

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 07-137

Polk County Employee Bill of Rights

QUESTION

The Polk County Commission has proposed a private act that would create an “Employee Bill of Rights.” Is the proposed legislation constitutional?

OPINION

The proposed Polk County Employee Bill of Rights (“EBR”) conflicts with two different statutes of statewide applicability. First, the EBR would prohibit elected county officials from dismissing employees in their offices. Under Tenn. Code Ann. § 8-20-109, deputies and assistants in the offices of the clerk and master, county clerk, clerks of the probate, criminal, circuit and special courts, county trustee, register of deeds, and sheriff are at-will employees unless protected by a civil service system. The EBR does not create a civil service system. Second, the EBR would deprive county elected officials of their authority to adopt their own personnel policies under Tenn. Code Ann. §§ 5-23-101, *et seq.* This Office is unaware of any rational basis for exempting Polk County from either of these statutes. Absent a rational basis, to the extent the EBR is inconsistent with these statutes, it violates Article XI, Section 8, of the Tennessee Constitution. Further, some of the restrictions on the political activities of employees may be vulnerable to a challenge that they unconstitutionally encroach upon rights guaranteed by the First Amendment of the United States Constitution. They should be more narrowly drafted to target activity that would undermine the ability of an employee’s department or official employer to carry out its official functions.

ANALYSIS

This request concerns the constitutionality of a proposal to enact a private act creating the Polk County Employee Bill of Rights (“EBR”). (Copy attached). Section 1 of the act provides in part:

(b) Under the EBR, all Polk County Employees who have been employed by the county for a continuous, uninterrupted period of time of at least two (2) years full-time employment, and who during that tenure with Polk County have maintained a satisfactory work history, shall be protected from arbitrary firing or failure to rehire. The two (2) year employment period needed to obtain protection under the EBR begins on each employee’s date of full-time employment within the County

Employment, and job protection status is achieved on the two-year anniversary of each employee's hire date to full-time, continuous employment.

(c) No incoming Office Holder shall be able to hire more new employees than the number exempted by the EBR and not retained. An incoming Office Holder shall hire no more employees than allowed under the existing departmental budget in place and previously approved by the county commission.

Section 2 exempts temporary, part-time, and volunteer employees, employees whose position is funded by a grant, school board employees, and employees with disciplinary occurrences in their personnel file. Section 2(g) of the EBR also explicitly exempts:

(g) Employees who are *not* hired or appointed by elected officials of Polk County or whose position is *not* subject to dismissal by a branch or entity of the county government[.]

(Emphasis added). Section 3 of the EBR provides:

The individual rank of those employees covered by the EBR is not protected, regardless of time employed with the department. A ranking employee can be classified by a new office holder at a pay level that is no lower than the highest non-ranking position within the division he or she is to be assigned, with the amount of salary determined by the department's salary chart which takes into account an employee's longevity with the department, and state certification status, if applicable.

Section 4 of the act restricts job reassignments for employees protected under the EBR. Under Section 5, benefits to employees covered by the EBR are protected. Benefits include holidays, and other leave, retirement benefits, and worker's compensation insurance. Benefits extended to the employees of office holders by the county government are subject to change. *Id.*

Section 6 imposes the following restrictions:

(a) No employee of a county office holder shall take part in any political campaign while on duty, nor under any circumstances shall any employee solicit money for political campaigns while on duty.

(b) No employee shall use his or her position with a department to promote his or her personal political opinions, or portray his or her own personal political opinions as representing those of the department or office holder.

(c) No employee of the county shall use his or her position with the county in an attempt to influence the political opinions of others.

(d) No employee shall make any political endorsements of any candidate, in any campaign for elected office while on duty.

(e) Nothing in this act shall be construed to prohibit *or* prevent any employee of the Polk County Government which are [sic] covered under the EBR from becoming or continuing to be a member of a political club or organization, and enjoying all the rights and privileges of such membership, or from attending any political meeting or other activity while not on duty.

(f) Employees shall not be denied freedom in the casting of his or her [sic] vote.

Article XI, Section 8, of the Tennessee Constitution provides in part:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass 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.

In order to trigger application of Article XI, Section 8, a statute must “contravene some general law which has mandatory statewide application.” *Civil Service Merit Board of City of Knoxville v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991) (quoting *Leech v. Wayne County*, 588 S.W.2d 270, 273 (Tenn. 1979)). 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). The burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute. If any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute must be upheld. *Id.*

Thus, under Article XI, Section 8, a special act generally may not conflict with a general law of mandatory applicability unless there is a rational basis for the different treatment. The EBR conflicts with two different statutes of statewide applicability. This Office is unaware of any rational basis for exempting Polk County from these statutes. Absent a rational basis, to the extent the EBR is inconsistent with these statutes, it is unconstitutional. Further, some of the restrictions on the political activities of employees may be vulnerable to a challenge that they unconstitutionally encroach upon rights guaranteed by the First Amendment of the United States Constitution.

1. At-Will Status of Employees in Offices of Elected County Officials

The EBR does not define the term “officeholder.” Under Section 2(g), however, the EBR exempts employees who are *not* hired or appointed by elected officials of Polk County or whose position is *not* subject to dismissal by a branch or entity of the county government. The act,

therefore, applies to employees hired or appointed by elected officials of Polk County, and those whose positions are otherwise subject to dismissal by a branch or entity of county government. Tenn. Code Ann. §§ 8-20-101, *et seq.*, apply to the clerk and master, county clerk, clerks of the probate, criminal, circuit and special courts, county trustee, register of deeds, and sheriff. Tenn. Code Ann. § 8-20-101(a). With the exception of the office of clerk and master, these are all elective offices. Tenn. Const. Art. VII, § 1; Tenn. Const. Art. VI, § 4. Tenn. Code Ann. § 8-20-109 provides:

Any and all deputies and assistants in any of the offices covered by this chapter shall be removable by the officer for whom they are acting, at will.

The term “deputies and assistants” is not defined in the statute. But Tenn. Code Ann. § 8-20-101(a) authorizes various county officials to petition for the authority to hire “deputies and assistants as may be actually necessary to the proper conducting of such person’s office” Logically, this term would include any employee in that official’s office. Tenn. Code Ann. § 8-20-112 provides:

In any county having a civil service system for the sheriff’s department pursuant to chapter 8, part 4 of this title or other provision of general law or the provisions of a private act, or a civil service system for *all* county employees pursuant to the provisions of a private act, the employment or termination of employment of any deputy or assistant in any offices covered by this chapter shall be pursuant to the provisions of such civil service system, and the provisions of § 8-20-109 shall not apply to such county.

(Emphasis added). Thus, the statute making employees of elected county officials at-will employees does not apply to a county with a civil service system that covers these employees. The statute cites Tenn. Code Ann. §§ 8-8-401, *et seq.*, the Sheriff’s Civil Service Law, as an example. In counties that adopt this law, the statute creates a civil service board to develop a classification plan for employees, keep records regarding performance, and administer eligibility tests for positions in the classified service. Research indicates that no private act establishes a civil service system for Polk County employees. Further, the EBR does not create such a system. This Office is unaware of a rational basis for exempting employees of elected county officials in Polk County from at-will employee status unless they are protected by a county civil service system. Absent a rational basis, the EBR is unconstitutional to the extent it conflicts with Tenn. Code Ann. § 8-20-109.

2. Personnel policies

Under Tenn. Code Ann. §§ 5-23-101, *et seq.*, officials such as the county trustee, register of deeds, county clerk, court clerk, assessor of property, and head of the public works department are authorized to adopt their own “base personnel policies” regarding leave and compensatory time. If these officials do not adopt their own policies, those offices follow the policies developed by the county commission. Tenn. Code Ann. § 5-23-108 provides in part that, “[n]othing in this chapter or any of the policies adopted pursuant to this chapter shall be construed to affect the employment-at-will status of any county employee or otherwise create any contractual obligation on the part of

the county as employer.” The statutory scheme supersedes conflicting provisions of general or private acts, with a few exceptions inapplicable to Polk County. Tenn. Code Ann. § 5-23-112. The EBR sets forth employee benefits that must continue to be granted to employees of elected county officials. The bill, therefore, takes away from county officials their discretion to adopt their own base personnel policies conferred under Tenn. Code Ann. §§ 5-23-101, *et seq.* This Office is unaware of a rational basis for depriving elected officials in Polk County the authority to adopt their own base personnel policies under Tenn. Code Ann. §§ 5-23-101, *et seq.* Absent a rational basis, the EBR is unconstitutional to the extent it conflicts with Tenn. Code Ann. §§ 5-23-101, *et seq.*

3. Restrictions on Political Activities

Section 6 of the EBR restricts the political activities of county employees, including those of elected and appointed officials. Tenn. Code Ann. § 7-51-1501 generally preserves the political rights of local government employees. The local government is not required to pay an employee’s salary for work not performed for the governmental entity. Under Tenn. Code Ann. § 7-51-1503, time off from work used by a local government employee for political activities must be limited to earned days off, vacation days, or to other arrangements worked out between the employee and the municipal or county governmental body. We do not think these statutes, however, prevent a local government from imposing more explicit restrictions that are consistent with these statutes. Thus, the restrictions under subsections (a)¹ and (d)² do not violate Article XI, Section 8, particularly where, as in the EBR, they are consistent with those statutes. Further, these statutes do not unconstitutionally infringe on the First Amendment rights of employees since they promote the efficiency of the county workforce. Governments may limit the political activities of government employees to ensure impartial execution of the laws and maintain public confidence in governmental fairness. *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

In determining the validity of a restraint on job-related speech of public employees, however, a court must arrive at a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (citing *Pickering v. Board of Education of Township High School District 205, Will County*, 391 US. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)). Subsections (b) and (c) of Section 6 prohibit an employee from using his or her position to “promote his or her personal political opinions, or portray his or her own personal political opinions as representing those of the department or office holder,” or from using his or her position “in an attempt to influence the political opinions of others.” These provisions cover a broad range of activity. Arguably, for example, subsection (b) would prohibit

¹ Section 6(a) provides: “No employee of a county office holder shall take part in any political campaign while on duty, nor under any circumstances shall any employee solicit money for political campaigns while on duty.”

² Section 6(d) provides: “No employee shall make any political endorsements of any candidate, in any campaign for elected office while on duty.”

an employee from carrying out his or her employment duties if they promote policies he or she personally favors. These provisions should be more narrowly drafted to target activity that would undermine the ability of an employee's department or official employer to carry out its official functions.

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