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August 2, 2010

Opinion No. 10-90

Real Estate Licensing Requirements for Non-Tennessee Residents

QUESTIONS

1. May the Tennessee Real Estate Commission create or establish a different licensing requirement for residents of states with which Tennessee has reciprocity than for residents of states with which Tennessee does not have reciprocity?

2. May the Commission deny a license to a nonresident who completes all of Tennessee's requirements if that licensee intends to use the Tennessee license to secure a license in another state through that state's reciprocity procedure?

3. Tenn. Code Ann. § 62-13-303(e)(2)(B) requires a showing of forty-five days of residency in this state as a qualification for an affiliate broker's license. The same is required for someone seeking a broker's license. Tenn. Code Ann. § 62-13-303(f)(2)(B). Is this residency requirement constitutional?

4. Reciprocity is outlined in Tenn. Code Ann. § 62-13-314, and subsection (a)(4) states that the "commission may, in its discretion, refuse to issue, renew or reinstate a broker's, affiliate broker's or time share salesperson's license if the applicant for, or holder of, the license is not a resident of this state." May the Commission refuse a license based only on residency?

OPINIONS

1. With regard to reciprocal licensing requirements, the Commission may treat nonresidents from states with and without reciprocity differently, as long as the difference is related to the state's desire to secure an advantage in another state for its residents on similar terms. As for standard licensing requirements, the constitutional analysis considers the discrimination suffered by nonresidents from states with and without reciprocity as compared to Tennessee residents. The discriminatory requirement must satisfy the "substantial reason" and "substantial relationship" tests and must not unduly burden interstate commerce. Residency requirements are unconstitutional for both reciprocal and standard licensing statutes.

2. No. Such a provision would violate the Privileges and Immunities Clause. It would discriminate against nonresidents because it would apply to them but not Tennessee residents.

To deny a license to a nonresident who intends to use it to secure a license in another state while allowing a Tennessee resident to do the same would violate the "substantial reason" test.

3. No. With regard to standard licensing statutes, residency requirements violate the Privileges and Immunities Clause.

4. No. With regard to reciprocal licensing statutes, residency requirements violate the Privileges and Immunities Clause.

ANALYSIS

1. Tenn. Code Ann. §§ 62-13-301 *et seq*. (2009) set forth qualifications that must be satisfied for a person to obtain a real estate broker, affiliate broker, time-share salesperson, or acquisition agent license in Tennessee. Theses statutes contemplate two types of license applicants. The first type is an applicant who does not already possess a valid license. Tenn. Code Ann. § 62-13-303 (2009). Such an applicant may obtain a Tennessee license in accordance with Tennessee's standard licensing statute, which requires an applicant to satisfy educational requirements, pass a written exam, and be a resident of Tennessee for forty-five days. Tenn. Code Ann. §§ 62-13-303(b)(2), (c)(2), (e)(2)(B), (f)(2)(B), and -304 (2009). The second type is an applicant who possesses a valid license from another state. Such an applicant may obtain a Tennessee license pursuant to the reciprocal licensing statute. Tenn. Code Ann. § 62-13-314 (2009). The applicant is not required to pass the Tennessee license exam, but must have passed a written exam to obtain the out-of-state license and meet or exceed Tennessee's licensing qualifications. Tenn. Code Ann. § 62-13-314(a)(3)(A) and (B) (2009). Also, the applicant's state of residence must have a reciprocity agreement with Tennessee. Tenn. Code Ann. § 62-13-314(a)(3)(D) (2009). However, the Tennessee Real Estate Commission reserves the right to "refuse to issue, renew or reinstate a . . . license if the applicant . . . is not a resident of" Tennessee. Tenn. Code Ann. § 62-13-314(a)(4) (2009).

The Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution prevents states from discriminating against nonresidents through their standard licensing statutes. It is unconstitutional for such statutes to discriminate against nonresidents unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989). With regard to the "substantial relationship" test, a court should "consider the availability of less restrictive means." *Piper*, 470 U.S. at 284; *Barnard*, 489 U.S. at 552-53. In *Piper* and *Barnard*, the United States Supreme Court held that rules prohibiting nonresidents from obtaining a law license through each state's standard licensing statute violated the Privileges and Immunities Clause. *Piper*, 470 U.S. at 288; *Barnard*, 489 U.S. at 558-59. The rules discriminated against nonresidents, and the Court was not convinced by the proffered justification that nonresidents, as compared to residents, would be less familiar with local rules and procedures, less likely to behave ethically, less likely to be available for court proceedings, and less likely to perform pro bono work. *Piper*, 470 U.S. at 285-87; *Barnard*, 489 U.S. at 553-58. It must also be noted that the Commerce Clause of Art. I, § 8, of the Constitution prohibits

standard licensing statutes that unduly burden interstate commerce. *Georgia Ass'n of Realtors, Inc. v. Alabama Real Estate Comm'n*, 748 F. Supp. 1487 (M.D. Ala. 1990).

States have more latitude with regard to reciprocal licensing statutes. States are not obligated to recognize professional licenses issued by other states. *Fales v. Comm'n on Licensure to Prac. Heal. Art*, 275 A.2d 238, 240 (D.C. App. 1971). Thus, a state has a legitimate interest in securing for its residents the advantage of having its professional licenses recognized by another state by offering the same advantage to residents of that state. *Hawkins v. Moss*, 503 F.2d 1171, 1177 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); *Parks v. Bd. of Bar Exam'rs*, 878 A.2d 297, 300-01 (Vt. 2005). Because of this legitimate interest, reciprocal licensing statutes "have been found invulnerable to constitutional attack on equal protection grounds." *Hawkins*, 503 F.2d at 1177-78. A state may enter into a reciprocal arrangement with one state without being required to do so with other states, even though the effect is that the state treats residents from states that do not offer reciprocity differently than residents from states that do. *Id*. at 1177. Also, a state may have different reciprocity requirements for residents from different states. *Parks*, 878 A.2d at 300-01 (Vermont Supreme Court upholding reciprocal licensing statute that required Rhode Island applicants to have five years' experience while admitting applicants with only three years' experience from states that extend the same three-year requirement to Vermont residents).

Reciprocal licensing statutes generally do not violate the Privileges and Immunities Clause because they do not discriminate against nonresidents in favor of residents. Nonresidents often benefit from such a statute because it exempts them from requirements that they otherwise would have to satisfy under a standard licensing statute. *Hawkins*, 503 F.2d at 1179-80; *Fales*, 275 A.2d at 240-41; *Arthur v. Iowa State Bar Ass'n*, 415 N.W.2d 168, 171 (Iowa 1987) (rule requiring reciprocal—but not standard—licensing applicants to show they intend to maintain an "office for the practice of law" does not violate the Privileges and Immunities Clause because standard licensing applicants show such intent by bearing "the burden of taking the bar exam"). However, as with standard licensing statutes, the United States Supreme Court has held that residency requirements in reciprocal licensing statutes violate the Privilege and Immunities Clause. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988).

The courts have permitted states to make a distinction in treatment between nonresidents located in states offering reciprocity and nonresidents located in states without reciprocity. Entering into a reciprocity arrangement with one state but not another is constitutional, *Hawkins*, 503 F.2d at 1177, and treating these groups differently in a reciprocal licensing statute would be constitutional as long as the difference is related to the state's desire to secure an advantage in another state for its residents on similar terms. *Parks*, 878 A.2d at 300-01. With regard to a standard licensing statute, the constitutional analysis would concern the discrimination suffered by nonresidents from states with and without reciprocity as compared to Tennessee residents. Any discriminatory treatment must satisfy the "substantial reason" and "substantial relationship" tests, *Piper*, 470 U.S. at 284 and *Barnard*, 489 U.S. at 552, and must not unduly burden interstate commerce. *Georgia Ass'n of Realtors, Inc.*, 748 F. Supp. at 1493. Residency requirements are unconstitutional as to both reciprocal and standard licensing statutes. *Friedman*, 487 U.S. at 70; *Piper*, 470 U.S. at 288; *Barnard*, 489 U.S. at 558-59.

2. A provision permitting the Commission to deny a license to a nonresident who satisfies Tennessee's standard licensing statute because the nonresident intends to use another state's reciprocal licensing statute to obtain a license in that state would be unconstitutional. The Privileges and Immunities Clause prohibits discrimination against nonresidents unless "there is a substantial reason for the" discrimination and the discrimination "bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. Such a provision would discriminate against nonresidents because it would apply to them but not Tennessee residents. The Commission might contend that the "substantial reason" for the discrimination would be to prevent nonresidents from a state with reciprocity (*i.e.*, Mississippi) from using Tennessee's standard licensing statute and the Mississippi and Tennessee reciprocity arrangement to obtain a Mississippi license while avoiding requirements under Mississippi's standard licensing statute. While Mississippi might be concerned with the subversion of its standard licensing requirements, Tennessee would not suffer any harm in such circumstances. And even if there were some sort of harm, it is unclear why it would occur only when a nonresident, as opposed to a Tennessee resident, uses Tennessee's standard licensing statute and the reciprocity arrangement to avoid Mississippi's standard licensing requirements. Accordingly, the proposed provision would be unconstitutional.

3. Statutes and rules prohibiting nonresidents from obtaining a license through a state's standard licensing statute violate the Privileges and Immunities Clause. *Piper*, 470 U.S. at 288; *Barnard*, 489 U.S. at 558-59. Such is the case even for a relatively short 45-day residency requirement.

4. Similar to standard licensing statutes, residency requirements in reciprocal licensing statutes violate the Privileges and Immunities Clause. *Friedman*, 487 U.S. at 70.

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