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May 26, 1989

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ATTORNEY GENERAL OPINION NO. 89-65

The Honorable Vernon L. Williams
State Representative, Ninety-First District
2402 Coolidge Avenue
Wichita, Kansas 67204

Re: Elections--State Board of Education Member
Elections--Disqualification for Office; State
Employees

Synopsis: K.S.A. 25-1904 precludes any state employee from being a member of the state board of education. A tenured faculty member of a regent's institution is a state employee and thus, unless the employment is terminated, is disqualified from being a state board of education member. In that the constitutionality of statutes is presumed and all doubts resolved in favor of constitutionality, we believe K.S.A. 25-1904, an attempt to assure the independence of the board, is constitutionally sound. Cited herein: K.S.A. 25-1903; 25-1904; 74-4925; 75-2935; K.S.A. 1988 Supp. 76-746; Kan. Const., Art. 6, §§2, 3.

* * *

Dear Representative Williams:

You request our opinion regarding the appointment of Professor Everett Johnson to the state board of education. Specifically you question whether Professor Johnson is disqualified to serve as a board member pursuant to K.S.A. 25-1904.

The statute in question provides:

"No state, school district or community college officer or employee shall be a member of the state board of education."

We understand that Professor Johnson is a tenured faculty member of Wichita State University, an institution under the board of regents. He is thus clearly a state employee. Faculty members of Regents' institutions are in the unclassified service under the Kansas civil service act. K.S.A. 75-2935(1)(f); K.S.A. 1988 Supp. 76-746. "Except for the retirement plan for unclassified employees, the fringe benefits for employees of Regents' institutions are the same as those provided for other state employees." Proposal No. 31, Report on Kansas Legislative Interim Studies to the 1983 Legislature 490, 496 (1982). While they do not participate in the Kansas public employees retirement system (KPERs), members of the faculty of regents' institutions participate in a retirement program known as TIAA-CREF (Teachers Insurance and Annuity Association and College Retirement Equities Fund). The state, through the board of regents, makes employer contributions toward the purchase of annuities under this program. K.S.A. 74-4925(1)(c); Proposal No. 31, supra. Further, faculty members of Regents' institutions are entitled to defense and indemnification by the state, in appropriate circumstances, under the Kansas tort claims act. K.S.A. 75-6101 et seq. Only state employees are entitled to such benefits from the state.

The question remains, however, whether K.S.A. 25-1904 is constitutionally sound. Two arguments against its constitutionality have been raised. The first is that the legislature has no authority to add to constitutionally prescribed qualifications. While this may be true generally, see 81A C.J.S. States §83 (1977), we do not believe this rule renders K.S.A. 25-1904 invalid. To begin with, the constitutional provision, Kan. Const., Art. 6, §3, does not clearly establish qualifications. It does indicate that a person elected as a board member must reside in the district from which he or she is elected. However, this provision is more than just a "qualification," it is directive of how the election is to be conducted to achieve the geographical representation required for a statewide elective body such as the state board of education. See generally 67 C.J.S. Officers and Public Employees §16 (1978). Further, article 6, section 2 of the Kansas Constitution specifically directs the legislature to "provide for a state board of education."

The Supreme Court of Kansas has held that this part of section 2(a) is not self-executing and requires legislative action to establish the board. State, ex rel., v. Board of Education, 212 Kan. 482, 487 (1973). It is our opinion that this non-self-executing provision authorizes the legislature to establish qualifications, such as K.S.A. 25-1904, not inconsistent with the constitutional provisions. If this were not the case, persons under 18 years of age could be elected to the Board as the constitution does not require that members be qualified electors or of a certain age. This qualification is provided by statute at K.S.A. 25-1903.

The second argument raised has to do with the inability of the legislature to prescribe unreasonable or arbitrary requirements for holding a public office. See 67 C.J.S. Officers and Public Employees §16 (1978); Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285, 292 (1961). It has been held that when the state's exercise of its right to impose restrictions on one seeking a public office invades an individual's constitutional rights, such as freedom of political expression, the state must show a compelling state interest justifying the restriction. Commonwealth, ex rel. Toole v. Yanoshak, 346 A.2d 304 (Pa. 1975). We must therefore attempt to determine the state interest sought to be achieved by this restriction and whether that interest is a compelling one.

While documentation of the processes leading to the enactment of K.S.A. 25-1904 is sparse, the legislative journals reveal that the language in question was in the bill as originally introduced, and though the disqualification of school district and community college officers and employees was removed at one point and then added back in, the disqualification of state employees was not altered. House Journal, Report of Committee on Education for H.B. 1205, 182 (March 6, 1967); Senate Journal, Conference Committee Report on H.B. 1205, 319 (March 7, 1968). This indicates that the provision was carefully considered and deemed to be an essential requirement. Apparently the legislature wanted the state board of education to be a body totally independent of other state agencies, answerable only to the general public. We believe this can be said to be a compelling interest, and as we are restricted to finding legislation unconstitutional only if there is no reasonable way to find it valid, [see Leek v. Theis, 217 Kan. 784, 792 (1975), and cases cited therein], it is our opinion that K.S.A. 25-1904 is constitutional.

In conclusion, K.S.A. 25-1904 precludes any state employee from being a member of the state board of education. A tenured faculty member of a regent's institution is a state employee and thus, unless the employment is terminated, is disqualified from being a state board of education member. In that the constitutionality of statutes is presumed and all doubts resolved in favor of constitutionality, we believe K.S.A. 25-1904, an attempt to assure the independence of the board, is constitutionally sound.

Very truly yours,


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