

1984 WL 249928 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 12, 1984

*1 Captain J. Leon Gasque
State Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221

Dear Captain Gasque:

Attorney General Medlock has referred your letter, dated April 25, 1984 to me for reply. The question you presented as follows: Could a licensed South Carolina polygraph examiner, who is in good standing in this State, train a non-U.S. citizen to be certified as a polygraph examiner in accordance with the requirements set forth in the Code of Laws? It appears from your letter that part of the non-citizen's training would consist of conducting real polygraph examinations, for which he would have to have an intern license granted by the State Law Enforcement Division. At present, South Carolina statutes require that, for one to be eligible for an intern license, he be a U.S. citizen. You presented the following three specific questions:

1. Does the South Carolina statute regarding polygraphs and the use thereof require a person to be a citizen of the United States?
2. If the statute does require such citizenship, would it allow a waiver for a foreign national to be trained in South Carolina if his intention is to practice that trade within the confines of South Carolina or the United States?
3. Would there be an exception to the statutory requirement if that foreign national was a bona fide member of a Criminal Justice Agency recognized as such by the International Association of Chief of Police?

The Polygraph examiner's statute is found at [§ 40-53-10 et. seq. of the Code of Laws of South Carolina](#) (1976 as amended). Section 40-53-30 requires a trainee to take a polygraph course under the personal supervision of a licensed polygraph examiner in accordance with a SLED-approved course of study. The normal training course includes an internship. During the internship a trainee must conduct a minimum of 200 real polygraph exams. Near the conclusion of the training, SLED reviews a sampling of those examinations in making its determination that the licensee has met the training requirements. Those 200 exams must be given under the administration or supervision of a licensed polygraph examiner.

Section 40-53-60 makes it unlawful to administer a polygraph examination unless licensed in accordance with the statute. Section 40-53-70 sets forth the qualifications for a license and includes the requirement of U.S. citizenship. In order to give polygraph examinations, either as an examiner or an intern, one is required to obtain a license. During internship a trainee must hold an 'internship license.' The statute requires that he be a U.S. citizen to get either type of license.

No waiver is expressly provided in the statute for an examiner to confine his practice within the geographical limits of South Carolina or the United States. Nor is a waiver expressly provided for an individual who is a member of an agency recognized by the International Association of Chiefs of Police. Absent such a waiver, and given such an explicit statute, it must be presumed that such a waiver was not intended.

*2 Finally, the only non-resident sections of the polygraph law, §§ 40-53-100 and 40-53-110, apply to citizens of another state or U.S. territory. There is no provision for a foreign national. Accordingly, pursuant to the statutory scheme, the non-U.S. citizen would be prohibited from being trained by a polygraph examiner because, as part of his training he would have to conduct real polygraph exams under an internship license and to be licensed as an intern he would have to be a U.S. citizen.

A more fundamental question is whether such a requirement of citizenship would be constitutionally permissible and whether SLED or any other governmental entity or officer should enforce such a requirement in conjunction with their duties with respect to the licensing of persons who are trainees for polygraph examiners. We would advise that such a requirement is of doubtful constitutionality; accordingly, you would be best advised not to enforce the provision in the situation you describe and probably not until a court has ruled upon the constitutionality of the requirement or the General Assembly has clarified the situation.

The United States Supreme Court has only recently stated:

As a general matter, a State law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.

Bernal v. Fainter, 52 U.S.L.W. 4669, 4670 (May 30, 1984). Based upon this general rule, the Court has ‘invalidated an array of state statutes that denied aliens the right to pursue various occupations Supra. For example in Sugarman v. Dougall, 413 U.S. 634 (1973), the Court struck down a State statute barring aliens from employment in permanent positions in the competitive class of the State civil service. In In Re Griffiths, 413 U.S. 717 (1973), the Court nullified a State law excluding aliens from eligibility for membership in the State bar. And in Examining Board v. Flores de Otero, 426 U.S. 572 (1976), the Court voided a State law that excluded aliens from the practice of civil engineering.

The Court has, on the other hand, developed a narrow exception to the general rule that discrimination based on alienage invokes strict judicial scrutiny, thus requiring a compelling reason to justify its existence or enforcement. This exception is known as the ‘political function’ exception. Under that exception, a statute which makes reasonable classifications may be applied to ‘persons holding state elective or important nonelective executive, legislative, and judicial positions [where those officers] participate directly in the formulation, execution or review of broad public policy [and thus] perform functions that go right to the heart of representative government.’

Sugarman v. Dougall, 413 U.S. at 647. However, such an exception has been sparingly applied by the Court to such governmental positions as policemen, Foley v. Connelie, 435 U.S. 291 (1978); teachers, Ambach v. Norwick, 441 U.S. 68 (1979); and probation officers, Cabell v. Chazey-Salido, 454 U.S. 432 (1982). The Court has explained the exception as follows:
*3 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 supplementation of self-government that the State is permitted to exclude from those portions persons outside the political community, hence persons who have not become part of the process of democratic self-determination. (Emphasis added.)

52 U.S.L.W. at 4671. If a restriction based on alienage fits within the political function exception, the Court looks only for rational justification rather than a compelling reason in order to uphold the statute.

However, again, the Court has emphasized that the political function exception is to be narrowly construed. ‘[O]therwise, the exception will swallow the rule and depreciate the significance the should attach to the designation of a group as ‘discrete and insular minority for whom heightened judicial solicitude is appropriate.’ Bernal v. Fainter, 52 U.S.L.W. at 4671, n. 7. Based upon this principle, the Court in Bernal, the most recent case in this area, refused to grant the exception to a Texas Constitutional provision which required that notaries public be United States citizens; thus applying the usual strict scrutiny and compelling reason test, the Court invalidated the Texas requirement as violative of the Equal Protection Clause of the Fourteenth Amendment.

Based upon the foregoing cases, it is doubtful that a court would apply the 'political function' exception in this instance. Unlike the cases mentioned earlier where the exception has been applied, the statute relating to polygraph examiners is a licensing law, rather than one relating to the holding of a public office. See, Ill. Polygraph Soc. v. Pellicano, (Ill.), 414 N.E.2d 458 (1980). Professional licensure is viewed by the courts as primarily economic, rather than political in nature; thus strict scrutiny is usually required. See, Examining Board v. Flores de Otero, supra. In every instance of which we are aware, courts have invalidated provisions in licensing laws having citizenship requirements. These include licensure to practice dentistry, Szeto v. La. State Board of Dentistry, 508 F.Supp. 268 (E.D. La. 1981); physical therapy, Kulkarni v. Nyquist, 446 F.Supp. 1269 (N.D.N.Y. 1977); pharmacy, Wong v. Hohnstrom, 405 F.Supp. 727 (D. Minn. 1975); and civil engineering, Examining Board v. Flores Otero, supra. We have found no case where the political function exception and thus the lesser standard of review has been employed to occupational licensing. Even where it has been argued that the particular professional licensee also happens to occupy an important governmental position or because of his occupation is delegated certain sovereign functions by the State, a requirement of citizenship has been held to be unconstitutional. In Re Griffiths, supra (lawyer). Indeed, in Foley v. Connelie, the Court stated that '[t]he essence of our holdings to date is that . . . we extend to aliens the right to earn a livelihood and engage in licensed professions.' 435 U.S. at 2

*4 Thus, because a court probably would not apply the political function exception here, but instead would require a compelling state interest to justify the citizenship requirement, it is unlikely that the requirement would pass constitutional muster. As noted recently in Bernal, where Texas required its notaries public to be citizens, the Supreme Court stated that '[o]nly rarely are statutes sustained in the face of strict scrutiny.' 52 U.S.L.W. at 4670, n. 6. While it may be arguable that the close connection of polygraph examiners with law enforcement and criminal prosecutions and the importance of this profession to the detection of truth or deception, see, Heisse v. Vt., 519 F.Supp. 36 at 48 (D.Vt. 1980) serves a compelling state interest, so as to enable the State to require that persons so licensed be citizens, such in our view is doubtful. Thus, the requirement of citizenship in this instance as in the case of notaries or attorneys would probably not be upheld by a court.

In such a circumstance of probable unconstitutionality of a portion of a statute,¹ we refer you to a recent opinion issued by this Office concerning the enforcement of such statutes by public officials. There, we stated:

Generally, a public officer such as yourself, may not decline to enforce laws found on the statute books until the courts have declared such enactments unconstitutional. 67 C.J.S., Officers, § 201; 16 Am.Jur.2d, Constitutional Law, § 199, 63 Am.Jur.2d, Public Officers and Employees, § 276 However, a governmental officer who takes an oath to uphold the United States Constitution may act on the ruling of the Attorney General as to the doubtful constitutionality of a particular statute, if the courts have not acted. 67 C.J.S., Officers, § 201; see also, 63 Am.Jur.2d, Public Officers and Employees, § 277; O'Shields v. Caldwell, 207 S.C. 194, 219, 35 S.E.2d 184, 194 (1945). This is consistent with the federal case law that would permit a governmental official to be held personally liable in a suit for money damages if he violates a person's clearly established constitutional rights. See, Harlow v. Fitzgerald, 73 L.Ed.2d 396 (1982); Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90 (1974); Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214 (1975). A court may deem such rights to be clearly established based upon the above analysis. This provides further authority for you, as well as any other South Carolina public official, to decline to enforce the state statute. O'Shields v. Caldwell, supra.

In this instance, in view of the existing United States Supreme Court cases on the matter, cited above, we would advise that, to the extent it is necessary for SLED or any other state official to enforce the requirement of citizenship with respect to polygraph examiners, we would suggest that they not do so in the situation described in your letter; in other words, the provision should probably not be enforced until it can be ruled upon by a court of competent jurisdiction or until the General Assembly has clarified the situation. In other words, until such time, an individual should probably not be denied the right to be trained as a polygraph examiner solely on the basis that he is not a United States citizen.

*5 I hope that this fully responds to your inquiry. With kindest personal regards, I remain

Very truly yours,

Robert D. Cook

Executive Assistant for Opinions

Footnotes

- 1 We assume that if a court found the requirement of citizenship unconstitutional in this instance, it would be severable from the remainder of the statute.

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