law." 1975-76 Rep. Att'y Gen. 70. Again, in that opinion we were not asked to, nor did we, address the constitutionality of the existing two-year provision.

We find neither of these opinions to be overruled by the advice which we have rendered herein. We acknowledge that, if challenged, the constitutionality of the two-year provision contained within Neb. Rev. Stat. § 80-301(1)(a) will "be most difficult to defend." ***See*** 1975-76 Rep. Att'y Gen. 70. We reiterate that it is only because the statute is "subject to more than one construction, one of which would make the act constitutional," that we are precluded from finding Neb. Rev. Stat. § 80-301 to be clearly unconstitutional. ***See Evans***, 187 Neb. at 264, 188 N.W.2d at 857.

Sincerely yours,

DON STENBERG
Attorney General



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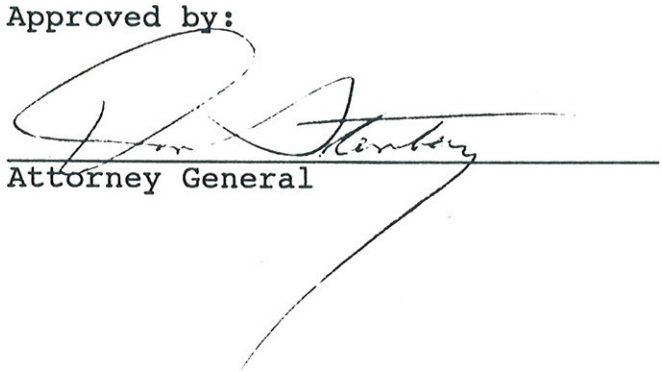

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