



STATE OF KANSAS

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CURT T. SCHNEIDER
Attorney General

April 24, 1975

Opinion No. 75-183

Mr. Edward F. Reilly, Jr., Chairman
Senate Federal and State
430 Delaware
Leavenworth, Kansas 66048

Dear Senator Reilly:

You inquire concerning the constitutionality of K.S.A. 44-407 which establishes the fee employment agencies may charge. You have indicated that this inquiry is prompted by Senate Bill 475 which will be considered by one of your Committees during the interim.

The statute in question, K.S.A. 44-407, provides:

"Where a registration fee is charged for receiving or filing applications for employment, said fee shall in no case exceed the sum of one dollar (\$1), unless the salary or wages shall be more than three dollars (\$3) per day, in which case a fee of not more than two dollars (\$2) may be charged, for which a duplicate receipt shall be given (one copy to be kept by the employee and the other for the employer), in which shall be stated the name and address of the applicant, the date of such application, the amount of the fee, and the nature of the work to be done or the situation to be procured.

In case the said applicant shall not obtain a situation or employment through such licensed agency within three (3) days after registration as aforesaid, then said licensed agency shall forthwith repay and return to such applicant, upon demand being made therefor, the full amount of the fee paid or delivered by said applicant to such licensed agency: Provided, That said employment agency shall make no additional charge for their services rendered other than the fees set out above."

In regard to its constitutionality, the annotation subsequent to this statute refers to the case of Ribnik v. McBride, 277 U.S. 350, 371 48 S.Ct. 545 72 L.Ed 913 (1928), which held that the business of an employment agent is not affected with a public interest so as to enable the state to fix the charges to be made for the services rendered. 277 U.S. at page 371.

Subsequent to the decision in Ribnik, the Nebraska Supreme Court held in State ex rel. Western Reference and Bond Assn. v. Kinney, 138 Neb. 574, 293 N.W. 393 (1940), that a statute fixing the maximum compensation which a private employment agency might collect from an applicant for employment was unconstitutional under the due process clause of the Fourteenth Amendment. On writ of certiorari, the Supreme Court, per Douglas, reversed the lower court decision and stated that "the drift away from Ribnik v. McBride has been so great that it can no longer be deemed a controlling authority." Olsen v. State of Nebraska, 313 U.S. 236, 61 S.Ct. 862. The Court went on to hold that the statute, fixing the maximum compensation which an employment agency may collect as a two dollar (\$2) registration fee and ten percent (10%) of all moneys paid or to be paid or earned by the applicant for the first month's service growing out of the employment, does not deny "due process of law" in violation of the Fourteenth Amendment

The underlying rationale of this decision finds expression in the following excerpt from that opinion:

"We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be left where * * * it was left by the Constitution--to the states and to Congress." Ribnik v. McBride, supra, 277 U.S. at page 375, 48 S.Ct. at pages 552, 553, 72 L.Ed. 913, 56 A.L.R. 1327, dissenting opinion. There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. Tyson & Brother v. Banton, supra, 273 U.S. at page 446, 47 S.Ct. at page 433, 71 L.Ed. 718, 58 A.L.R. 1236; Adkins v. Children's Hospital, supra, 261 U.S. at page 570, 43 S.Ct. at page 405, 67 L.Ed. 785, 24 A.L.R. 1238. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined." 313 U.S. at pg. 868.

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Research of the case law antedating the decision in Olsen has not revealed any decisions emanating from the Federal courts which are contradictory of the conclusions expressed therein.

Accordingly, it is the opinion of this office that K.S.A. 44-407 is constitutional as it presently exists.

It is also suggested that the agency charges fixed by K.S.A. 44-407 may be so restrictive as effectively to preclude any employment agency from operating economically within the state, and that the provisions are thus unconstitutional on that ground. The economic impact of these restrictions on charges is a matter which must be determined as a matter of fact. We have no basis for drawing such an inference purely as a matter of law, and thus, we cannot conclude purely as a matter of law that the provision is unconstitutional on that score.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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