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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 8, 1998

Buford S. Mabry, Jr., Chief Counsel
SC Department of Natural Resources
Post Office Box 167
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Mr. Mabry:

You have requested an opinion regarding the constitutionality of S.C. Code Ann. Sec. 50-17-250. Such Section provides as follows:

> [i]n the event that a nonresident's state charges South Carolina residents commercial license fees in excess of the amounts provided for like activities in this chapter, the nonresident must pay the same total license fees which his state charges South Carolina residents. The department may deny inssuance of any. license or permits for commercial fishing equipment or activities to residents of any coastal state which denies the same privileges to South Carolina residents. The department may limit the type of fishing equipment used, seasons, and areas where nonresidents may fish in accordance with comparable limitations placed upon South Carolina fishermen by the nonresident's state.

Law / Analysis

In an Informal Opinion, dated February 16, 1995, we addressed an issue similar to that raised by your letter. There, the question presented was whether a proposed Bill requiring that, before a nonresident contractor could perform work in South Carolina, such

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contractor must remit to the Contractor's Licensing Board the same fees which such contractor's home state charged to a South Carolina contractor doing work there was constitutional. We examined the issue in the context that the "proposed amendment would differentiate on the basis of residency for purposes of the fees paid to do business as a general or mechanical contractor in South Carolina.

Our conclusion in that Opinion was that the proposed legislation was of doubtful constitutionality on the basis of the Federal Privileges and Immunities Clause. While we recognized that such legislation would be presumed constitutional if enacted and that only a court (and not this Office) is empowered to declare an Act of the General Assembly unconstitutional, nevertheless, based upon prior rulings of the courts, the Privileges and Immunities Clause would most probably be violated by such a statutory enactment. We stated the following as support of this conclusion:

> It is well-settled that:
>
> > ... license legislation that discriminates against nonresidents of the State ... either by refusing to grant licenses to such nonresidents a higher fee or adding other burdens, where not required under the police power of the State for the protection of local citizens is void as violating Art. IV, § 2 of the Federal Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," or § 1 of the 14th Amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...."
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> 51 Am.Jur.2d Licenses, § 31. There is "no hard and fast rule" governing a distinction based upon residency, but "the question is simply one of degree." 53 C.J.S., Licenses, § 27.
>
> Courts in the past have struck down a variety of provisions deemed to be discriminatory against nonresidents. See e.g. Lipkin v. Duffy, 119 N.J.L. 366, 196 A. 434 (1938) [nonresident excluded from obtaining a license]; In re Irish, 122 Kan. 33, 250 P. 1056, 61 A.L.R. 332 (1926) [license fee

> of $150 per year for nonresidents selling bakery products in city, void]; Ex Parte Robinson, 68 Cal. App. 744, 230 P. 175 (1924) [similar]. An act imposing a license fee on nonresident contractors for the privilege of doing business has been held to be discriminatory and violative of the Constitution. State v. Board of Equalization, 403 P.2d 635 (Mont. 1965).
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> The United States Supreme Court has described the purpose of the Privileges and Immunities Clause:
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> > in any State, every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.
>
> Hague v. CIO, 307 U.S. 496, 511, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). This constitutional provision "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation." Hicklin v. Orbeck, 437 U.S. 518, 525, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), quoting Ward v. Maryland, 12 Wall. 418, 20 L.Ed. 449 (1871).

The Opinion also discussed a number of cases decided by the United States Supreme Court:

> [i]n contrast, the Court held in Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), that a South Carolina statute mandating that nonresidents pay license fees one hundred times higher to engage in commercial fishing violated the Privileges and Immunities Clause. Noting that while the Clause "does not preclude disparity in treatment in the many situations where there are perfectly valid independent reasons for it," the Court concluded that the Clause "does bar discrimination where there is no substantial reason for the discrimination beyond the fact they are citizens of other states." 334 U.S. at 396. For such discrimination to

> stand, noncitizens must constitute "a peculiar source of the evil" sought to be eliminated. See also, Tangier Sound Waterman's Assoc. v. Pruitt, 4 F.3d 264 (4th Cir. 1993).
>
> Similarly, the Court struck a statute penalizing nonresidents seeking to earn a livelihood in Mullaney v. Anderson, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). There, Alaska charged a $5 commercial fishing fee for residents and a $50 fee for nonresidents. Relying upon the analysis in Toomer, the Court conceded that a State is even empowered to charge nonresidents a differential "to compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." Still, the total amount payable by nonresident fishermen to Alaska was far in excess of what would have been needed for enforcement. Thus, the Alaska statute was found to be unconstitutionally discriminatory.

The Opinion cited numerous other cases including Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) and Austin v. New Hampshire, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975). In Austin, New Hampshire had imposed a tax on nonresident's income earned in that State exceeding $2,000 at 4%, but if the nonresident's state imposed a lesser tax on income earned there, the New Hampshire rate would equal that of the nonresident's state. On the other hand, no resident's income derived in another State, nor domestic income of New Hampshire residents, was taxed by New Hampshire.

The Court held the New Hampshire Commuters Income Tax violative of the Privileges and Immunities Clause, rejecting the State's argument that a receipt of a tax credit of nonresidents from their own state for tax paid to New Hampshire, sufficiently offset the nonresidents to render the statute valid. To the argument that Maine could simply repeal the credit provision as to New Hampshire, while retaining it for the remaining states, the Court responded:

> ... New Hampshire in effect invites appellants to induce their representatives, if they can, to retaliate against it.

A similar though much less disruptive invitation was extended by New York in support of the discriminatory personal exception by New York in support of the discriminatory personal exception at issue in Travis [v. Yale and Towne Mfg. Co., 252

U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920)]. The Statute granted the nonresident a credit for taxes paid to his State of residence on New York-derived income only if that state granted a substantially similar credit to New York residents subject to its income tax. New York contended that it thus "looked forward to the speedy adoption of an income tax by the adjoining States," which would eliminate the discrimination "by providing similar exemptions similarly conditioned." To this, the Court responded in terms which referred to the anticipated legislative response of the neighboring states:

> [t]his, however is wholly speculative; New York has no authority to legislate for the adjoining States; and we must pass upon its statute with respect to its effect and operation in the existing situations ... A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the Constitution. 420 U.S. at 667.

The South Carolina Supreme Court has likewise determined that such "retaliatory" statutes are unconstitutional as violative of the Privileges and Immunities Clause. In Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (1984), affd. 471 U.S. 82, 105 S.Ct. 1859, 85 L.Ed.2d 62 (1985) nonresident taxpayers from North Carolina paid their South Carolina income taxes under protest and brought an action for a refund. The plaintiff was employed in Greenville and attacked the validity of § 12-7-750 which provided that "a nonresident individual shall not be permitted to apportion and allocate his nonbusiness deductions between this State and his state of principal residence unless his state of principal residence also permits similar apportionment and allocation of nonbusiness deductions by nonresident individuals filing returns in that State."

The Court first determined "whether the statute burdens one of the privileges and immunities protected by the Clause." Reasoning that "one of the most fundamental privileges which the Clause guarantees to citizens of a state is that of doing business in another State on terms of substantial equality with the citizens of that State ...", the Court concluded that "[t]he discrimination against nonresident taxpayers in the case at bar clearly burdens their privileges of earning a living in the neighboring state of South Carolina." 316 S.E.2d at 388.

Next, the Court founded its analysis upon "the more difficult question of whether substantial reasons justify the discrimination and whether the degree of discrimination

bears a close relationship to those reasons." Id. The burden rests upon the State to show that nonresidents "are a peculiar source of the evil at which the statute is aimed." Pursuant to the Privileges and Immunities Clause, "the classification must fall if it has the effect of retaliating against citizens of other States who have no representation in the taxing state's legislative halls." 316 S.E.2d at 388.

The State argued that the proviso was not retaliatory, but designed to encourage other states to enact legislation favorable to South Carolinians. Nevertheless, the Court discussed the justification:

> ... The goal of encouraging other states to enact reciprocal legislation does not bear a substantial relationship to the result of penalizing taxpayers like the Spencers who live in North Carolina and work in South Carolina. These taxpayers are not the source of evil sought to be remedied by our legislature.
>
> The Privileges and Immunities Clause was intended to prevent retaliation and promote federalism. Therefore, denying nonresidents nonbusiness deductions initially allowed by the first paragraph of § 12-7-750 and allowed fore South Carolina residents who work in the State violates the Privileges and Immunities Clause.

Finally, the Informal Opinion referenced the fact that "the Attorney General of Texas has concluded that a retaliatory licensure provision would violate the Privileges and Immunities Clause." There, the Texas Attorney General analyzed such issue as follows:

> [c]ommercial fishing has been recognized as an occupation protected by the Privileges and Immunities Clause. Toomer v. Witsell, supra. Cf. Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) (recreational big-game hunting in Montana is not a right protected by Privileges and Immunities Clause). In Toomer v. Witsell, the United States Supreme Court declared unconstitutional a South Carolina statute which virtually excluded nonresidents from commercial shrimp fishing in South Carolina waters. Toomer v. Witsell, supra, at 396-97. For each shrimp boat owned by a nonresident, South Carolina required a license fee one-hundred times that paid by residents. Id. at 389. The court found no reasonable relationship between the state's alleged purpose of

> conservation and the discriminatory statute. There was no "reasonable relationship between the state's alleged purpose of conservation and this discriminatory statute. There was no "reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them." Id. at 399. Nor did a state's interest in its wildlife justify its unreasonable interference with a nonresident's right to pursue a livelihood in a state other than by his own. Toomer v. Witsell, 334 U.S. 385 (1948). See also Dobard v. State, 233 S.W.2d 435 (Tex. 1950).
>
> We conclude, in answer to your second question, that Texas may not discriminate against the residents of other states in the sale of commercial fishing licenses unless such discrimination is supported by a "substantial reason" as required by the United States Supreme Court. Retaliation against Arkansas for apparent discrimination against Texas residents does not constitute the requisite reason.

Based upon the foregoing authorities, it would appear that § 50-17-250 is constitutionally suspect. Such provision requires that where a nonresident's state charges South Carolina residents commercial license fees in excess of the amounts provided for like activities in South Carolina, "the nonresident must pay the same total license fees which his state charges South Carolina residents." The various authorities cited above would clearly indicate that such a provision would violate the Privileges and Immunities Clause.

However, this Office must presume the validity of this provision as it does with respect to any other statute enacted by the General Assembly. As stated in a recent opinion of this Office with respect to another statute, "'[a] declaratory judgment or legislative clarification would be advisable to determine the constitutionality of this statute or to take corrective legislative measures. Until such legislative or judicial action is taken, however, it would appear that [the statute in question] should be followed.'" This same advice would be applicable here as well. Until the Legislature or the courts act or rule to the contrary, I must advise that the statute continue to be followed.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an