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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 27, 1978

Representative Judy C. Kany
State House
Augusta, Maine 04333

Dear Representative Kany:

You have asked whether the provisions of the Maine Personnel Law which favor Maine domiciliaries as to employment in the State classified service violate the equal protection clauses of the United States and Maine Constitutions. Our response is that the provision that domiciliaries of the State shall be certified ahead of non-domiciliaries and otherwise given preference does not appear to be unconstitutional. However, we believe that the requirement that employment in the classified service be open only to persons who are domiciled in the State for at least six months appears to be inconsistent with these constitutional provisions.

The provisions of State law which favor Maine domiciliaries as to employment in state service are as follows:

> "Employment in the classified service shall be open to all qualified persons who have been residents* of the State of Maine for at least 6 months immediately preceding that employment, except that at the request of the appointing authority the residence requirement may be waived by the Director of Personnel in exceptional or emergency cases when such action is necessary for the good of the service." 5 M.R.S.A. § 556.
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> "In making appointments to any position on an open competitive basis in the classified service or recruiting for the same, preference shall be given to residents of the State of Maine.
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> "When names are certified for a position in state service, Maine residents shall be certified ahead

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* "Resident" is defined by 5 M.R.S.A. § 552(7) to mean "a person who is domiciled in Maine."

of all nonresident. Nonresident eligibles, placed upon registers under relevant statutory provisions of this section, may be certified when there is an insufficient number of qualified Maine residents." 5 M.R.S.A. § 557

Two questions are thus presented: Does the requirement of Section 556 that a person be a domiciliary for six months in order to be eligible for state employment violate the equal protection clauses, and does the provision of Section 557 that domiciliaries be certified ahead of and given preference over non-domiciliaries suffer from similar constitutional infirmities? (In light of our answer to the first question, it is not necessary to consider the effect and constitutionality of the waiver provision of Section 556).

I. Constitutionality of Six-Month Residence Requirement

In analyzing equal protection questions, the first step is to determine whether a constitutionally guaranteed right, such as those found in the Bill of Rights, is penalized by the statute. If so, the court must then find that the discrimination in the statute serves a compelling state interest in order for it to be sustained. If a constitutional right is not involved, the court need only find a rational basis for the statute to uphold it.

In passing on the constitutionality of duration residence requirements in other contexts, the Supreme Court has uniformly found that such statutory provisions penalize a constitutionally protected right to travel freely about the United States, and so have applied the strict compelling state interest test. Shapiro v. Thompson, 394 U.S. 618 (1969) (one year residence requirement for eligibility for welfare benefits); Dunn v. Blumstein, 405 U.S. 330 (1972) (one year residence requirement for eligibility for registering to vote); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (one year residence requirement for eligibility for non-emergency hospital care); Sosna v. Iowa, 419 U.S. 393 (1975) (one year residence requirement for eligibility for petitioning for divorce).

In the first three of these cases, the Court found the State's interest insufficiently compelling to sustain the statute. In Sosna, however, the Court upheld the durational residency requirement, distinguishing the three earlier cases on the ground that the appellant was "irretrievably foreclosed from obtaining some part of what she sought, as was the case with welfare recipients in Shapiro, the voters in Dunn or the indigent patient in Maricopa County." Id., at 406. Thus, the penalty on interstate travel was not deemed to be so severe as to outweigh the state's compelling interest, in the area to divorce proceedings, in ensuring that persons seeking to have their private relations regulated by a court have a substantial connection to that court's State to begin with.

The Supreme Court has yet to consider a durational residence requirement for public employment. Other courts in the country, however, have done so. The issue was first addressed by the Supreme Court of Washington in Eggert v. City of Seattle, 505 P.2d 801 (Wash. 1973). There, the Court, relying on Shapiro and Dunn, invalidated a requirement of the city charter of Seattle that an applicant for a civil service position be a resident of the city for one year before his application could be considered. The Supreme Court of Alaska, in State v. Wylie, 516 P.2d 142 (Alas. 1973) struck down a similar requirement relating to state employment, relying on the same authority. In both these cases, the court was unable to find any compelling state interest sufficient to sustain the penalty of the right to travel which the durational residence requirement imposed, and the Alaska court specifically found that the objective of reducing unemployment within the State could not be constitutionally pursued in this manner. Id., at 149-50. See also Stevens v. Campbell, 332 F. Supp. 102 (D. Mass. 1971) and Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971), both invalidating durational residence requirements for eligibility for veterans' preference for public employment.

Most recently a United States District Court in Hawaii has ruled that the Hawaii one year durational residency requirement for public employment violates the Equal Protection Clause Nehring v. Ariyoshi 46 LW 2333 U.S.D.C. Hawaii (December 12, 1977).

Against this authority, the Supreme Judicial Court in Massachusetts has sustained a statute giving a preference for consideration for employment on a municipality's police force to persons who have resided in that municipality for one year. Town of Milton v. Civil Service Commission, 312 N.E. 2d. 188 (Mass. 1974). The Court first determined that the burden imposed on the right to travel by the statute was not so severe as to rise to the level of a penalty under Shapiro, Dunn and Maricopa County, and thus, did not require a showing of a compelling state interest. It then undertook an analysis of the nature of police work to show that a durational residence requirement of one year served a rational purpose of insuring that a potential policeman needed that amount of time in residence to become adequate to his job. It thus sustained the statute.

Without offering any prediction as to how the United States Supreme Court would have ruled on Milton had it been appealed, it is clear that the case turns on the specific character of the public employment involved, and should not be read to apply to legislative limitations on public employment generally. Where such general limitations are at issue, the analysis of Eggert and Wylie, supported by the Supreme Court authority on which they rely, would appear to be pursuasive and, so far, uncontradicted. Thus, it would seem that the outright prohibition from state employment of persons who have not been domiciled in the State for more than six months would not survive constitutional scrutiny.

## II. Constitutionality of Residential Preference

The second question raised by your inquiry concerns the constitutionality of the preference accorded to domiciliaries by Section 557 of the Personnel Law. Here, the situation is somewhat different. Our research has not disclosed any court ruling on the question of constitutionality of an employment preference for residents, as distinct from a residence requirement for employment. In view of this, we cannot say that such a preference is unconstitutional.

I hope this answers your question.

Sincerely,

Joseph E Brennan

JOSEPH E. BRENNAN
Attorney General

JEB:jg
cc: Robert Stolt, Commissioner of Personnel