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ATTORNEY GENERAL OPINION NO. 2013-20

The Honorable Kris W. Kobach
Kansas Secretary of State
120 S.W. 10th Ave.
Topeka, KS 66612

Re: Elections–Voting Places and Materials Therefor–Voting Places

State Departments; Public Officers and Employees–Firearms–Personal and Family Protection Act

Synopsis: Except as described herein, the use of real property as a polling place does not transform the nature of that property for the purposes of the PFPA. Any concealed carry requirements that applied to that property immediately before its temporary use as a polling place continue to apply during its use as a polling place and thereafter.

The Personal and Family Protection Act (PFPA) authorizes concealed carry licensees to carry a concealed handgun into a polling place to the extent that concealed handguns are permitted to be carried into the building in which the polling place is located.

The provisions of K.S.A. 2013 Supp. 75-7c20 apply only to buildings that are owned or leased in their entirety by the state or a municipality. If the PFPA requires concealed carry to be permitted in a state or municipal building, then concealed carry licensees must be permitted to carry a concealed handgun in *all* parts of the building, including areas used as polling places, with the exception of courtrooms, ancillary courtrooms, and secure areas of correctional facilities, jails and law enforcement agencies.

The governing body or chief administrative officer, if no governing body exists, of a state or municipal building may exempt the building from the provisions of K.S.A. 2013 Supp. 75-7c20 for a set period of time. If a state

or municipal building is so exempted, concealed carry may be prohibited by posting the building in accordance with K.S.A. 2013 Supp. 75-7c10.

If the governing body or chief administrative officer of a state or municipal building does not exempt a building from the provisions of K.S.A. 2013 Supp. 75-7c20, then concealed carry licensees must be permitted to carry a concealed handgun inside the building unless adequate security measures are provided and the building is posted as prohibiting concealed carry.

Concealed carry is not required to be permitted in a polling place located inside a privately-owned building unless the county has leased the entire privately-owned building.

Concealed carry is not required to be permitted in polling places located inside public school district buildings because a public school district is not a municipality for the purposes of the PFPA.

An equal protection claim against a county based upon the varying ability of concealed carry licensees to carry a concealed handgun into a polling place would be subject to the rational basis test. Cited herein: K.S.A. 2013 Supp. 25-1122; K.S.A. 25-2703; K.S.A. 2013 Supp. 75-7c01; 75-7c10; 75-7c20; K.A.R. 16-11-7.

* * *

Dear Secretary Kobach:

As the chief state election officer for the State of Kansas, you ask for our opinion regarding the application of the Personal and Family Protection Act (PFPA)¹ to polling places used for advance voting and election-day voting.

County election officers are responsible for providing “suitable voting places in which to hold all national, state, county, township, city and school primary and general elections, question submitted elections and other public elections.”² A county election officer “may designate places other than the central county election office as satellite advance voting sites.”³

In your letter, you state that county election officers often use the following locations for polling places: buildings owned by counties, cities and townships; National Guard armories; public schools; churches; nursing homes; and other buildings owned by private persons or entities. You further state that county election officers enter into

¹ K.S.A. 2013 Supp. 75-7c01 *et seq.*

² K.S.A. 25-2703.

³ K.S.A. 2013 Supp. 25-1122(g).

agreements with the owner or manager of each polling site in order to allow polling to occur on the property. Such agreements may be oral or written, and rent monies may or may not be paid to the property owner. Depending on the agreement, polling places may be used during the 21-day advance voting period and/or on election day.

Your questions pertain to K.S.A. 2013 Supp. 75-7c20, which states in relevant part:

The carrying of a concealed handgun as authorized by the personal and family protection act shall not be prohibited in any state or municipal building unless such building has adequate security measures⁴ to ensure that no weapons are permitted to be carried into such building and the building is conspicuously posted in accordance with K.S.A. 75-7c10, and amendments thereto.⁵

...

“State or municipal building” means a building owned or leased by such public entity. It does not include a building owned by the state or a municipality which is leased by a private entity whether for profit or not-for-profit or a building held in title by the state or a municipality solely for reasons of revenue bond financing.⁶

You ask whether this new statute requires all public polling places to allow concealed carry inside the polling place. By its plain language, K.S.A. 2013 Supp. 75-7c20 applies to “any state or municipal building.” Therefore, the issue is whether an agreement between a county and a property owner to allow a building or a portion of a building to be used for polling means that the building is “leased” by the county and is therefore a “state or municipal building” within the meaning of the PFPA.

As a threshold matter, we refer you to Attorney General Opinion No. 2013-14, in which we opined that for the purposes of the PFPA, “state or municipal building” refers to the entire structure, and not simply a room or portion of the building. Therefore, if a county leases a room or portion of a building that does not otherwise meet the definition of state or municipal building, such lease does not render the polling place or the building subject to the provisions of K.S.A. 2013 Supp. 75-7c20 because the county has not leased the entire building.

⁴ “‘Adequate security measures’ means the use of electronic equipment and personnel at public entrances to detect and restrict the carrying of any weapons into the state or municipal building, including, but not limited to, metal detectors, metal detector wands or any other equipment used for similar purposes to ensure that weapons are not permitted to be carried into such building by members of the public. Adequate security measures for storing and securing lawfully carried weapons, including, but not limited to, the use of gun lockers or other similar storage options may be provided at public entrances.” K.S.A. 2013 Supp. 75-7c20(l)(1).

⁵ K.S.A. 2013 Supp. 75-7c20(a).

⁶ K.S.A. 2013 Supp. 75-7c20(l)(5)(A).

With the exception of correctional facilities, jails, law enforcement agencies, courtrooms and ancillary courtrooms,⁷ the PFPA does not allow the state or a municipality to exclude only portions of a state or municipal building from the provisions of K.S.A. 2013 Supp. 75-7c20. Thus, aside from those exceptions, if K.S.A. 2013 Supp. 75-7c20 applies to a building, it applies to the *entire* building. If the polling place is located inside a state or municipal building as defined by the PFPA, then the PFPA requires concealed carry to be allowed throughout the building, including the public polling place, to the extent that concealed carry is permitted inside the building.

Lease vs. license

You ask whether an agreement between a county and a private property owner to allow the property to be used for polling means that the county has “leased” the property for the purposes of the PFPA. The answer depends on the language of the agreement and the intention of the parties. We were not provided with a sample polling place rental agreement to review, but we offer some general considerations that may be useful in determining whether an agreement to rent property for use as a polling place is a lease.

A lease is “a contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, [usually] rent.”⁸ Used as a verb, lease means “[t]o grant the possession and use of (land, buildings, rooms, movable property, etc.) to another in return for rent or other consideration.”⁹ Because a lease requires consideration, an agreement to allow property to be used as a polling place without the payment of rent or other consideration is not a lease.

In addition, a key component of a lease is the transfer of the exclusive right to possess the property. “The right to possession is normally transferred if the arrangement contemplates that the transferee will assume a physical relationship to the leased property which gives him control over and the power to exclude others from the property.”¹⁰ Possession is defined as “[t]he fact of having or holding property in one’s power; the exercise of dominion over property. . . . The right under which one may exercise control over something to the exclusion of all others”¹¹

In your letter, you state that polling places are “used” by the county for polling. If a polling place rental agreement merely permits the county to enter onto the property and use it for a particular purpose without transferring the right to possession, the

⁷ See K.S.A. 2013 Supp. 75-7c20(g) (“Nothing in this act shall limit the ability of a corrections facility, a jail facility or a law enforcement agency to prohibit the carrying of a handgun or other firearm concealed or unconcealed by any person into any secure area of a building located on such premises. . . .”); K.S.A. 2013 Supp. 75-7c20(h) (“Nothing in this section shall limit the ability of the chief judge of each judicial district to prohibit the carrying of a concealed handgun by any person into courtrooms or ancillary courtrooms within the district provided that other means of security are employed such as armed law enforcement or armed security officers.”).

⁸ Black’s Law Dictionary (9th ed. 2009).

⁹ *Id.*

¹⁰ Restatement (Second) of Property, Land. & Ten. § 1.2 (1977).

¹¹ *Id.*

agreement is a *license*, not a lease. “A mere permission to occupy the land of another for any purpose is a license and not a lease”¹²

A real property license is simply the authority to enter the land of another and perform a specified act or series of acts without obtaining any permanent interest in the land. It is a permit or privilege to do what otherwise would be a trespass, a tort, or otherwise unlawful. . . . In determining whether a license or some interest or estate has been created by an instrument or agreement, the intention of the parties as ascertained from the instrument or agreement will govern. . . . If the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease, but if it merely confers a privilege to occupy the premises under the owner, it is a license.¹³

Thus, whether a polling place is “leased” by the county for the purposes of the PFPA depends on the language of the agreement, specifically whether the agreement gives the county exclusive possession of the entire building and whether consideration is given in exchange for the use of the building. The absence of such language means the polling place would not be considered a state or municipal building for purposes of the PFPA.

Polling places located inside buildings that are wholly owned or leased by the state or a municipality

If the state or a municipality owns or leases the entire building where the polling place is located, then the provisions of K.S.A. 2013 Supp. 75-7c20 apply to the building *and* the polling place within it. Whether concealed carry is prohibited in such polling place is dependent on whether an exemption under the PFPA applies.

K.S.A. 2013 Supp. 75-7c20(i) and (j) allow the governing body or chief administrative officer, if no governing body exists, of certain state and municipal buildings to exempt such building from the provisions of K.S.A. 2013 Supp. 75-7c20 for set periods of time. If a state or municipal building has been exempted from the provisions of K.S.A. 2013 Supp. 75-7c20, then concealed carry may be prohibited inside the building simply by posting signs at all exterior entrances to the building in accordance with K.S.A. 2013 Supp. 75-7c10.¹⁴

A state or municipal building that is *not* exempt from the provisions of K.S.A. 2013 Supp. 75-7c20 may prohibit concealed carry only in accordance with K.S.A. 2013 Supp. 75-7c20(a): by providing adequate security measures and posting the building as prohibiting concealed carry. If the building lacks either adequate security measures or required posting, then concealed carry must be permitted in the non-exempt state or municipal building.

¹² *Smyre v. Board of Com'rs of Kiowa County*, 89 Kan. 664, 668 (1913).

¹³ 53 C.J.S. Licenses § 133.

¹⁴ See also K.A.R. 16-11-7.

For example, if a room within a city-owned recreation center that is exempt from the provisions of K.S.A. 2013 Supp. 75-7c20 is used as a polling place, concealed carry may be prohibited in the recreation center, including the room used as a polling place, if the recreation center is posted in accordance with K.S.A. 2013 Supp. 75-7c10. However, if the recreation center is *not* exempt from the provisions of K.S.A. 2013 Supp. 75-7c20, concealed carry must be permitted inside the recreation center *and* the polling place unless adequate security measures are provided and the recreation center is posted as prohibiting concealed carry.

Polling places located inside public school district buildings

The legislature has expressly excluded public school districts from the definition of “municipal” under the PFPA;¹⁵ therefore, a public school or other public school district building is not a “state or municipal building” under the PFPA. This means that polling places located in public school district buildings are not required to allow concealed carry. Public school districts may prohibit concealed carry inside school district buildings by posting the building in accordance with K.S.A. 2013 Supp. 75-7c10, and that posting would apply to all areas inside the school building, including any portion used as a polling place.

Polling places located inside privately-owned buildings and other buildings not wholly owned or leased by the state or a municipality

You ask whether a privately-owned building or other building not wholly owned or leased by the state or a municipality automatically becomes subject to the provisions of K.S.A. 2013 Supp. 75-7c20 by virtue of a polling place rental agreement between the property owner and county election officers. For the reasons explained above, the answer is no unless the county has actually leased the entire building.

For example, if a church grants the county a license to conduct polling in a classroom inside the church, the church as a whole does not become a “state or municipal building” for the purposes of the PFPA because the county has not leased the entire building. In such a case, the church may prohibit concealed carry into the church by posting the building in accordance with K.S.A. 2013 Supp. 75-7c10, and that posting would apply to all areas inside the church, including any portion used as a polling place.

County government liability

You also ask whether a county government is liable for claims of denial of constitutional equal protection guarantees if some polling places permit concealed carry and other polling places do not.

¹⁵ “The terms ‘municipality’ and ‘municipal’ are interchangeable and have the same meaning as the term ‘municipality’ is defined in K.S.A. 75-6102, and amendments thereto, but does not include school districts.” K.S.A. 2013 Supp. 75-7c20(l)(2).

Traditionally, when analyzing an equal protection claim, the United States and Kansas Supreme Courts employ three levels of scrutiny: strict scrutiny, intermediate scrutiny, and the rational basis test. The level of scrutiny applied by the court depends on the nature of the legislative classification and the rights affected by that classification. The general rule is that a law will be subject to the rational basis test unless the legislative classification targets a suspect class or burdens a fundamental right.¹⁶

In this case, the effect of the PFPA is that some concealed carry licensees will be permitted to carry a concealed handgun into a polling place and others will not. This classification between groups of concealed carry licensees does not involve a suspect class such as race or national origin. In addition, as of this writing no court has held that concealed carry is a fundamental right. To the contrary, the United States Supreme Court has suggested that state prohibitions against concealed carry in public buildings are constitutionally valid.¹⁷ And recently, the United States Court of Appeals for the 10th Circuit held that concealed carry falls outside the scope of Second Amendment rights.¹⁸ Accordingly, we presume that a court would apply the rational basis test to an equal protection challenge on this issue.

To survive the rational basis test, a statute challenged on equal protection grounds must bear “some rational relationship to a valid legislative purpose.”¹⁹ “The rational basis standard is a very lenient standard. All the court must do to uphold a legislative classification under the rational basis standard is perceive any state of facts which rationally justifies the classification.”²⁰

There are rational justifications for the classification between groups of concealed carry licensees, such as allowing private property owners to determine whether concealed handguns should be permitted on their own property, and allowing local governments to make case-by-case decisions regarding the advisability of allowing concealed carry inside each municipal building. In our opinion, K.S.A. 2013 Supp. 75-7c20 would likely survive an equal protection challenge.

¹⁶ *State v. Limon*, 280 Kan. 275, 283-84 (2005) (internal citations omitted).

¹⁷ “Like most rights, the right secured by the Second Amendment is not unlimited. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (internal citations omitted).

¹⁸ “The Second Amendment does not confer a right to carry concealed weapons.” *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013).

¹⁹ *Miami County Bd. of Com’rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 316 (2011).

²⁰ *Peden v. Kansas Dept. of Revenue*, 261 Kan. 239, 258 (1996).

Summary

In sum, except as described below, the use of real property as a polling place does not transform the nature of that property for the purposes of the PFPA. Any concealed carry requirements that applied to that property immediately before its temporary use as a polling place continue to apply during its use as a polling place and thereafter. While the likely effect of K.S.A. 2013 Supp. 75-7c20 is that some polling places will allow concealed carry while others prohibit it, that variation is not likely to give rise to an equal protection violation.

The one exception to the general rule stated above would be a circumstance in which the county enters into a lease – not a licensing agreement – for an *entire* privately-owned building to be used as a polling place. The effect of that circumstance would be to temporarily transform the private property into a “state or municipal building” for the purposes of the PFPA during the term of the lease; however, we do not imagine this circumstance occurring often if at all.

Sincerely,

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