

## **N.D.A.G. Letter to Sinner (March 28, 1990)**

March 28, 1990

Honorable George A. Sinner  
Governor  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Governor Sinner:

Thank you for your February 22, 1990, letter concerning the status of Pemina Yellowbird and her eligibility to remain as a member of the North Dakota State Historical Board.

The laws governing the State Historical Board are found in N.D.C.C. ch. 55-01. N.D.C.C. § 55-01-01 requires each member of the State Historical Board to be a resident of North Dakota. Thus, Pemina must be a resident of North Dakota to continue as a member of the State Historical Board.

On March 15, 1990, I received a letter from Pemina outlining the reason she voted in Wisconsin. Pemina stated that she missed the deadline for obtaining an absentee ballot. Pemina telephoned the League of Women Voters and explained her situation to the woman who answered. Pemina informed the woman that she was an out-of-state student, and was a member of the North Dakota State Historical Board and did not want to do anything that would jeopardize her North Dakota residency. Based on the advice received from the woman, Pemina voted in Wisconsin.

Unfortunately, Pemina made a mistake when she voted in Wisconsin on April 5, 1988. The laws governing a presidential election are not the same as the laws governing a presidential primary. Pemina voted in a presidential primary. In order to vote in Wisconsin, a person must have either his or her name on a registration list or else fill out an affidavit indicating he or she is qualified to vote in Wisconsin. Wis. Stat. Annot. § 6.55 (West 1986).

In filling out the affidavit, the person is required to present acceptable proof of Wisconsin residence. By signing the voter registration form on April 5, 1988, Pemina swore or affirmed that Wisconsin is her legal residence. The affidavit that Pemina signed provided in part: "I hereby swear or affirm that I am a citizen of the United States, a resident of the State of Wisconsin." I am enclosing a copy of Pemina's voter registration form for your review.

N.D.C.C. § 16.1-01-04(3) provides that a person's voting residence shall be determined in accordance with the residency rules outlined in N.D.C.C. § 54-01-26. N.D.C.C. § 54-01-26 provides that a person can only have one legal residence. "A person's declaration of intent is significant" in determining a person's residency. Dietz v. City of Medora, 333 N.W.2d 702, 705 (N.D. 1983).

On April 5, 1988, Pemina declared that her one legal residence was Wisconsin. If Pemina contends that she was a North Dakota resident when she voted in Wisconsin, her declaration of Wisconsin residency would not be accurate and she, therefore, would be subject to prosecution for election fraud in Wisconsin. Wis. Stat. Annot. § 12.3 West 1986). Thus, I must assume Pemina's April 5th declaration to be accurate.

N.D.C.C. § 44-02-01 governs vacancies in public offices. A vacancy exists where an incumbent ceases to be a resident of the state where "the duties of the office are to be discharged" or where he or she may have been elected. N.D.C.C. § 44-02-01(7). A vacancy exists where the incumbent ceases to possess any of the qualifications of the office prescribed by law. N.D.C.C. § 44-02-01(9). On April 5, 1988, Pemina was a Wisconsin resident and, therefore, was no longer qualified to be a member of the State Historical Board since she was not a North Dakota resident. Thus, on April 5, 1988, a vacancy occurred and you had the power to appoint someone to fill the vacancy. N.D.C.C. § 55-01-01.

On July 1, 1989, you reappointed Pemina to the State Historical Board. The issue of whether Pemina had regained her North Dakota residency between April 5, 1988, and July 1, 1989, is a question of fact. Pemina must prove three elements to reestablish North Dakota residency:

- (1) Abandonment of old domicile,
- (2) Actual removal to a new domicile, and
- (3) Intent to change from the old to the new and remain at the new domicile.

Dietz v. City of Medora, 333 N.W.2d 702, 705 (N.D. 1983). Therefore, in order for Pemina to prove she has reestablished her North Dakota residency, you may wish to have her sign an affidavit indicating that she has met the requirements outlined in the Dietz decision. If Pemina is unable to reestablish her North Dakota residency, a vacancy continues to exist and you may appoint a new member to the State Historical Board. N.D.C.C. § 55-01-01.

I hope this information is helpful to you. Feel free to give me a call if you wish to discuss this matter in greater detail.

Sincerely,

Nicholas J. Spaeth

dfm  
Enclosure