



ALAN WILSON
ATTORNEY GENERAL

May 22, 2015

Brandy A. Duncan, Esquire
Chief General Counsel
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, SC 29212-3540

Dear Ms. Duncan:

Attorney General Alan Wilson has referred your letter dated May 1, 2013 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

"Due to their holding of a public office, law enforcement officers in South Carolina are required to be United States citizens in order to be certified as law enforcement officers. The question has arisen, however, as to whether 911 operators must also be United States citizens to be certified as Class 4 telecommunications officers pursuant to 38-060 et al. ... Any guidance your Office can provide with regard to this question would be greatly appreciated."

Law/Analysis:

By way of background, it is this Office's understanding the Criminal Justice Academy is given its authority pursuant to South Carolina law § 23-23-10 et seq. The Criminal Justice Academy (hereinafter "Academy") is charged with the training of law enforcement officers and other employees of the criminal justice system in South Carolina. S.C. Code § 23-23-10. A law enforcement officer is defined as "an appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed." S.C. Code § 23-23-10(E)(1). The director of the Academy enforces the minimum standards the Academy requires for certification. *Id.* The Academy requires certification for E-911 operators. S.C. Code Regs. 38-061 (2014); 37-062 (2014). Those minimum standards include age, education and good character requirements. *Id.* Nevertheless, the good character standard is referenced in S.C. Code Regs. 37-063(B) (2014) as R.37-073, but we were not able to find that regulation at this time. However, the Academy authorizes agencies to require higher standards than its minimum requirements. S.C. Code Regs. 38-061(B) (2014). South Carolina Code § 6-1-170 specifically conditions this when it states:

...

(D) A city, county, municipality, or other local government or political subdivision may not enact any ordinance, policy, regulation, or other legislation pertaining to the employment, licensing, permitting, or otherwise doing business with a person based upon that person's authorization to work in the United States that exceeds or

otherwise conflicts with federal law or that is in conflict with state law. An enactment found to be in conflict with federal or state law is void.

...

(E)(3) If the court finds that the political subdivision has intentionally violated this section, the court shall enjoin the enactment, action, policy, or practice, and may enter a judgment against the political subdivision of not less than one thousand dollars nor more than five thousand dollars for each day that the enactment, action, policy, or practice remains or remained in effect. The proceeds from any such judgment must be used to reimburse the resident's reasonable attorney's fees. Any remaining proceeds must be used to cover the administrative costs of implementing, investigating, and enforcing the provisions of Chapter 8, Title 41.

South Carolina Code § 6-1-170(D)-(E) (emphasis added).¹ Please note that whether or not a requirement for United States citizenship is listed, one still must be law-abiding and one's residency must otherwise comply with State and federal law.

Let us examine some United States Supreme Court cases regarding citizenship requirements for similar jobs. In 1978 the United States Supreme Court upheld against an equal protection challenge a New York law limiting its police officers to citizens of the United States. Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1067 (1978). As the United States Supreme Court stated concerning California probation officers, "they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens." Cabell v. Chavez-Salido, 454 U.S. 432, 445, 102 S.Ct. 735, 743. The Court went on to compare the responsibility of the probation officer, which carries great discretion and is without direct supervision, with that of a police officer and a teacher. The Court held California's citizenship requirement to be a probation officer as valid. Id. In a 1984 opinion, the Supreme Court described the "political function" exception to a constraint that citizenship requirements are typically analyzed under a strict scrutiny analysis, describing it, as quoted:

We have, however, developed a narrow exception to the rule that discrimination based on alienage triggers strict scrutiny. This exception has been labeled the "political function" exception and applies to laws that exclude aliens from positions intimately related to the process of democratic self-government. The contours of the "political function" exception are outlined by our prior decisions. In Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978), we held that a State may require police to be citizens because, in performing a fundamental obligation of government, police "are clothed with authority to exercise an almost infinite variety of discretionary powers" often involving the most sensitive areas of daily life. Id., at 297, 98 S.Ct., at 1071. In Ambach v. Norwick, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979), we held that a State may bar aliens who have not declared their intent to become citizens from teaching in the public schools because teachers, like police, possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation. They have direct, day-to-day contact with students, exercise unsupervised discretion over them, act as role models, and influence their students about the government and the political process. Id., at 78-79, 99 S.Ct., at 1595-1596. Finally, in Cabell v. Chavez-Salido, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677 (1982), we held that a State may bar aliens from positions as probation officers because they, like police and teachers, routinely exercise discretionary power, involving a

¹ For further reading see U.S. v. South Carolina, 840 F.Supp.2d 898 (2011).

basic governmental function, that places them in a position of direct authority over other individuals.

The rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community. Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination.

“The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.” *Id.*, at 439–440, 102 S.Ct., at 740.

We have therefore lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations “go to the heart of representative government.” *Sugarman v. Dougall*, *supra*, 413 U.S., at 647, 93 S.Ct., at 2850. “While not retreating from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny ... we have concluded that strict scrutiny is out of place when the restriction primarily serves a political function....” *Cabell v. Chavez-Salido*, *supra*, 454 U.S., at 439, 102 S.Ct., at 739 (citation omitted).

To determine whether a restriction based on alienage fits within the narrow political-function exception, we devised in *Cabell* a two-part test.

“First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends.... Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to ‘persons holding state elective or important nonelective executive, legislative, and judicial positions,’ those officers who ‘participate directly in the formulation, execution, or review of broad public policy’ and hence ‘perform functions that go to the heart of representative government.’ ” 454 U.S., at 440, 102 S.Ct., at 740 (quoting *Sugarman v. Dougall*, *supra*, 413 U.S., at 647, 93 S.Ct., at 2850).^{FN7}

FN7. We emphasize, as we have in the past, that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a “discrete and insular” minority for whom heightened judicial solicitude is appropriate. See *Nyquist v. Mauclet*, 432 U.S. 1, 11, 97 S.Ct. 2120, 2126, 53 L.Ed.2d 63 (1977).

Bernal v. Fainter, 467 U.S. 216, 220-22, 104 S.Ct. 2312, 2316-17 (1984). In this opinion, the Supreme Court found a Texas statute requiring a notary public to be a United States citizen violated equal protection. *Id.* Therefore, in addition to any other applicable federal law, you should analyze any such citizenship requirement with the above cases and two-part test in mind.²

² Please note that this is only a brief overview of the history of some cases involving citizenship requirements. There are numerous other sources and cases on this subject.

As you mentioned in your letter, this Office has previously opined a law enforcement officer would be an office for honor or profit under the South Carolina Constitution due to the use of the sovereign powers of the State. See, e.g., Op. S.C. Att’y Gen., 1987 WL 342737 (December 10, 1987). South Carolina’s Constitution requires an officeholder in this State to also be an elector. S.C. Const. Art. XVII § 1. In order to be an elector in South Carolina, you must be a citizen of South Carolina and of the United States. S.C. Code § 7-5-120.³ This Office has previously opined that a SLED licensing provision that polygraph examiners be a citizen, may not be upheld by a court and adding SLED should not deny licenses until there is a court ruling or legislative clarification on the matter. Op. S.C. Att’y Gen., 1984 WL 249928 (July 12, 1984).

This Office has previously written opinions opining that neither the position of director nor co-director of an E911 system was an office of honor or profit under the South Carolina Constitution but the holder of the position would be considered an employee. See, e.g., Ops. S.C. Att’y Gen., 2007 WL 3317628 (October 22, 2007); 2006 WL 2849807 (September 29, 2006); 1996 WL 452750 (June 24, 1996); 1990 WL 599313 (June 28, 1990). Thus we opine that a court would likely find an E911 dispatcher who works under the supervision of an E911 director would be an employee rather than an office holder. If a court determines an E911 operator is an employee, the requirement in the South Carolina Constitution that office holders be electors would not apply. Moreover, the Maryland Court of Appeals held that based on the facts given, 911 operators and dispatchers did not qualify for immunity as public officials because they performed a “public duty” but were not public officials. Muthukumarana v. Montgomery County, 370 Md. 447, 805 A.2d 372 (2002).⁴ This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984).

Conclusion:

Although South Carolina Regulation 38-061(B) (2014) authorizes South Carolina law enforcement agencies to make more stringent standards than the South Carolina Criminal Justice Academy’s standards, such standards may not violate or exceed other state or federal law in regards to immigration. S.C. Code § 6-1-170(D)-(E). Therefore, based on the current law at this time, we do not believe a court will determine an E911 dispatcher would be required to be a United States citizen to be a certified Class 4 telecommunications officer pursuant to South Carolina’s constitutional requirement that public officeholders must be qualified electors since a court would likely determine a dispatcher would be an employee rather than an officeholder. Unless and until federal or State law otherwise requires citizenship to be such an employee, we do not think a court will determine otherwise.⁵ If you have any additional questions or issues, please let us know.

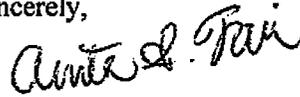
³ S.C. Code § 23-11-110 requires all sheriffs in South Carolina to be U.S. citizens.

⁴ Please note this case discusses this within the context of a liability question. S.C. Code § 23-47-70 releases all local government and public safety agencies and their employees from liability regarding a Public Safety Communication Center pursuant to the S.C. Tort Claims Act.

⁵ Please note we have not examined, nor do we address, all applicable law and sources. This opinion specifically addresses some State constitutional issues.

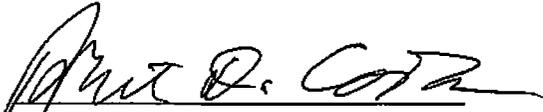
Brandy A. Duncan, Esquire
Page 5
May 22, 2015

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



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