**STATE OF TENNESSEE**
OFFICE OF THE
**ATTORNEY GENERAL**
**PO BOX 20207**
**NASHVILLE, TENNESSEE 37202**

October 3, 2012

Opinion No. 12-92

Governmental Hiring and Contracting Practices

## QUESTIONS

1. Whether either the United States or Tennessee Constitution prohibits a local government from requiring its employees to live within the local government's jurisdiction, even where safety concerns do not require an employee to be readily available?

2. If the answer to question one is no, could the General Assembly constitutionally prohibit local governments from requiring their employees to live within the local government's jurisdiction?

3. May the State or a local government constitutionally impose residency requirements or incentives that give preferential treatment to contractors that are either residents of the State or of the area encompassing a local government?

4. May the State or a local government constitutionally use race-based classifications in awarding public contracts?

## OPINIONS

1. No. Courts have upheld residency requirements for local government employees against challenges on various constitutional grounds. Such a requirement is constitutional so long as it is supported by a valid rational basis.

2. Yes, the General Assembly could constitutionally prohibit local governments from requiring their employees to live within the local government's jurisdiction.

3. Generally yes. Where a state or local government acts as a market participant rather than a regulator and purchases good or services on its own account, it may discriminate in favor of its citizens without violating the Commerce Clause of the United States Constitution. Further, since the right to contract with a governmental entity is not a fundamental right, such a practice would not violate the equal protection requirements of the United States or Tennessee Constitution so long as the practice is supported by a rational basis. If the practice extends so far that it burdens the right to pursue a common calling, however, it could be subject to challenge under the Privileges and Immunities Clause of the United States Constitution.

4. Any racial classification used in awarding public contracts is subject to strict scrutiny and will only be upheld if the state or local government can establish that it is narrowly tailored to promote a compelling governmental interest. Courts have found that remedying the effects of past intentional discrimination is a compelling governmental interest.

## ANALYSIS

The questions posed concern constitutional limits on the authority of local governments or the State of Tennessee to hire employees and award contracts, as well as the applicability to these questions of Tenn. Att'y Gen. Op. 12-59 (June 6, 2012). Opinion 12-59 states that residency and corporate asset location requirements for applicants seeking licensure as an alcoholic beverage wholesaler or package retailer violate the Commerce Clause of the United States Constitution. *Id.* The request asks whether, in light of this conclusion, certain hiring and contracting practices by local governments or the State might also be unconstitutional.

This opinion outlines constitutional provisions that these practices might implicate and the framework within which they would be analyzed. However, any definitive analysis of a particular policy or statute would depend upon the specific facts present in each situation.

1. The first question is whether a city or county may constitutionally require its employees to live within the city or county limits. The request asks whether these requirements are constitutional even if they apply to employees who do not need to be nearby and readily accessible to protect the public safety.

Residency requirements for governmental employees implicate two constitutional provisions. The Privileges and Immunities Clause of the United States Constitution provides that "[t]he citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states." U.S. Const. art IV, § 2. The United States Supreme Court has established a two-part analysis to determine whether a state law violates this clause. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 28–84 (1985). First, the court must decide whether the law under consideration burdens one of those fundamental rights protected by the Clause. *Id.* Second, if the law does burden such a right, there must be a "substantial reason" for discriminating between residents and non-residents, and the discrimination must bear a substantial relationship to the state's objective.

The second constitutional principle implicated is the right to equal protection guaranteed by both the Fourteenth Amendment of the United States Constitution and Article XI, § 8, of the Tennessee Constitution. The same rules are applied as to the validity of classifications made in legislative enactments under the United States Constitution, Amendment 14, and Article XI, Section 8 of the Tennessee Constitution. *City of Memphis v. State ex rel. Ryals*, 133 Tenn. 83, 179 S.W. 631, 633 (1915). These provisions guarantee that "all persons similarly circumstanced shall be treated alike." *State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000); *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993) (both quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Under an equal protection analysis, all classifications that do not affect a fundamental right or discriminate as to a suspect class are generally subject to the rational basis test. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994).

Under the rational basis test, a classification will be upheld "if any state of facts may *reasonably be conceived* to justify it." *Id.* (citing *Tennessee Small School Systems v. McWherter*, 851 S.W.2d at 153) (emphasis added). *See also Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978).

The Tennessee Supreme Court applied both of these constitutional principles in upholding as valid the City of Memphis's charter that required all city personnel to reside within the county where the city is located. *City of Memphis v. International Brotherhood of Electrical Workers Union, Local 1288*, 545 S.W.2d 98, 103 (Tenn. 1976). The Court found, first, that the requirements did not infringe on the exercise of a fundamental right protected by the Privileges and Immunities Clause of the United States Constitution. *Id.* at 102. The Court found that the requirement did not interfere with the employees' fundamental right to interstate travel. The Court distinguished other cases that concluded durational residence requirements unconstitutionally infringed on the right to travel interstate. *Id*. Further, the Court held there was no fundamental constitutional right to government employment. *Id.* (citing *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 646, (1976)). *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

Second, the Court found that the residency requirement was supported by a rational basis, and accordingly did not violate equal protection. The Court reasoned:

> A county residential requirement insures proximity to employee's job in emergencies. County taxes and other revenues are shared by both the County and the City of Memphis and the City reaps general economic benefits flowing from local expenditure of County resident's salaries. Furthermore, pride in one's place of employment and a feeling of greater personal stake in the city's progress can be expected from employees residing in the county wherein the city lies than from those who reside beyond the limits of the county.

*Id.* at 103. *See also Civil Service Merit Board of the City of Knoxville v. Burson*, 816 S.W.2d 725, 734 (Tenn. 1991) (a statutory one-year residency requirement for appointment to a local civil service board did not violate the Equal Protection Clause of the Fourteenth Amendment); Op. Tenn. Att'y Gen 01-007 (January 17, 2001) (opining that a residency requirement for the president emeritus of the Tennessee Board of Regents or the Board of Trustees of the University of Tennessee is constitutional).

The constitutional principles articulated in *City of Memphis* have not changed since the case was decided. Courts continue to hold that there is no fundamental right to government employment for purposes of the Equal Protection Clause. *See, e.g., United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (1984); *McCool v. City of Philadelphia*, 494 F. Supp. 307, 320 (E.D. Pa. 2007). Further, federal courts continue to reject claims that a residency requirement for city employees unconstitutionally burdens the right to travel. *See, e.g., Association of Cleveland*

*Firefighters v. City of Cleveland*, 502 F.3d 545, 549 (6th Cir. 2007). For these reasons, a local government may constitutionally require its employees to reside within its jurisdiction.

No case directly analyzes residency requirements on local government employees under the Commerce Clause of the United States Constitution, which states in relevant part that "[t]he congress shall have power . . . [t]o regulate commerce . . . among the several states" U.S. Const. art. I, § 8. But any such requirement would probably be upheld against a Commerce Clause challenge for two reasons. First, these requirements have only a negligible effect on interstate commerce. Second, where the local government acts as an employer, its conduct is generally exempt from Commerce Clause restrictions under the "market participant" exception. Under this exception, where a government acts in its more general capacity of market participant, it may favor its own citizens over others without violating the Commerce Clause. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-10 (1976). Thus, where a local government acts as an employer, rather than a regulator (as was the case in Tenn. Att'y Gen. Op. 12-59), it is generally free to favor its residents over residents of other local jurisdictions without violating the Commerce Clause.

2. Given such residency restrictions are constitutional, the General Assembly does have the requisite authority to constitutionally prohibit local governments from imposing them. This Office has previously opined that the General Assembly may pass general legislation that voids municipal ordinances or city charter provisions requiring municipal employees to reside within the municipality. Tenn. Att'y Gen. Op. 06-040 (Feb. 24, 2006). The General Assembly has the same authority with respect to counties and other local governments created by statute. *Id. See also Henderson County v. Wallace*, 173 Tenn. 184, 189-90, 116 S.W.2d 1003, 1005 (1938); *State ex rel. Bell v. Cummings*, 130 Tenn. 566, 172 S.W. 290 (1914).

3. The next question is whether the State or local governments may constitutionally impose residency requirements or incentives that give preferential treatment to contractors that are residents of the State or of the local government. Such preferences would violate any competitive bidding requirements that apply to the transaction. Tenn. Att'y Gen. Op. 78-303A (July 26, 1978) (opining that "Buy American" clause in Tennessee Department of Transportation contracts violated competitive bidding requirements). *See also* Tenn. Code Ann. § 12-4-109 and Tenn. R. & Regs. 0620-3-3 (setting procurement requirements for state services). Explicit statutory authority for this practice, therefore, is required. But, as discussed above, where a state or local government acts as a market participant, it is generally free to favor its own citizens without violating the Commerce Clause. *See White*, 460 U.S. at 208; *Reeves*, 447 U.S. at 436-37. *See also* Tenn. Att'y Gen. Op. 77-243 (August 1, 1977). Further, since the right to contract with a governmental entity is not a fundamental right, such a practice would not violate the equal protection requirements of the United States or Tennessee Constitution so long as it is supported by a rational basis. *See, e.g., Tennessee Small Schools Systems v. McWherter*, 851 S.W.2d at 153.

If the practice extends so far that it burdens the right to pursue a common calling, however, it would be subject to challenge under the Privileges and Immunities Clause of the United States Constitution. *United Building*, 465 U.S. at 216-23. In *United Building*, the United States Supreme Court reviewed the constitutionality of a municipal ordinance requiring forty percent of the employees of contractors working on city projects to be city residents. The Court found that the right to seek employment with private employers engaged on these projects is "'sufficiently basic to the livelihood of the Nation,' . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city." *Id.* at 221-22. The Court found that, to survive scrutiny under the Privileges and Immunities Clause, the ordinance must be supported by a "substantial reason" for the discrimination. *Id.* The Court could not determine on the record before it whether the ordinance at issue was supported by a substantial reason for the discrimination in favor of city workers and therefore remanded the case to the New Jersey Supreme Court to make the necessary factual findings. *Id.* at 223. *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 283-88 (1985) (concluding rule of New Hampshire Supreme Court excluding nonresidents of the State from its bar to practice law violated privileges and immunities clause); *Hicklin v. Orbeck*, 437 U.S. 518, 533-34 (1978) (Alaska state law requiring contractors, subcontractors, and their suppliers working on oil and gas projects to hire Alaska residents found to violate the Privileges and Immunities Clause).

4. The final question is whether the State or a local government may constitutionally use race-based classifications in awarding public contracts. These classifications implicate the equal protection provisions of the United States and Tennessee Constitutions. Race-based preferences in the award of public contracts, like "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Contractors v. Pena*, 515 U.S. 200, 227 (1995). Under this standard of review, racial classifications must be narrowly tailored to serve a compelling government interest. *Id.* The United States Supreme Court has since reiterated this principle in different contexts. *Johnson v. California*, 543 U.S. 499, 504-05 (2005) (prison policy); *Gratz v. Bollinger*, 539 U.S. 244, 267-70 (2003) (admission to public university). Remedying the effects of past intentional discrimination is a compelling interest. *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 669 F.3d 737, 742 (6th Cir. 2012) (citing *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007)).

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

The Honorable Stacey Campfield
State Senator
4 Legislative Plaza
Nashville, Tennessee 37243