

IN THE SUPREME COURT OF OHIO

CITY OF LIMA, :
 :
 APPELLEE, : CASE # 2008-0128
 :
 v. : On Appeal from the Allen
 : County Court of Appeals,
 STATE OF OHIO, : Third Appellate District
 :
 :
 APPELLANT. :

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF PROFESSIONAL
FIRE FIGHTERS IN SUPPORT OF APPELLANT STATE OF OHIO

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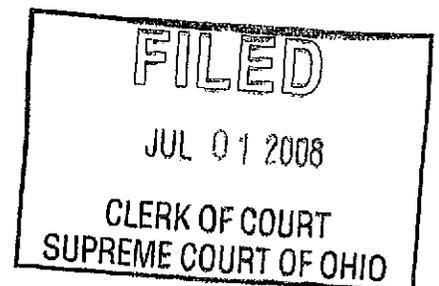


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STATEMENT OF FACTS AND INTERESTS OF *AMICUS CURIAE*

Local residency restrictions and the statewide validity of R.C. §9.481 are of great interest to *Amicus Curiae*, the Ohio Association of Professional Fire Fighters, and the more than 9,700 active Ohio firefighters represented by the Association. A number of Ohio cities, like Lima, have restrictive charter provisions or ordinances that take away the freedom of their employees to make residential choices. Those cities dictate that their employees must live within the city boundaries, thereby infringing upon the employees' right to choose where they live, significantly limiting the employees' residential options, and negatively impacting important matters such as family finances, family relationships, and school choices.

Lima's residency requirement may dramatically affect not only its employees and their interests and rights, but the family members of those employees and neighboring communities as well. For instance, employees may want to live near other family members who reside outside Lima. Those other family members may be disabled or elderly who need care or attention. Those employees could provide that care or attention, except for the fact that the Lima ordinance requires they live in Lima. Instead, they must make other arrangements, often at great expense, to insure that their family members receive the needed care or attention (or those family members may simply have to go without that care or attention).

A residency requirement, by dictating where an employee (and, of course, consequently, his/her immediate family) must live, effectively limits an employee's choices as to who his/her neighbors will be, as well as where the employee and his/her family will worship, shop, and socialize.

Individuals who may own property outside Lima either must choose not to reside on their

own property or forego a civil service job with Lima. Depending upon their financial situations, some employees may be hard pressed to afford housing in the community where they work, while more affordable housing may exist just across the city limits.

An employee may be deprived of the opportunity to send his/her child to a school better suited for the needs of that child because the employee must reside in one city and not some other community. While one school district may be particularly suited to meet the special needs of a student, the parents must send that student to the school where they are forced to live, not to the school that could better serve their needs.

Families may be caught in a dilemma. If one spouse works for Lima while the other is obligated to reside in a different community, what are they supposed to do? Divorce? Live apart?

Imposing a residency requirement upon employees not only infringes upon their right to choose where to live, but also creates the potential for an invasion of their privacy. See *State, ex rel. Fisher, v. Cleveland*, 109 Ohio St. 3d 33, 2006-Ohio-1827 (policy requiring employees to disclose their tax returns to prove residency within the city violated the employees' right to privacy).

Clearly residency requirements such as the Lima Ordinance, requiring employees to live within the city limits, have a significant impact on employees and their families, but those restrictions can also have a detrimental impact beyond the city of employment. For instance, if employees must live in Lima, they obviously cannot live in neighboring jurisdictions.

Communities in Auglaize, Hardin, Hancock, Putnam, and Van Wert Counties are deprived of potential residents and the diversity that they might provide.

Unemployment in one community may be higher because its residents are precluded from working in a neighboring community. Indeed, it should be noted that many of the benefits Lima claims to have as a result of its residency requirement actually operate to the detriment of all other communities. For instance, if there are “economic benefits that flow to a city from having resident employees” as claimed by Lima, then other jurisdictions are going to be deprived of those benefits. It is not just Lima that is affected by its residency requirement, but all the area surrounding Lima as well.

Obviously Lima’s residency requirement has a significant impact on its employees and their rights as well as an extra-territorial impact that extends outside the City of Lima. On the other hand, R.C. §9.481 represents only a minimal intrusion upon the City. Lima can still hire and retain employees. In fact, R.C. §9.481 actually increases Lima’s applicant pool and makes it more likely that it will be able to hire and then retain qualified employees.

In response to the many significant ramifications imposed by a residency requirement such as Lima’s, not only upon the employees and their families but on neighboring communities, the Ohio General Assembly enacted Section 9.481 of the Ohio Revised Code. That section, which became effective May 1, 2006, generally provides that “no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of state” and that “employees of political subdivisions of this state have the right to reside any place they desire.” R.C. §9.481(B)(1), (C). The statute does make one exception, allowing political subdivisions to file an initiative petition or adopt an ordinance or resolution requiring that certain employees of the political subdivision reside either in the county where the political subdivision is located or in any adjacent county in the state in order for those employees to respond to

emergencies or disasters. R.C. §9.481(B)(2)(b).

When the Ohio General Assembly enacted R.C. §9.481, it referenced its intent in the following manner:

SECTION 2. In enacting section 9.481 of the Revised Code in this act, the General Assembly hereby declares its intent to recognize both of the following:
(A) The inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution.
(B) Section 34 of Article II, Ohio Constitution, specifies that laws may be passed providing for the comfort, health, safety, and general welfare of all employees, and that no other provision of the Ohio Constitution impairs or limits this power, including Section 3 of Article XVIII, Ohio Constitution. Sub.S.B. 82.

Also, when it enacted §9.481, the Ohio General Assembly made the following specific legislative finding:

SECTION 3. The General Assembly finds, in enacting section 9.481 of the Revised Code in this act, that it is a matter of statewide concern to generally allow the employees of Ohio's political subdivisions to choose where to live, and that it is necessary to generally prohibit political subdivisions from requiring their employees, as a condition of employment, to reside in a specific area of the state in order to provide for the comfort, health, safety, and general welfare of those public employees. Sub.S.B. 82.

On May 22, 2006, the City of Lima filed a complaint against the State of Ohio. The complaint alleged, among other things, that Lima is a charter city and that R.C. §9.481 violates the Ohio Constitution, primarily because it infringes upon the City's home rule powers (Sections 3, 7, Article XVIII, of the Ohio Constitution).

Both the State of Ohio and Lima filed motions for summary judgment. On February 16, 2007, the Court of Common Pleas granted the State's motion for summary judgment and denied the City's motion. The Court's ruling is summarized by the following paragraph on page 15 of its decision:

O.R.C. 9.481 was lawfully enacted by the Ohio General Assembly to provide for

general welfare of employees of Ohio's political subdivisions, in addition to being a matter of statewide concern. Since the Ohio General Assembly's authority to legislate in this area is constitutionally superior to the City of Lima's Home Rule authority to enact local laws that ban employees from living outside the city's corporate boundaries, the City of Lima's Ordinance # 201-00 enacted on October 23, 2000 must succumb to State Law.

However, on December 3, 2007, the Court of Appeals reversed, limiting Article II, Section 34's grant of power to the General Assembly only to "working environment conditions," and concluding that Lima's residency restriction has nothing to do with "working environment conditions." The State has appealed to this Court. *Amicus Curiae* the Ohio Association of Professional Fire Fighters now submits its brief in support of the State of Ohio.

ARGUMENT

PROPOSITION OF LAW # 1

SECTION 34, ARTICLE II, OF THE OHIO CONSTITUTION AUTHORIZES THE OHIO GENERAL ASSEMBLY TO LEGISLATE IN THE AREA OF EMPLOYEES' RESIDENCY OPTIONS.

A. PRESUMPTION OF CONSTITUTIONALITY

Ohio has a long-established principle requiring courts to presume the constitutionality of legislative enactments. *State, ex rel. Jackman, v. Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 161-162. The presumption of the constitutionality of legislative enactments can only be overcome by proof, beyond a reasonable doubt, that the legislation and the Constitution are clearly incompatible. *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142; *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 10.

As stated by the Supreme Court in *Kettering v. State Emp. Relations Bd.* (1986), 26 Ohio St. 3d 50:

Initially, it is important to observe that legislative enactments "have a strong presumption of constitutionality." *Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375. As Justice Locher stated in *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, "courts must apply all presumptions * * * so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional." See, also, *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. Thus, in the instant case, Kettering must rebut the presumption of constitutionality attaching to R.C. 4117.01(F)(2). 26 Ohio St. 3d at 52.

For the reasons stated below, the City cannot overcome the strong presumption of constitutionality of R.C. §9.481.

B. SECTION 9.481 WAS ENACTED PURSUANT TO THE GENERAL ASSEMBLY'S AUTHORITY GRANTED BY SECTION 34, ARTICLE II, OF THE OHIO CONSTITUTION

Section 34, Article II, of the Ohio Constitution provides:

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

This Court has consistently interpreted Section 34, Article II, as a broad grant of authority to the General Assembly, not as a limitation on its power to enact legislation. *Am. Assn. of Univ.*

Professors, Cent. State Univ. Chapter v. Cent. State Univ. (1999), 87 Ohio St. 3d 55, 61.

Regarding the scope of this constitutional provision, this Court stated the following:

This provision constitutes a broad grant of authority to the legislature to provide for the welfare of all working persons, including local safety forces. (Citation omitted.) *The provision expressly states in "clear, certain and unambiguous language" that no other provision of the Constitution may impair the legislature's power under Section 34.* (Citation omitted.) *This prohibition, of course, includes the "home rule" provision contained in Section 3, Article XVIII.* *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 13 (emphasis added).

Or as stated in *Central Ohio Transit Auth. v. Transport Workers Union of America, Local 208* (1988), 37 Ohio St. 3d 56, 62:

The Ohio Constitution contains a broad grant of authority to the legislature to provide for the “comfort, health, safety and general welfare of all employees,” and further declares that no other constitutional provision shall impair or limit that authority. Section 34, Article II, Ohio Constitution. By refusing to interfere in the legislature's exercise of its prerogative in this area, this court upholds the doctrine of separation of powers by preserving the integrity of the legislative function. 37 Ohio St. 3d at 62.

Legislation adopted pursuant to Section 34, Article II, cannot be impaired or limited by any other provision, including the home rule provisions, of the Constitution. Simply put, the General Assembly’s authority to provide for the comfort, health, safety and general welfare of employees “trumps” Lima’s home rule powers.

The Court of Appeals, however, ruled that Section 34, Article II, did not apply, basing its ruling on the conclusion that the references to “comfort” and “general welfare” in the Section only relates to “working environment conditions.” Then fabricating an artificial distinction between “working environment conditions” and “conditions of employment,” the Court opined that, residency, as a condition of employment, has nothing to do with “working environment conditions” and is beyond the scope of Section 34.

Although the Court of Appeals discussed the history of Section 34, and noted that working conditions (e.g., long hours of work) were addressed by the Section, at no time could the Court of Appeals point to any history that would suggest the term “general welfare,” as used in the Section, was intended to be limited solely to “working environment conditions.” The fact that work conditions could certainly be encompassed within the broad term “general welfare” hardly means that the term refers solely and exclusively to work conditions. Indeed, if the Section were to be limited to “working environment conditions,” why wouldn’t the drafters have

used restrictive language to that effect, rather than the broad term “general welfare.”¹

In addition, the Court of Appeals was unable to find any authority since the adoption of the Section that would support such a restrictive reading of that Section. To the contrary, the cases that have interpreted this Section have never placed restrictions on the Section or limited its scope. Thus, the General Assembly can require local governments to transfer assets to the state’s pension fund. *State, ex rel. Bd. of Trustees of Pension Fund, v. Bd. of Trustees of Relief Fund* (1967), 12 Ohio St. 2d 105. Further, the General Assembly may require municipalities to collectively bargain with its employees. *Kettering v. State Emp. Relations Bd.* (1986), 26 Ohio St. 3d 50; *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1. And the General Assembly may pass legislation for sick leave benefits which, by virtue of Section 34, prevails over local provisions. *State, ex rel. Mun. Constr. Equip. Operators’ Labor Council v. Cleveland*, 114 Ohio St. 3d 183, 197, 2007-Ohio-3831.

By providing employees with the right to choose where they live, the General Assembly has provided for the comfort and general welfare of those employees. Regardless of whether or not R.C. §9.481 may violate the home rule provisions of the Constitution, the statute must still be upheld since it was passed pursuant to the authority vested in the General Assembly by Section 34, Article II.

¹Interestingly, the Court of Appeals implicitly recognized that one aspect of the Section was the intention to allow trade unions. How can the term “general welfare” be so broad for the General Assembly to pass legislation dealing with trade unions, but so narrow that the General Assembly has no authority to enact legislation dealing with conditions of employment? If a constitutional provision is broad enough to allow the General Assembly to pass legislation that would allow employees to join a trade union, as part of their general welfare, isn’t that same provision clearly broad enough for the General Assembly to pass legislation protecting employees’ residential options?

PROPOSITION OF LAW # 2

R.C. §9.481, AS A GENERAL LAW OF STATEWIDE CONCERN, SUPERSEDES THE POWERS OF LOCAL SELF-GOVERNMENT AND HOME RULE

A. LAWS OF A GENERAL NATURE PREVAIL OVER THE POWERS OF LOCAL SELF-GOVERNMENT AND HOME RULE

Section 3, Article XVIII, of the Ohio Constitution provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*" (Emphasis added.)

Section 7, Article XVIII, of the Ohio Constitution provides:

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

This Court has made it clear that these two sections of the Constitution are limited to the authority of municipal corporations to adopt laws not in conflict with "general laws." For instance, in upholding the State's Public Employee Collective Bargaining Act, this Court in *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, stated the following:

This court has already determined that "[t]he collective bargaining law of the state of Ohio is a law of a general nature. * * *" *Dayton F.O.P.*, supra, at paragraph one of the syllabus. Section 3, Article XVIII explicitly withholds from municipalities the authority to exercise powers or adopt regulations which are in conflict with "general laws." The home-rule amendment, Section 7, Article XVIII, grants municipalities powers of home rule "subject to the provisions of section 3 of this article * * *." (Emphasis added.) Therefore, the power of home rule is constitutionally limited to powers not in conflict with "general laws." 43 Ohio St. 3d at 12-13.

See also *DeVennish v. Columbus* (1991), 57 Ohio St. 3d 163, 167 ("[T]he municipal power of local self-government is constitutionally limited to the exercise of powers which do not conflict with any general law.").

Through the years the General Assembly has passed numerous laws affecting or governing the terms and conditions of employment of employees in political subdivisions, including charter cities such as Lima. And this Court has consistently rejected the notion that Sections 3 or 7 of Article XVIII of the Ohio Constitution invalidated those laws.

For instance, in 1983 the General Assembly passed Chapter 4117 of the Revised Code requiring all Ohio cities to collectively bargain with some of their employees and establishing the procedures to be followed for that bargaining. The City of Lima, despite the fact that it is a charter city, must follow that state law. See generally *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44, v. State Emp. Relations Bd.* (1986), 22 Ohio St. 3d 1; *Kettering v. State Emp. Relations Bd.* (1986), 26 Ohio St. 3d 50; and *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1. In recognizing that the State collective bargaining act law prevailed over city charters, this Court in *Cincinnati v. Ohio Council 8, American Fedn. of State, Cty. & Mun. Emp., AFL-CIO* (1991), 61 Ohio St. 3d 658, stated the following:

R.C. Chapter 4117, of which R.C. 4117.10(A) is a part, is a law of a general nature which is to be applied uniformly throughout the state. (*Citation omitted.*) As such, it prevails over any inconsistent provision in a municipal home-rule charter by virtue of Section 3, Article XVIII of the Ohio Constitution. See, e.g., *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St. 3d 44, 48-49, and cases therein cited. We have also recognized that R.C. Chapter 4117 prevails over home-rule charters because it was enacted pursuant to Section 34, Article II of the Ohio Constitution. 61 Ohio St. 3d at 662.

There are numerous other examples of state laws of a general nature prevailing over inconsistent municipal corporation ordinances or charters. For example, in *State, ex rel. Evans, v. Moore* (1982), 69 Ohio St. 2d 88, this Court upheld the prevailing wage law as it applied to municipal corporations.

In *State, ex rel. Villari, v. Bedford Hts.* (1984), 11 Ohio St. 3d 222, this Court held that

the State could legislate as to the amount of vacation municipal corporations had to grant its employees (“We believe and so find that R.C. 9.44 manifests a similar concern for the security and protection of public employees, and at the same time presents only a minimal intrusion into matters of traditionally local concern.” 11 Ohio St. 3d at 225).

In *State, ex rel. Adkins, v. Sobb* (1986), 26 Ohio St. 3d 46, this Court specifically rejected the contention that a city’s home rule powers invalidated the State’s regulation of vacation for employees of municipal corporations. The Court stated:

The city argues that it is entitled to regulate the vacation leave of its employees pursuant to its powers of local self-government under Sections 3 and 7, Article XVIII of the Ohio Constitution. State law must govern, however, when a statute addresses a matter of general and statewide concern in an area otherwise subject to municipal regulation. See, e.g., *State, ex rel. Evans, v. Moore* (1982), 69 Ohio St.2d 88. Further, the constitutional home-rule powers of municipalities are subject to the requirement that municipal regulations "not [be] in conflict with general laws." Section 3, Article XVIII. 26 Ohio St. 3d at 48.

Finally, in *State, ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St. 3d 183, 197, 2007-Ohio-3831, this Court noted that the State’s laws on public employee sick leave entitlement “are laws of a general nature that prevail over conflicting municipal ordinances.”

B. R.C. §9.481 IS A GENERAL LAW OF STATEWIDE CONCERN

Clearly residency requirements such as the Lima Ordinance, requiring employees to live within the city limits, have a significant impact that extends well beyond the city of employment. As noted at pages 1 - 4, *supra*, Lima’s residency requirement dramatically affects not only the interests and rights of its employees and their family members, but neighboring communities as well. In response to the statewide implications of residency requirements, the General Assembly enacted R.C. §9.481.

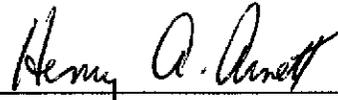
If the home rule provisions do not prevent the General Assembly from requiring Lima to collectively bargain with its employees, if the home rule provisions do not prevent the General Assembly from requiring Lima to pay prevailing wages, if the home rule provisions do not prevent the General Assembly from mandating vacation leave provisions for Lima employees, and if the home rule provisions do not prevent the General Assembly from requiring Lima to comply with statewide sick leave provisions, then clearly those provisions do not prevent the General Assembly from protecting the rights of Ohio citizens to reside where they please and preventing Lima from infringing upon those rights. Section 9.481 is not in violation of Sections 3 and Section 7 of Article XVIII of the Ohio Constitution.

CONCLUSION

Lima's residency requirement is not an issue of local self-government. The residency requirement directly affects not only employees but also their family members. It restricts the employees' right to decide where they should live. It significantly affects not just their workday, but it also dictates every hour of their lives outside the workplace. It also impacts communities outside the City of Lima, often to the detriment of those communities.

Ohio law, R.C. §9.481, represents a minimal intrusion upon Lima's local self-government while protecting the rights of Ohio citizens. The Ohio law is not in violation of the home rule provisions of the Ohio Constitution, and, in addition, was well within the authority of the General Assembly to enact pursuant to Section 34, Article II. Accordingly, the Allen County Court of Appeals should be reversed.

Respectfully submitted,



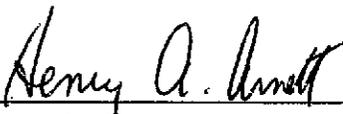
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief was served by regular U.S. mail, postage prepaid, this 15th day of July, 2008, upon the following:

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CONSTITUTIONAL PROVISIONS

§ 2.34 Welfare of employees

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

§ 18.03 Powers

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

§ 18.07 Home rule

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

STATUTORY PROVISIONS (SUBSTITUTE SENATE BILL 82)

AN ACT

To enact section 9.481 of the Revised Code to generally prohibit political subdivisions from imposing residency requirements on certain employees.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 9.481 of the Revised Code be enacted to read as follows:

Sec. 9.481. (A) As used in this section:

(1) "Political subdivision" has the same meaning as in section 2743.01 of the Revised Code.

(2) "Volunteer" means a person who is not paid for service or who is employed on less than a permanent full-time basis.

(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.

(2)(a) Division (B)(1) of this section does not apply to a volunteer.

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. For the purposes of this section, an initiative petition shall be filed and considered as provided in sections 731.28 and 731.31 of the Revised Code, except that the fiscal officer of the political subdivision shall take the actions prescribed for the auditor or clerk if the political subdivision has no auditor or clerk, and except that references to a municipal corporation shall be considered to be references to the applicable political subdivision.

(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire.

SECTION 2. In enacting section 9.481 of the Revised Code in this act, the General Assembly hereby declares its intent to recognize both of the following:

(A) The inalienable and fundamental right of an individual to choose where to live pursuant to Section 1 of Article I, Ohio Constitution.

(B) Section 34 of Article II, Ohio Constitution, specifies that laws may be passed providing for the comfort, health, safety, and general welfare of all employees, and that no other provision of the Ohio Constitution impairs or limits this power, including Section 3 of Article XVIII, Ohio Constitution.

SECTION 3. The General Assembly finds, in enacting section 9.481 of the Revised Code in this act, that it is a matter of statewide concern to generally allow the employees of Ohio's political subdivisions to choose where to live, and that it is necessary to generally prohibit political subdivisions from requiring their employees, as a condition of employment, to reside in any specific area of the state in order to provide for the comfort, health, safety, and general welfare of those public employees.