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Agents

STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

December 9, 1974

Opinion No. 74- 387

Mr. Max Bickford
Executive Officer
Kansas Board of Regents
Suite 1416, Merchants National Bank
Topeka, Kansas 66612

Dear Mr. Bickford:

You advise that a question has been raised concerning the constitutional validity of a provision found in a memorandum of understanding between the Extension Service of Kansas State University and the McPherson County Extension Council. That provision, paragraph 5 on page 4 of the memorandum, provides that the Division of Extension and the McPherson County Extension Council, represented by its Executive Board, mutually agree that

> "county extension agents will not be employed in their home county, except in cases of emergency. Close relatives of county extension agents will not be employed in the same county."

The constitutional validity of this provision has been drawn in question by an applicant for a position as Assistant County Extension Home Economist in McPherson County. The applicant attended and graduated from high school in that county, and her parents still reside there. The applicant received her bachelor's degree cum laude from Kansas State University in Home Economics after two and one-half years, and has received her master's degree in that field from the same institution, according to the facts we have been furnished. However, she is regarded as disqualified for the position because of the so-called "home county" rule.

You advise that the Extension Service has maintained that the rule, which is an old and well-established one, is justified by the need to avoid employing a person who would

be susceptible to pressures and favor-seeking from friends and relatives which an agent might receive in a county of his or her origin, and secondly, on the ground that a young graduate returning to his or her home county might not be looked upon as mature as a newcomer and that the native individual's advice and judgment regarded as seriously as those of an individual from another area.

You pose two questions to be considered, whether the restriction denies the applicant equal protection of the law by the use of a qualification or restriction not reasonably related to a ligitimate legislative purpose, and whether the rule offends the applicant's right to due process of law respecting her property right in education and her right to pursue employment. We are advised that the applicant, upon graduation, was married, and that her husband is employed in the McPherson area.

You enclose a comprehensive and most helpful memorandum dealing with this question.

K.S.A. 1973 Supp. 2-616 sets forth the purpose and duties of extension councils in pertinent part as follows:

> "The county extension council shall have for its sole purpose the giving of instruction and practical demonstrations in agriculture, marketing, home economics, 4-H club and youth work, community and resource development, to all persons in the county and the imparting to such persons of information on said subjects through practical demonstrations, meetings, publications, or otherwise."

K.S.A. 1973 Supp. 2-615 states in part thus:

> "County extension agents shall be selected and appointed by the executive board of the county extension council and shall be under the general supervision of said executive board and the director of extension. *The director of extension* of Kansas state university of agriculture and applied science *shall determine the qualifications of each county extension agent*." [Emphasis supplied.]

There arises, at the outset, the question of what constitutes a "home county." Were this disqualification for employment found in a statute, without further definition, it would surely be adjudged defective for ambiguity, for otherwise definition of the term would be left to the unfettered discretion of the administrator. For the purposes of this opinion, we take the phrase to refer to the county in which the applicant attended and graduated from high school, those being the facts upon which the disqualification was invoked in this instance. Obviously, of course, a student might, prior to completing secondary education, live in a number of counties, each of which might well be deemed a "home county." Given the facts upon which the question is raised here, however, we need not dwell on the potential ambiguities in the phrase.

The director of extension is empowered to prescribe qualification for extension agents. The power to prescribe qualifications for individuals includes, surely, the power to prescribe qualifications applicable uniformly to all applicants, such as minimum education requirements and the like. In prescribing qualifications, of course, the director at the same time prescribes disqualifications. This disqualification here is not one which the courts have heretofore held to be "inherently suspect," such as criteria based on race, religion, sex, national origin or ancestry, or alienage. And, of course, the disqualification here is not total, that is, the applicant is eligible for employment in similar positions elsewhere, indeed, presumably in any community or county which has not heretofore been her "home county."

It may be helpful to consider this requirement, a non-residence requirement, as it were, in light of the treatment courts have given residence requirements, whether durational or otherwise. In *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), the Court held that there exists "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications," and that a state "may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." These same principles apply equally to public employment as well as to public office.

Residence requirements have consistently been required by the courts to satisfy a more rigorous and demanding standard of constitutional justification than that applied to most ordinary state action. Ordinarily, a legislative classification will be sustained unless it is patently arbitrary and unless it bears no rational relationship to a legitimate governmental interest. As review of durational residence standards has evolved however, in the various contexts in which they have been challenged, the courts have consistently concluded with few exceptions, that such residence requirements will be upheld not merely because they may be shown to bear some rational relationship to a legitimate governmental interest; in addition, it must be shown that the residence requirement is necessary to promote a compelling governmental interest. See *Chimento v. Stark*, 353 F.Supp. 1211 at 1214, ft. 7 (D.N.H. 1973).

Overlong durational residence requirements for voters were first held invalid by the United States Supreme Court in *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274, 92 S.Ct. 995 (1972), on several grounds. The Court pointed out that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens of the jurisdiction, that a classification based on durational residence results in denial of the franchise to some while permitting it to others substantially similarly situated, and that eligibility to vote based on recent interstate travel constituted an impermissible burden on the exercise of another constitutionally protected right, the right to travel.

In a field more pertinent here, that of public employment rather than elections, the Alaska Supreme Court held in *Alaska v. Wylie*, decided November 23, 1974, that state personnel regulations giving an absolute hiring preference to persons who have resided in Alaska for at least one year placed an unconstitutional burden on the exercise of a citizen's right to travel. See 42 L.W. 2307.

The requirement in question here does not impose any burden on the applicant as a result of recent travel. Rather the requirement reaches back, as it were, and attaches a present disqualification to employment there because it is the county where she attended and graduated from high school. Apparently, the applicant left to go elsewhere to college. It is entirely possible that she did not reside in that county

while she was eighteen years of age; prior to that time, of course, she was legally incapable of establishing residence in the county. Whether she in fact did or did not is immaterial, for the "home county" rule would have the same effect, regardless. Her ineligibility for the particular public employment in question there would result in net effect, from her parents' lawful choice to make McPherson County their home county during her youth.

If an affirmative residence requirement were imposed, e.g., that the applicant show that the county were her "home county," and presumably, that she had resided there for several years, however many that may be to constitute it her "home county," we have no doubt that such a qualification would be deemed to constitute a constitutionally impermissible burden on the right to travel as a condition of public employment. The reverse requirement which we have here, that the applicant show in net effect, no prior residence there sufficient to constitute it a "home county," imposes a directly equal unconstitutional burden on the applicant's exercise of her right to travel and to establish a lawful home, or, of course, on the exercise of that right by her parents. In effect, there is established, as a result of this disqualification, an ineligibility for public employment based upon prior durational residence of substantial, albeit, imprecisely defined, duration.

As stated at the outset, the justification urged for the "home county" rule is primarily twofold, first, that an individual returning to a home county would be subject to pressures and favor-seeking from friends and relatives, and secondly, that a young graduate returning to his or her home county may not be looked upon as mature, or may not be regarded as seriously, as a "newcomer." That the "home county" rule will serve these purposes is speculative, at best. It can be argued with equal plausibility, and it is probably the greater likelihood, that a "native son" of a county who returns there after college to take up a professionalized and specialized position of public employment will be more highly regarded by the citizens because of the familiarity, trust and regard which stems from long community attachments. The suggestion that a "native," as it were, would be subject to favor-seeking from long-standing friends and relatives is, at the most conjectural, and in no way justifies a disqualification from public employment based upon years of prior residence in the community.

In *Hanson v. Unified School District No. 500, Wyandotte County, Kansas*, 364 F.Supp. 330 (1973), there was challenged a regulation of the school district requiring all certificated employees to reside within Wyandotte County. The opinion sets forth a most able analysis of the regulation and justifications offered therefor, and concludes that the regulation

> "violates the Fourteenth Amendment's equal protection guarantee, because the classification of residents versus non-residents of Wyandotte County is essentially arbitrary and does not rest on any reasonable basis . . ." 364 F.Supp. at 334.

The residence requirement there was nondurational; the residence disqualification here is essentially durational. The justification for the latter is at least as tenuous as that offered for the former, and we cannot but agree that it is arbitrary and without any reasonable basis as a disqualification for public employment in the position in question here.

We cannot but conclude, in addition, that the restrictive provision incorporated in the "Memorandum of Understanding" and prescribed by the Director of Extension by virtue of his statutory power under K.S.A. 1973 Supp. 6-615, prohibiting employment of county extension agents in their "home county," imposes a constitutionally impermissible condition upon access to public employment based upon the antecedent exercise, whether by the applicant or by her parents, of a constitutionally protected right to travel and establish residence in McPherson County, and that the enforcement of such a requirement or restriction is without any legal justification whatever.

Yours very truly,

VERN MILLER
Attorney General

VM:JRM:tp
cc: Mr. Dick Seaton
Mr. Jay K. Breymer
Mr. John W. Casebeer