December 6, 2010

Dear City Attorney:

The U.S. Supreme Court, the U.S. Sixth Circuit Court of Appeals, and other federal and state courts have held that continuing residency requirements are constitutional. Most of the cases apply to police officers and firemen, but the residency rules at issue in those cases generally applied to all employees.

In McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976), the residency requirement applied to all employees. A police officer moved from the City of Philadelphia, was terminated, and challenged his termination on the ground that the residency requirement violated his constitutional right to travel. The Commonwealth Court of Pennsylvania sustained the regulation, and the Pennsylvania Supreme Court denied review. The U.S. Supreme Court upheld the residency requirement, declaring that:

The Michigan Supreme Court held that Detroit’s similar requirement for police officers did not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. We dismissed the appeal from that judgement because no substantial federal question was presented. Detroit Police Officers Ass’n v. City of Detroit,405 U.S. 950, 92 S.Ct. 1172, 31 L.Ed.2d 227 (1972). We have therefore held that this kind of ordinance is not irrational. Hicks v. Miranda, 442 U.S. 332, 343-345, 95 S.Ct. 2281, 2288-2289, 45 L.Ed.2d 223 (1975); see Wardell v. Board of Education of Cinncinati, 529 F.2d 6725, 628 (CA6 1976).

We have not, however, specifically addressed the contention made by appellant in this case that his constitutionally recognized right to travel interstate as defined in Shapiro v. Thompson, 394 U.S. 618, 89 S.C. 1322, 22 L.Ed.2d 600 (1969); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); and Memorial

Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), is impaired. Each of those cases involved a statutory requirement of residence in the State for at least one year before becoming eligible to vote, as in Dunn, or to receive welfare benefits, as in Shapiro and Memorial Hospital. *Neither of those cases, nor in any others, have we questioned the validity of a condition placed upon municipal employment that a person be a resident at the time of his application. In this case appellant claims a constitutional right to be employed by the city of Philadelphia while he is living elsewhere. There is no support in or cases for such a claim*. [At 646-647] [Emphasis is mine]

The Court continued that, “Shapiro and Dunn did not question “‘the validity of appropriately defined and uniformly applied bona fide residence requirements.’”.... This case involves that kind of bona fide continuing residence requirement....” [At 647]

The recent case of Association of Cleveland Firefighters v. City of Cleveland, 502 F.2d 545 (6th Cir. 2007), follows McCarthy, above. In that case some city firefighters challenged this provision of the Cleveland City Charter on the grounds that it violated the Equal Protection Clause, the constitutional right to travel, and the right to travel set forth in the International Covenant on Civil and Political Rights, and was void for vagueness:

[e]xcept as in this Charter otherwise provides or except as otherwise provided by a majority vote of the Council of the City of Cleveland, every temporary or regular officer or employee of the City of Cleveland, including members of all City boards, and commissions established by the Charter or the ordinances of Cleveland, whether in the classified or unclassified service of the City of Cleveland, appointed after the effective date of this amendment, shall, at the time of his appointment, or within six months thereafter, be or become a bona fide resident of the City of Cleveland, and shall remain as such during his term of office or while employed by the City of Cleveland. [At 546] [Section 74(a)]

The firefighters also alleged that the Cleveland City Council had “arbitrarily” granted exceptions from § 74(a) of the city charter to “numerous city employees,” but had denied exemptions to them.

The Court rejected all the firefighters claims as follows:

**- Right to travel**:

Pointing to McCarthy, above, the Court declared that in that in the present case the district court properly rejected that claim, declaring that:

.... The [Supreme] Court explicitly stated that the plaintiff “claims a constitutional right to be employed by the city of Philadelphia while he is living elsewhere. There is no support in our cases for such a claim.” [Citations omitted by me.] Other circuits have accordantly declined right to travel challenges to municipal residency requirements. See *Andre v. Bd of Trustees*, 561 F.2d 48, 52 (7th Cir. 1977); *Wright v. City of Jackson*, 506 F.2d 900, 901 (5th Cir. 1975).... [At 549]

**- Equal protection”**

The Court responded generally to this challenge, then to its two components:

The residency requirement neither makes classifications along suspect lines nor burdens Appellants’ right to travel. Furthermore, even Appellants do not purport that Appellees have, in applying the requirement, done so in such a manner so as to discriminate on the basis of suspect classes or to burden Appellants fundamental rights. Nevertheless, the Supreme Court has recognized successful equal Protection claims brought by “class[es] of one.” *Vill. of Willowbrook v. Olech*, 528 U.S. 546, 564, 120 S.Ct. 1073, 145 L.Ed. 2d 1060 (2000) (per curium) In these “class of one” cases, the plaintiff must “allege [ ] that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” Id (citations omitted (by court)). [At 549]

**1. Facial Challenge**

The Court reasoned that:

The Supreme Court has held that municipal residency requirements such as that at issue in the instant case do not, on their face, constitute an equal protection violation. In Detroit Police Officers Ass’n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97, 97-98 (1971), the Michigan Supreme Court held that a Detroit residency requirement requiring police officers to reside in the city did not violate the equal protection Clause because “[a] policeman’s very presence, whether actually performing a specified duty during assigned hours, or engaged in any other activity during off-duty hours, provides a trained person immediately available for enforcement purposes.”

The United States Supreme Court dismissed the appeal of that case for want of a substantial federal question. [Citation omitted by me.] That dismissal constituted a decision on the merits. [Citations omitted by me.].... “We have therefore held that this kind of ordinance is not irrational.” [At 549-550] [Citations omitted by court.]

**2. As Applied Challenge**

The essence of the Court’s rejection of this claim is that, “Consequently, because it is rational for the City to treat fire fighters differently from other City employees, as stated above, we affirm the district court with respect to this issue as well.” [At 550]

**- Void for Vagueness**

This claim by the firefighters related to the exemption provision of the city charter, which they alleged contained no standards.

The Court declared that the void for vagueness had two primary goals:

(1) To provide fair notice [of the rule or regulation] to the citizenry;

(2) To provide standards for enforcement by police, judges and juries.

The exemption provision in § 74(a) of the Cleveland City Charter satisfied both standards. As to the first standard, the Court said:

.... The requirement sets forth a very clear rule, namely that city employees must live in Cleveland. The exception provision is a limited exception to this clear rule, one that is granted at the City Council’s discretion. This exception is not only acceptable, but it should be encouraged. Indeed, in many cases, especially when they deal with the numerous and varied needs of employees, municipal governments should not be barred from making individualized determination based on unique circumstances.... [At 551

The Court turned to the case the district court cited for its dismissal of the firefighters void for vagueness claim: Brockert v. Skornicka, 711 F.2d 1376, 1892 (7th Cir. 1982), in which that court had upheld the City of Madison, Wisconsin’s residency requirement that contained the exemption provision, “unless permission to reside outside the city shall be expressly granted by the mayor.” That requirement, reasoned the Seventh Circuit, gave the employee notice of the first step necessary to comply with the waiver provision, and declared that:

[a]lthough the ultimate question of what medical problem (or other matter) would justify a waiver was left as unclear as before, the due process clause does not demand the impossible of government authorities. A waiver provision that attempted to incorporate every situation justifying an exemption would be of enormous proportion, if not impossible to draft. On the other hand, a provision setting forth a few general situations deserving a waiver would deprive the mayor of the flexibility necessary to deal with unforseen but meritorious requests. Finally, a waiver provision incorporating a broad standard, such as an exemption “for cause,” would provide little more in the way of guidance or notice than no standard at all.... [At 552 in Association of Cleveland Firefighters]

As to the second goal of the void for vagueness doctrine, which was to provide standard for enforcement to police, judges, juries, the waiver provision in Association of Cleveland Firefighters, did not delegate basic policy matters to police, judges or juries; exemptions were in the hands of the city council [in the hands of the mayor in Brockert]. [At 552-53]

Also see the Sixth Circuit case of Campbell v. City of Allen Park, 829 F.2d 576 (1987).

The Tennessee Supreme Court also tackled the question of whether city residency requirements were constitutional under the Fourteenth Amendment to the U.S. Constitution, and Article 1, Section 8, of the Tennessee Constitution, in City of Memphis v. International Brotherhood of Electrical Workers Union, Local 1288, 545 S.W.2d 98 (Tenn. 1976). The residency requirements in this case were contained in the Memphis City Charter with respect to “employees employed solely by the city of Memphis, or any of its departments, bureaus or commissions shall be required to live and maintain a residence within the boundaries of the County of Shelby....”[At 99]

The Court upheld that provision, citing McCarthy, above, and other cases for the proposition that such requirements need to be supported only by a rational basis. For the rational basis of the city’s charter provision, the Court found that:

A county residential requirement insures proximity to employee’s [sic] job in emergencies. County taxes and other revenues are shared by both the County and the City of Memphis and the City reaps general economic benefits flowing from local expenditure of County’s resident’s [sic] salaries. Furthermore pride in one’s place of employment and a feeling of greater personal stake in the city’s progress can be expected from employees residing in the county wherein the city lies than from those who reside beyond the limits of the county.

Note here that the continuing residency requirement provision in the Memphis City Charter that was at issue in City of Memphis v. International Brotherhood of Electrical Workers Union, above, applied to Shelby County. The 2004 amendment to the Memphis Home Rule City Charter applied the continuing residency requirement to the City of Memphis. But in light of McCarthy, above, and City of Memphis v. International Brotherhood, above, it does not appear to me that affects the constitutionality of that charter amendment.

There are a significant number of other cases in addition to those mentioned above that have upheld continuing residency requirements for local government employees. For example, McClelland v. Paris Public Schools, 742 S.W.2d 907 (Ark. 1988), upheld a school district’s residency requirements that provided that certain school personnel, apparently including teachers, were required to live in the school district or within a 10 mile driving distance of the city limits of the City of Paris. The plaintiff moved 17 miles outside the district and was terminated. She sued in both federal and state court, alleging that the policy violated her constitutional rights. The federal court dismissed her claim, without prejudice to her state claims, which were that the policy violated her right to equal protection under the Arkansas Constitution, that the action [of terminating her] was discriminatory and unreasonable under the Teacher Fair Dismissal Act, and that her implied rights under Article II of the Arkansas Constitution to travel, reside and teach were violated. [At 909]

The plaintiff acknowledged that under federal law, the standard for measuring continuing residency requirements was the rational basis test, but she argued that under the Arkansas Constitution the standard ought to be higher. The Court rejected her argument, declaring that the rational basis test applied to all her claims, citing McCarthy, and a raft of federal and Arkansas cases. The court concluded that:

Similar residency requirements have been consistently upheld as being constitutional. Such policies have been instituted and found valid not only for teachers, but for policemen, firemen and municipal employees generally. *Wardell v. Board of Education, supra*; *Mogle v. Sevier County School Dist*., 540 F.2d 478 (1976); *Cook County Teacher Union Local 1600 v. Taylor*, 432 F. Supp. 270 (1977); *Carofano v. City of Bridgeport*, 196 Conn. 623, 495 A.2d 1011 (1985); *Simien v. City of San Antonio*, 809 F.2d 255 (5th Cir. 1987); *Abrahams v. Civil Service Comm*., 65 N.J. 61, 319 A.2d 483 (1974); and see annotation, 4 ALR 45h 38, Policemen-Firemen Residency Requirements § 2; *Mc Carty v. Philadelphia Civil Service Comm., supra*. [At 909]

It seems clear that both the Sixth Circuit and the Tennessee Supreme Court have held that continuing residence requirements for municipal employees are constitutional and otherwise legal, provided they meet the rational basis standard. Indeed, the above cases, and those cases cited in them, appear to reflect the heavy weight of authority in the United States that such requirements are both constitutional and otherwise legal. Some states have enacted prohibitions or restrictions on such requirements, but I have not found that to be the case in Tennessee.

The rational basis test does not appear difficult to meet.

Sincerely,

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