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Opinion No. 04-087

Constitutionality of Tenn. Code Ann. § 12-4-320

QUESTION

Tenn. Code Ann. § 12-4-320 creates a pilot program through which licensed residential homes for the aged in certain counties designated by population brackets and by metropolitan form of government are reimbursed a *per diem* payment for residents whose income does not exceed six hundred dollars ($600) per month and whose income is limited to payments made under the Social Security Act. Is the statute unconstitutional as lacking a rational basis for excluding counties based upon population?

OPINION

We think that a court could find the applicability of Tenn. Code Ann. § 12-4-320 to be supported by a rational basis because it implements a pilot program. However, if a court were to reject the pilot program rationale, we think that a court might find that Tenn. Code Ann. § 12-4-320, to the extent that it applies only in certain counties based on population bracket designation and on metropolitan form of government, is unconstitutional since no rational basis relating to population size or form of government appears on the face of the statute to justify its limited application based on those characteristics.

ANALYSIS

When first enacted by 1986 Pub. Chap. 927, Tenn. Code Ann. § 12-4-320 created a pilot program in three counties. The joint rule promulgated by both the Department of Health and the Board for Licensing Health Care Facilities which implements the Act and establishes the pilot program, Tenn. Comp. R. & Reg. 1200-8-7, terms the program the "Residential Home for Aged Quality Enabling Program, " and cites as its purpose "....to improve the quality of care and of service in Tennessee's Resident Homes for the Aged through the mechanism of distributing certain designated and limited state funds." Tenn. Comp. R. & Reg. 1200-8-7-.01. Two of the original three counties in this pilot program were designated by population brackets, and one was designated as falling within the rubric of "those counties having a metropolitan form of government." The 1986 Act directed the Board for Licensing Health Care Facilities by regulation to establish a pilot program through which the Department of Health [and Environment] shall reimburse licensed residential homes for the aged, as defined by Tenn. Code Ann. § 68-11-201, to the exclusion of institutional homes for the aged, in the amount of nine dollars ($9.00) per day, less patient income for each

resident whose total income does not exceed six hundred dollars ($600.00) per month and whose income is limited to payments made under the Social Security Act. Under the Act, these regulations may, in the discretion of the Board, distinguish between the types of facilities and between beds within a facility to implement the pilot program, the cost of which shall not exceed the amount provided for this purpose in the general appropriations act. Implementation of the provisions of the Act as well as expenditure of any funds to implement such provisions are subject to the approval of the Commissioner of Finance and Administration. Further, the 1986 Act cited Article II, § 24, of the Tennessee Constitution in mandating that the Act be null and void "unless there is a specific appropriation included in the general appropriations act to fund its estimated cost." 1986 Pub. Chap. 927.

Subsequent amendments to the statute included, *inter alia*, an increase in the amount of the *per diem* payment by the Department of Health to the current rate of thirteen dollars ($13.00), a provision permitting (rather than requiring) the Board by regulation to establish the pilot program, and expanding the applicability of the pilot program by including additional counties designated by population bracket.[1] The current section states that its provisions shall have no application unless funding is specifically provided for and included in the general appropriations bill, and the implementation of such provisions, as well as the expenditure of any funds to implement such provisions, shall be subject to the approval of the Commissioner of Finance and Administration. Tenn. Code Ann. § 12-4-320(c).

Generally, there is a strong presumption in favor of the constitutionality of acts passed by the Legislature. *See, e.g., Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978); *West v. Tennessee Housing Development Agency*, 512 S.W.2d 275, 279 (Tenn. 1974). The burden of proof rests on one challenging the constitutionality of the statute to rebut the presumption that the act is constitutional. *State Personnel Recruiting Services Board v. Horne*, 732 S.W. 2d 289, 291 (Tenn. Ct. App. 1987).

The question asks whether there is a rational basis to support the exclusion of counties from the program established by Tenn. Code Ann. § 12-4-320. Implicit in the question is whether that section violates either the equal protection clause or Article XI, § 8, of the Tennessee Constitution, which proscribes the passage of any law granting to any individual or individuals "rights, privileges, immunitie [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law." Because Tenn. Code Ann. § 12-4-320 does not appear to us to implicate any fundamental right or affect any suspect class, it is subject to review under the rational basis test. Under the rational basis test, "[i]f some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (citations omitted); *see also Estrin v. Moss*, 221 Tenn. 657, 667, 430 S.W.

[1]It is our understanding that the pilot program enacted in Tenn. Code Ann. § 12-4-320 currently is established in eighteen (18) counties: Davidson, Shelby, Trousdale, Dyer, Haywood, White, Wilson, Grundy, Madison, Sequatchie, Hardeman, Fayette, Knox, Moore, Bedford, Dekalb, Carroll, and Weakley.

2d 345 (1968), appeal dismissed, 393 U.S. 318, 89 S. Ct. 554 (1969).

First we must address the fact that Tenn. Code Ann. § 12-4-320 establishes a pilot program. We have found no specific definition of the term "pilot program" or "pilot project," either in the statute or elsewhere. However, one of the dictionary definitions of the adjective "pilot" is "[s]erving as a tentative model for future experiment or development." American Heritage College Dictionary, Third Edition (1993). The rule which establishes the "Residential Home for Aged Quality Enabling Program" echoes this definition when, among its eligibility requirements for participation in the program, it includes a requirement that a residential home for the aged must

> [p]rovide the Department with such data and information as is necessary to evaluate the effectiveness of the program to include a quarterly report which describes how the expenditures improve the Quality of Care and Services in Tennessee Residential Homes for the Aged. These expenditures must be for services on care above what the regulations require as mandatory.

Tenn. Comp. R. & Reg. 1200-8-7-.03(1)(f).

Moreover, a case which we cited in a previous opinion involving creation of a pilot program, Tenn. Op. Att'y Gen. No. 01-106 (June 27, 2001), found that "a legislature is allowed to attack a perceived problem piecemeal....Underinclusivity alone is not sufficient to state an equal protection claim." *Howard v. City of Garland*, 917 F.2d 898, 901 (5th Cir. 1990) (quoting *Jackson Court Condominiums v. City of New Orleans*, 874 F. 2d 1070, 1079 (5th Cir. 1989), citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). *See also* Opinion of the Justices, 135 N.H. 549, 608 A.2d 874 (1992), (implementation of a pilot program in one part of the state does not violate equal protection). Therefore, we think that a court could find the applicability of Tenn. Code Ann. § 12-4-320 to be supported by a rational basis because it implements a pilot program.[2]

If a court were to reject the pilot project rationale as a justification for the classifications in Tenn. Code Ann. § 12-4-320, then some other rational basis for those classifications must be identified. The equal protection principles embodied in Article XI, Section 8, of the Tennessee

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[2]We would point out, however, that although the statute unambiguously terms it a pilot program, this particular pilot program has been in effect for almost eighteen years; that Tenn. Code Ann. § 12-4-320 includes no expiration date for the pilot program; and that over a decade ago, in a legislative session the sponsor of the original bill expressed his view that the program no longer was a pilot program, while another legislator urged the Department of Health to decide "that this has gone beyond the pilot program stage and if they feel like it's valuable that they would go ahead and implement it statewide and I know its funding is a major concern, but we keep adding a little here and a little there, and if it's worthwhile, we ought to go ahead and make it worthwhile for everyone, and if it's not, then that's a consideration." Attached to this opinion are transcriptions of pertinent portions of the Senate General Welfare Committee, March 31, 1993, as well as pertinent portions of the Senate General Welfare Committee, April 21, 1993. Moreover, transcription of pertinent portions of a House Session on May 10, 1989, a copy of which also is attached, demonstrates that retention of the pilot program has been long debated.

Constitution protect against arbitrary classifications. "Our state government was created to benefit all Tennesseans, not to preside over a hodgepodge of statutory exclusions having the very real effect of redistributing revenue monies among the counties for no rational reason." *Nolichuckey Sand Co., Inc. v. Huddleston,* 896 S.W.2d 782 (Tenn. Ct. App. 1995).

The Tennessee Court of Appeals has stated, in a declaratory judgment action which challenged a statute as unconstitutional under Article XI, § 8, of the Tennessee Constitution, that a classification based on a population bracket must have some relation to a distinctive characteristic of that size population. "[E]ven the generous rational basis standard requires that an exclusion based on a population bracket have some relation to a distinctive characteristic of that size population." *Chattanooga Metropolitan Airport Authority v. Thompson,* 1997 WL 129366 (Tenn. Ct. App. 1997), (citing *Knoxville's Community Development Corp. v. Knox County*, 665 S.W.2d 704, 705 (Tenn. 1984); *State ex rel. Bells v. Hamilton County*, 170 Tenn. 371, 95 S.W.2d 618, 619 (Tenn. 1936)). No such rational basis appears on the face of the legislation, and none occurs to this office. Most of the population brackets enumerated in Tenn. Code Ann. § 12-4-320 are narrow, and some are extremely narrow. The population brackets are determined by those counties having a population according to the 1980 or any subsequent census. Although one of the population brackets in the statute permits a range of 10,000, many permit a range of only 50 or 100, and one permits an extremely narrow range of only 20 ("not less than 27,900 nor more than 27,920"). Likewise, no rational basis is readily apparent for limiting the application of the statute to counties having a metropolitan form of government. Therefore, we think that if a court were to reject the argument that the statute is supported by a rational basis because it implements a pilot program, a court then might find that Tenn. Code Ann. § 12-4-320 is unconstitutional as lacking a rational basis to the extent that it applies only in certain counties based on population bracket designation and on metropolitan form of government.

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