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Opinion No. 01-007

Validity of Residency Requirement for President Emeritus under Chapter 840, 2000 Tennessee Public Acts under United States and Tennessee Constitutions

QUESTION

With respect to the requirement set forth in Section (a)(4) of Chapter No. 840 of the 2000 Public Acts ("Chapter 840") that any person employed by the Board of Regents of the State University and Community College System (the "Board of Regents") and the Board of Trustees of the University of Tennessee (the "Board of Trustees") as president emeritus "must reside in the State of Tennessee at the time of the initial appointment and at the time of any subsequent appointment": (a) is such residency requirement permissible under the United States and Tennessee Constitutions; and (b) does the president emeritus have to live in the State of Tennessee?

OPINION

Based upon an analysis of decisions rendered by the United States Supreme Court and the Tennessee Supreme Court: (a) the residency requirement set forth in Section (a)(4) of Chapter 840 is permissible under the United States and Tennessee Constitutions; and (b) any person who shall be lawfully appointed to the position of president emeritus must comply with the provisions of Section (a)(4) of Chapter 840.

ANALYSIS

A. CONSTITUTIONAL ANALYSIS.

1. United States Constitution.

The more recent decisions by the United States Supreme Court hold that when a state government enters the marketplace as a participant, it is not subject to limitations upon the state's power under the privileges and immunities clause, Article 4, § 2, clause 1 (the "Privileges & Immunities Clause"), or the commerce clause, Article 1, § 8, clause 3 (the "Commerce Clause"), of the United States Constitution. The power of a state government to discriminate with respect to employment of persons on the basis of residency within the state has been analyzed by the United States Supreme Court in several decisions with

respect to possible violations of both the Privileges & Immunities Clause and Commerce Clause. Although certain precedents by the Court that hold the Constitution limits a state's power to enact residency requirements have never been expressly overturned, the more recent view expressed by the Court is that neither the Privileges & Immunities Clause nor the Commerce Clause limits a state's power to act when the state acts as a market participant as opposed to in a regulatory capacity. Under this analysis, Tennessee would not be prohibited from enforcing the residency requirement for a president emeritus under Chapter 840.

Prior decisions by the Supreme Court suggest that a state's power to discriminate based upon residency are significantly limited under both the Privileges & Immunities Clause and Commerce Clause. *See, e.g., Hicklin v. Obreck,* 437 U.S. 518 (1978). In *Hicklin,* the Court provided that a state must establish a "substantial reason" for employment discrimination based on residency to withstand a constitutional challenge under the Privileges & Immunities Clause. Citing *Toomer v. Witsell,* 334 U.S. 385 (1948), as precedent, Justice Brennan wrote that a substantial reason would not exist "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Hicklin,* at 525; quoting *Toomer,* at 398.

However, more recent decisions by the Supreme Court have distinguished the reasoning set forth in *Hicklin* and expressly permit state and local governments, when acting as participants in the marketplace, to act free from any constitutional limitations under the Commerce Clause or the Privileges & Immunities Clause. In *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), the Court stated "*Alexandria Scrap* and *Reeves*, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *Id.* at 208, citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). In *White*, Justice Rehnquist clearly distinguished the reasoning of *Hicklin* by stating that the rule of law expressed by the Court in *Hicklin* and the several precedents cited therein applies only when the Constitution imposes restraints on the government's activity and expressly does not apply when the government enters the market as a participant. *White,* at 210.

The residency requirement under Chapter 840 does not violate the Commerce Clause or the Privileges & Immunities Clause under the more modern view of the Supreme Court because the State of Tennessee acts as a market participant when it appoints a president emeritus. Accordingly, the Legislature may act free from the constitutional restraints and may expressly condition any such employment upon residency within the State.

Any challenge to this residency requirement under the equal protection clause of the Fourteenth Amendment of the United States Constitution (the "Equal Protection Clause") must be analyzed under the "rational basis" test because no fundamental right or suspect class is implicated. *See Civil Service Merit Board v. Burson*, 816 S.W.2d 725 (Tenn. 1991) (discussion by the Tennessee Supreme Court of equal protection challenge to residency requirement for county civil service board). While Chapter 840 does not cite any basis for the residency requirement, a rational basis for the requirement may be implied, including, without limitation, a requirement that a president emeritus be readily available and proximate in order to

discharge the duties of the office. Because a rational basis may be found to support the discrimination, such discrimination would be valid and constitutional under the Equal Protection Clause.

Because the residency requirement under Chapter 840 does not violate the Commerce Clause, the Privileges & Immunities Clause, or the Equal Protection Clause, this provision must be deemed valid and constitutional under the United States Constitution.

2. Tennessee Constitution.

In *Civil Service Board*, the Tennessee Supreme Court reviewed the validity of the residency requirement for appointment to a county civil service board set forth in T.C.A. § 6-54-114(a) under the Equal Protection Clause and, in addition, the Court denied challenges to this statute under Article I, Section 8 of the Tennessee Constitution ("Article I, § 8"). In this case, the Supreme Court applied a rational basis test to challenges to the statute under both the United States and Tennessee Constitutions. Accordingly, the residency requirement set forth in Chapter 840 must be examined under Article I, § 8 of the Tennessee Constitution using a rational basis test to ensure that such requirement is not arbitrary, capricious, unreasonable, or fundamentally unfair. Because, as in the analysis of the Equal Protection Clause, legitimate reasons may be implied to support the residency requirement, this provision of Chapter 840 does not violate Article I, § 8 and, accordingly, is valid under the Tennessee Constitution.

Article I, § 8, commonly referred to as the due process clause of the Tennessee Constitution, provides: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgement of his peers or the law of the land." It is well settled law in Tennessee that Article I, § 8 does not prohibit the Legislature from making distinctions in the law based on reasonable and proper classifications. *See Civil Service Board*, at 730; *Cavendar v. Hewitt*, 239 S.W. 767 (Tenn. 1922); *Stratton Claimants v. Morris Claimants*, 15 S.W. 87 (Tenn. 1891). Moreover, it is settled law that the basis of any classification need not appear on the face of a statute. *See Civil Service Board*, at 730; *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439 (Tenn. 1978); *City of Memphis v. International Bhd. of Elec. Workers Union, Local 1288*, 545 S.W.2d 98 (Tenn. 1976). The proper test of whether a classification is proper under Article I, § 8 is that the basis of the classification, whether expressed or implied, be reasonable and not arbitrary or capricious. *See Breyer v. State*, 50 S.W. 769 (Tenn. 1899); *City of Chattanooga v. Harris*, 442 S.W.2d 602 (Tenn. 1969)(any "natural and reasonable" classification is constitutional, any "arbitrary and capricious" classification is unconstitutional and invalid).

As discussed above in the analysis of the Equal Protection Clause, a rational basis for the residency requirement of Chapter 840 may be reasonably implied. Accordingly, the residency requirement would not be deemed arbitrary or capricious and, therefore, must be deemed valid under Article I, § 8 of the Tennessee Constitution.

B. VALIDITY OF LAW.

Because Section (a)(4) of Chapter 840 is valid under both the United States and Tennessee Constitutions, the residency requirement is the law of Tennessee and, accordingly, must be followed by the Board of Regents and Board of Trustees when appointing a president emeritus. Therefore, any person who is appointed president emeritus "must reside in the State of Tennessee at the time of the initial appointment and at the time of any subsequent appointment."

For the reasons expressed above, it is the opinion of this Office that the residency requirement set forth in Section (a)(4) of Chapter 840 of the Tennessee Public Acts of 2000 is valid under the United States and Tennessee Constitutions and, as the duly enacted law of the State of Tennessee, governs the appointment of any president emeritus by the Board of Regents or the Board of Trustees.

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