METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

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Legal Opinion 2010-02

To: Mr. Rip Ryman
Member of Metropolitan Council
District 10
Suite 204, Metropolitan Courthouse
Nashville, Tennessee 37201

Date: June 21, 2010

You requested the opinion of the Department of Law on whether a proposed amendment to the Metropolitan Charter that imposes a residency requirement on certain employees of the Metropolitan Government is constitutional. It is the opinion of the Department of Law that a court is likely to find that the proposed Charter Amendment is constitutional.

PROPOSED CHARTER AMENDMENT

The text of the proposed Charter Amendment is as follows:

Article 12 of the Charter of The Metropolitan Government of Nashville and Davidson County shall be amended by adding the following new Section:

Section 12.14. Residency requirements.

Notwithstanding any other provision of this Charter to the contrary, every director, executive director, assistant director, deputy director, chief, assistant chief, and deputy chief of any department, board, commission, or agency of the metropolitan government created by this Charter or by ordinance, other than those who are employees of the electric power board, the metropolitan board of public education, or the airport authority, shall be a resident of the area of the Metropolitan Government and shall continue to reside therein as a condition of his/her employment. Any such director, executive director, assistant director, deputy director, chief, assistant chief, or deputy chief currently residing outside of the area of the Metropolitan Government shall have one hundred eighty (180) days in which to establish residency within the area of the Metropolitan Government.

The proposed charter amendment would require directors, executive directors, assistant directors, deputy directors, chiefs, assistant chiefs, and deputy chiefs ("principal management employees" herein) for every department, board, commission, or agency of the Metropolitan Government - other than the Board of Education, Electric Power Board, or the Airport Authority - be residents of the area of the Metropolitan Government. Additionally, those principal management employees currently serving in such positions who reside outside of the area of the Metropolitan Government would have one hundred eighty (180) days in which to establish residency within Davidson County.

ANALYSIS

I. RESIDENCY REQUIREMENT FOR EMPLOYEES

GENERAL RESIDENCY REQUIREMENT: The overwhelming majority of courts have upheld as constitutional the requirements adopted by municipalities that require employees to be residents of the municipality. These Courts have found that such laws do not violate the equal protection clause of the United Stated Constitution or the constitutional right of interstate travel.[1] In 1976, the Tennessee Supreme Court upheld a residency requirement for City of Memphis employees finding that it did not interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class. The Court imposed a rational basis test and determined that there was a rational basis for the requirement. [2] Also in 1976, the United States Supreme Court held that a municipal regulation requiring employees of the city to be residents of the city did not violate the constitutionally protected right of interstate travel.[3]

SPECIFIC EMPLOYEES DESIGNATED: Courts have also upheld laws imposing residency requirements limited to specific municipal employees, such as firefighters,[4] police officers,[5] and teachers.[6] The Kansas Supreme Court found that an ordinance requiring only department heads and major officers to reside in the City did not violate the equal protection clause or the right to travel.[7] The ordinance required specific officials[8] to be residents of the city in order to qualify and remain in their respective offices.[9] That Court stated:

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[1] Thomas A. Hampton, "*An Intermediate Standard for Equal Protection Review of Municipal Residence Requirements,*" 43 Ohio St. L.J. 195, 199 (1982).
[2] *City of Memphis v. International Broth. of Elec. Bhd. of Elec. Workers Union Local 1288,* 545 S.W.2d 98, 102 (Tenn. 1976).
[3] *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645 (1976).
[4] *Kiel v. City of Kenosha,* 236 F.3d 814 (7th Cir. 2000).
[5] *Nevitt v. Board of Sup'rs of Logan Tp., Blair County,* 379 A.2d 1072 (Pa. Commw. Ct. 1977).
[6] *Wardwell v. Board of Ed. of City School Dist. of City of Cincinnati,* 529 F.2d 625 (6th Cir. 1976).
[7] *Lines v. City of Topeka,* 577 P.2d 42 (Kan. 1978).

> The city justifies its residency requirement on the "emergency availability" and "salary expenditure" criteria; however, we are not limited to those choices. Were that the case the city's classification might be endangered on equal protection grounds because it does not require all employees of the city to reside therein. We feel the proper justification for the city's residency requirement lies in an examination of the class of employees required to live in the city under Charter Ordinance No. 22. *The group involved is narrowly drawn to include only department heads and major officers.* All other employees are excluded. *We feel the city is justified in requiring major officeholders to have a commitment and involvement with the city, its taxpayers and its activities in order to hold such an office.*
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> The question raised by plaintiff is whether the equal protection clause is violated because Charter Ordinance No. 22 applies to him, but not to firemen and policemen. If the "emergency availability" rationale were the only justification for requiring residency, plaintiff might prevail; but, as we stated earlier, we are allowed to consider any valid reason for the residency requirement applying to the class of persons of which plaintiff is a member. *We feel it is a legislatively permissible goal to require high level city officials, such as those enumerated in Charter Ordinance No. 22, to reside in the city, without making the same requirement of all other employees.* We perceive a difference between management employees and other employees.[10]

II. APPLICATION OF RESIDENCY REQUIREMENT TO EMPLOYEES APPOINTED PRIOR TO ENACTMENT OF THE RESIDENCY PROVISION

The Tennessee Constitution provides "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made."[11] Courts have construed the Constitutional provision prohibiting retrospective laws as prohibiting legislation that divests or impairs vested rights. In a 1999 case the Tennessee Supreme Court stated:

> Article I, section 20 of the Tennessee Constitution provides that "no retrospective law, or law impairing the obligations of contracts, shall be made." We have construed this provision as prohibiting laws "which take away or impair vested rights acquired under existing laws or create a new

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[8] City attorney, city clerk, city treasurer, city auditor, city engineer, superintendent of streets, superintendent of water works, fire chief, police chief, city forester, superintendent of public parks, airport manager, traffic engineer, building inspector, director of water pollution control, and the refuse director.

[9] *Lines v. City of Topeka,* 577 P.2d at 45.

[10] *Lines v. City of Topeka,* 577 P.2d at 48-49, emphasis added.

[11] *Tenn. Const. Art.* 1, § 20.

> obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." [12]

In 1971, the Tennessee Supreme Court said that the constitutional provision that no retrospective law shall be made does not mean that "absolutely no retrospective law" shall be made. Rather, the provision forbids making a law that divests or impairs vested rights.[13] A vested right is one that it is proper for the state to recognize and protect and of which an individual cannot be deprived arbitrarily without injustice.[14]

While no Tennessee case has been found dealing with a retrospective law, several courts from other jurisdictions have held that the application of a residency requirement to employees appointed prior to the enactment of the residency provision is constitutional. A Massachusetts case held that a retroactive application of a statute setting forth a residency requirement for members of the city police department did not render the statute invalid as an *ex post facto* provision because the statute was not a criminal or penal statute. Further, it held that the effects of any change in the laws may be harsh as applied to certain individuals, but such hardship does not render a statute invalid as an *ex post facto* law.[15] A 1977 federal circuit court upheld an ordinance requiring employees to establish residency within village limits within specified future date. It determined the ordinance was not retrospective in nature, that nonresident employees had no vested contractual right to live outside village

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[12] *See, Doe v. Sundquist,* 2 S.W.3d 919, 923 (Tenn. 1999).
[13] *Miller v. Sohns,* 464 S.W.2d 824, 826 (Tenn. 1971) *See also, Penn-Dixie Cement Corp. v. Kizer,* 250 S.W.2d 904, 909 (Tenn. 1952) (An act is not invalid merely because it is retroactive or retrospective in a degree, where it does not impair obligation of contract or divest rights to any vested interest.")
[14] *Doe v. Sundquist,* 2 S.W.3d. at 905. The Tennessee Supreme Court has noted that in determining whether a retroactive statute impairs or destroys vested rights, the most important inquiries are: (1) whether the public interest is advanced or retarded; (2) whether the retroactive provision gives effect to or defeats the bona fide intentions or reasonable expectations of affected persons; (3) whether the statute surprises persons who have long relied on a contrary state of the law; and (4) the extent to which the statute appears to be procedural or remedial. *Doe v. Sundquist,* 2 S.W.3d 919 at 924. Courts have held that vested pension benefits may not be retroactively modified in a manner that adversely affects a public employee who has complied with all conditions necessary to be eligible for the benefit. *See, Felts v. Tennessee Consolidated Retirement System,* 650 S.W.2d 371 (Tenn. 1983) (Pension rights of Justice of the Supreme Court who retired in 1965 should be determined under the statutes as they existed in 1960, when he began his last term of office, as they were then vested rights protected by constitutional guarantees against impairment of contracts, despite statutory amendment in 1963 deleting escalator clause in the prior statute.) *See also, Miles v. Tennessee Consolidated Retirement System,* 548 S.W.2d 299 (Tenn. 1977) (Contract between the state of Tennessee and two judges, one of whom retired in 1974 and one of whom resigned in 1971, to pay the judges a retirement pension in accordance with law in effect at the time of the resignation and retirement was unconstitutionally impaired by subsequent statute which reduced the benefit base for calculating the pension.)
[15] *Doris v. Police Com'r of Boston,* 373 N.E.2d 944, 949 (Mass. 1978).

limits, and that the ordinance did not impair the obligation of contracts in violation of the federal constitution.[16] Similarly, the Mississippi Supreme Court upheld an ordinance requiring civil service employees to move within city limits within 60 days. It held that it was not unconstitutional as an *ex post facto* law, as impairing the obligation of contracts, or as violating due process. The fact that current employees were affected by the ordinance and were required to establish a residence in the city within 60 days did not make the ordinance retrospective.[17]

CONCLUSION

The Tennessee Supreme Court has upheld as constitutional a residency requirement for government employees. No Tennessee case has been found that reviewed a requirement that some, but not all, employees be residents or a requirement that current employees conform to a new residency requirement. However, based on the opinions of courts from other jurisdictions, it is the opinion of the Department of Law that a court is likely to find that the proposed Charter Amendment is constitutional even though only principal management employees would have a residency requirement. Additionally, based on the opinions of other courts and the Tennessee Supreme Court's position on vested rights and conclusion that a residency requirement does not have an impact on a "fundamental right," it is the opinion of the Department of Law that a court is likely to find that the proposed Charter Amendment is constitutional.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

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cc: Mayor Karl F. Dean
Vice-Mayor Diane Neighbors
Members of the Metropolitan Council

[16] *Andre v. Board of Trustees of Village of Maywood*, 561 F.2d 48 (7th Cir. 1977).
[17] *Hattiesburg Firefighters Local 184 v. City of Hattiesburg* 263 So.2d 767 (Miss. 1972).