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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

January 27, 2005

The Honorable Danny Verdin
Senator, District No. 9
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Verdin:

You note that "[t]here is an entity called the IRC (Investigative Review Committee) operating in conjunction with the BOE (Board of Veterinary Medical Examiners) within the Department of Labor, Licensing and Regulation." By way of background, you state the following:

> I am writing to ask the opinion of your office regarding the legality of this entity. I can find no statutory reference or promulgated regulation authorizing or sanctioning this body. The BOE is the duly authorized and appointed body that licenses and disciplines the practice of Veterinary medicine in South Carolina.
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> Apparently, LLR has assumed under it's own authority to create the IRC to act as a "grand jury" to assess the merits of consumer complaints against licensed Veterinarians. The IRC is composed of former BOE members chosen by the staff at LLR. The IRC makes recommendation to BOE whether to move forward with hearings.
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> My immediate concern is not the advisability or merit of this body, but its legitimacy. It concerns me that any facet of the regulation of a private profession by the regulatory arm of state government would be at the direction of unelected bureaucrats acting extra-legally outside the proscribed bounds of statute and regulation.

Law / Analysis

Prior to addressing the merits of your particular request, it is important to emphasize several fundamental principles involving the power and authority of administrative agencies generally. First, it is black letter law that the authority of a state agency or governmental entity created by statute "is limited to that granted by the legislature." Nucor Steel v. S.C. Public Service Commission, 310 S.C. 539, 426 S.E.2d 319 (1992). An administrative agency "has only such powers as have been conferred by law and must act within the authority granted for that purpose." Bazzle v. Huff, 319

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S.C. 443, 462 S.E.2d 273 (1975). In this regard, we have consistently concluded that "... administrative agencies, as creatures of statutes, possess only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged." Op. S.C. Atty. Gen., February 11, 1993, citing Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council., 306 S.C. 488, 413 S.E.2d 13 (1991). Thus, as we have repeatedly emphasized, "[g]overnmental agencies or corporations ... can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly inherently, or impliedly." Op. S.C. Atty. Gen., September 9, 2002; Op. S.C. Atty. Gen., January 8, 1999; Op. S.C. Atty. Gen., September 22, 1988. See also, Medical Society of S.C. v. MUSC, 334 S.C. 270, 513 S.E.2d 352, 355 (1999).

In addition, in Op. S.C. Atty. Gen., September 6, 1996, we referenced the following principles regarding further delegation of particular duties which have been delegated by the Legislature to an administrative agency:

> [i]t is well-recognized that "[i]n general, administrative officers and bodies cannot alienate, surrender or abridge their powers and duties, and they cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or other officers or tribunals." Accordingly,
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> > ... in the absence of [a] permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character or which require the exercise of judgment.
> > 73 C.J.S., Public Administrative Law and Procedure, § 56.
>
> On the other hand,
>
> > [i]t has been observed that in the operation of any public administration body subdelegation of authority, impliedly or expressly, exists and must exist to some degree. Accordingly, it is recognized that express statutory authority is not necessarily required for the delegation of authority by an administrative agency, and the omission by the legislature of any specific grant of, or grounds for, the power to delegate is not to be construed as a denial of that power. So, if there is a reasonable basis to imply the power to delegate the authority of an administrative agency, such an implication may be made, and the power to delegate may be implied. Id. ....

> Legal authorities almost unanimously caution that whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may "deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, or discretionary or quasi-judicial in nature." Id. at 74. In other words, governmental agencies may delegate to assistants as long as the agency does not abdicate its power and responsibility" and reserves for itself the right to make the final decision. Id. at § [75].

In this same vein, it is clear that the actions of an administrative agency – either through regulation or policy – may not amend, modify or add to a statute. As our Supreme Court cautioned in McNickles, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998), "[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute .... A rule may only implement the law ...." See also, Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984); Hunter and Walden Co. v. South Carolina State Licensing Bd. for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978).

Closely related thereto is the fundamental principle that an administrative agency may not exercise legislative power. As we recently stated in Op. S.C. Atty. Gen., November 10, 2004, "... the power to make laws is a legislative power and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the effect of legislation, or otherwise. Similarly, the power to alter or repeal laws resides only in the General Assembly and executive officers may not by means of construction, rules and regulations, orders or otherwise, extend, alter, repeal, set at naught or disregard laws enacted by the Legislature."

Moreover, as we recognized in Op. S.C. Atty. Gen., Op. No. 85-81 (August 8, 1985), "[t]he State's power to contract is subject to the further limitation that a State cannot by contract divest itself of the essential attributes of its sovereignty and its governmental powers." (quoting 81 C.J.S., States, § 155.) In that same opinion, we noted that "[r]ecent cases decided by our Supreme Court indicate the Court's particular concern with regard to any unlawful delegation of authority to a private corporation. See, Gold v. South Carolina Bd. of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978); Toussaint v. S.C. Bd. of Med. Examiners, 329 S.E.2d 433 (1985); Eastern Fed. Corp. v. Wasson, 281 S.C. 450, 316 S.E.2d 373 (1984)."

Applying the foregoing principles, our courts have generally not been supportive of a subdelegation of discretionary functions to individual members of a public body or to agents or employees of that body. In Pettiford v. S.C. State Bd. of Ed., 218 S.C. 322, 62 S.E.2d 780 (1950), our Supreme Court held that an administrative board or body, when acting in a quasi-judicial capacity, must itself consider all the evidence before rendering a decision. In the Supreme Court's opinion, while the Board of Education could delegate to Board members the authority to take testimony and hear witnesses, the Board could not subdelegate its decision-making authority.

Additionally, in Dawson v. State Law Enforcement Division, 304 S.C. 59, 403 S.E.2d 124 (1991), the Supreme Court articulated the following reasoning:

> [w]e further conclude the Grievance Committee, as the final administrative authority, may not delegate its role as final decision-maker to the Personnel Director. See Bradley v. State Human Affairs Comm'n., 293 S.C. 376, 360 S.E.2d 537 (Ct. App. 1987). Once an appeal is forwarded to the Grievance Committee, the Committee has exclusive jurisdiction to decide all issues.

403 S.E.2d at 125.

In Bradley, the Court of Appeals held that the State Employee Grievance Committee chairperson could not delegate quasi-judicial powers of the Committee to the Committee's attorney, notwithstanding that a specific statute provided that the attorney could assist the Committee in preparation of its findings of fact, statements of policy and conclusions of law. The Court of Appeals concluded:

> [a] reading of the statute makes it clear that the job of a committee attorney is only advisory to the committee. (Not all committee members are lawyers and as such are not familiar with procedural and evidentiary matters.) However, the role of decision maker cannot be delegated. Kerr-McGee Nuclear Corporation v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (1981) (administrative bodies cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgment). Cf. South Carolina Department of Social Services v. Bacot, 280 S.C. 485, 489, 313 S.E.2d 45, 48 (Ct. App. 1984) (family court's duty to decide issue of paternity cannot be delegated to expert or anyone else). Here, the committee chairman took it upon himself to delegate decision making to the attorney. This was error. 360 S.E.2d at 539. ...

And, in G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980), our Supreme Court recited the rule that "[a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise." 266 S.E.2d at 85. See also, City of Beaufort v. Bft.-Jasper County Water and Sewer Authority, 325 S.C. 174, 480 S.E.2d 728 (1997) [contested clause in contract represents an unlawful delegation of governmental power by water authority]; see also, Op. S.C. Atty. Gen., Op. No. 85-81, supra [administrative body cannot delegate quasi-judicial, discretionary functions].

The previous opinions of this Office are also in accord with the above-referenced South Carolina court decisions. In Op. Atty. Gen., 89-45 (April 13, 1989), the question addressed was whether the administrative functions of a town's water and sewer department could be lawfully

delegated to a single commissioner of public works. In concluding that such subdelegation was not authorized, we stated:

> [t]he general law, applicable in this situation, is that authority vested in a board or commission for public purposes may be exercised by a majority of the members if all have had notice and opportunity to act and a quorum, or the number fixed by statute, are present. The presence and vote of a quorum is necessary, and the action of less than a quorum of a public body is void. 1 Am.Jur.2d Administrative Law Sec. 196. Unless otherwise provided by statute, the authority of a commission may not be exercised by a single member of such body, or less than a majority. 73 C.J.S. Public Administrative Law and Procedure Sec. 20. Therefore, the response to your question is that the elected commissioner has no individual authority to single-handedly make decisions concerning direction and control of the water and sewer department. Instead, all such decisions must be made by a majority vote of a quorum of the commissioners of public works, except where the Town ordinance provides otherwise. See also, Pettiford v. S.C. State Board of Education, supra, as to what constitutes an unlawful delegation of power. (emphasis added).

And, in an Opinion, dated April 6, 1989, we addressed the issue of the authority of Workers' Compensation Commissioners to delegate the approval of settlement agreements. Therein, we referenced previous opinions, dated August 2, 1985 and December 1, 1986. In the April 6, 1989 Opinion, we stated:

> [w]e believe that the August 2, 1985, Opinion made clear that the approval of workers' compensation settlements is a quasi-judicial function involving an exercise of discretion by an official who maintains quasi-judicial power under the Compensation Act and is non-delegable in the absence of express statutory authority. In the event that any doubt remains, I reference a recent State court decision [which recognized that] ... administrative bodies cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgement .... Bradley v. State Human Affairs Comm., 296 S.C. 376, 360 S.E.2d 537, 539 (S.C. App. 1987).

Furthermore, in an Opinion dated August 25, 1983, we said that "[i]t would appear, then, that the Director of SLED has the authority to delegate the responsibilities for conducting hearing to a separate hearing officer so long as the final decision on the matter is made by him."

An opinion dated August 10, 1971 (Op. No. 3163), applied the foregoing legal principles and reached a similar conclusion. There, we found that the Housing Authority of the City of Charleston could not delegate to an independent hearing officer or panel the power to make decisions concerning landlord-tenant relations which bind the Authority and not bind a tenant, and thereby deny the Authority remedies available under the South Carolina Landlord-Tenant law. We

referenced in that opinion the "general rule applied to statutes granting powers to administrative boards, agencies or tribunals [which] is that only those powers are granted which are expressly or by necessary implication conferred ... ." Further, we commented that the effect [of such rule] usually has been to accomplish a rather strict interpretation against the exercise of the power claimed by the administrative body ..." and to treat such a subdelegation "with disfavor." Thus, we concluded:

> [t]he Enabling Act for the various Housing Authorities is found in Title 36 of the South Carolina Code of Laws. I am unable to find any provision of the Enabling Act that would authorize the conduct of which you have inquired.. Section 36-133 does authorize redelegation within the Authority of the power to hold a hearing. It does not authorize redelegation of the power to decide. That the legislature has expressly authorized the Authority to subdelegate the power to hold a hearing strongly suggests that the legislature did not intend to authorize the Authority to subdelegate its power to decide in accord with the maxim of statutory construction Expressio Unius Exclusio [Alterius] Est. 3 Sutherland, Statutory Construction § 6603 p. 281; n. 26; Ex Parte York County Natural Gas Authority, 238 F.S. 964; Home Building and Loan Assn. v. Spartanburg, 194 S.E. 139, 185 S.C. 313 (1938).
>
> The matters contemplated by the HUD Circular involve more than the problem of subdelegation of decision making within an administrative agency. Contemplated is the transfer of the decision making function to persons outside the agency. For the stronger reason, it is the opinion of this office that the Housing Authorities of this state are not authorized to comply and your question should be answered no.

Thus, we advised that subdelegation of functions outside the agency, particularly to private individuals, is even more problematical than delegation within the agency itself.

We turn now to your specific question. The statutes regulating the practice of veterinary medicine are codified at S.C. Code Ann. Section 40-69-10 et seq. Section 40-69-10 declares that "the practice of veterinary medicine involves the public health, safety and welfare." Section 40-69-30 establishes the State Board of Veterinary Medical Examiners to enforce the Veterinary Medicine Act and for regulating the practice if veterinary medicine. Board members are appointed by the Governor; the at-large member and consumer advocate are selected outright; the other six are appointed by the Governor after a nomination process specified in the statute. The Board's powers and duties are found at § 40-69-70 and are as follows:

> (1) [t]o adopt and promulgate regulations, pursuant to the State Administrative Procedures Act, governing the practice of veterinary medicine as are necessary to enable it to carry out and make effective the purpose and intent of this article. These regulations may include minimum standards for all facilities where veterinary

medicine is practiced and minimum standards for continuing education for relicensure;

(2) To adopt rules of professional conduct prior to July 1, 1993, appropriate to establish and maintain a high standard of integrity, skills, and practice in the profession of veterinary medicine. In prescribing such rules of professional conduct, the board may be guided by the principles of veterinary medical ethics adopted by the American Veterinary Medical Association and the South Carolina Association of Veterinarians;

(3) To print its regulations and distribute them to all persons licensed to practice veterinary medicine in this State;

(4) To bring proceedings in courts for the enforcement of this article or any regulations made pursuant thereto;

(5) To establish qualifications for persons wishing to be licensed to practice veterinary medicine;

(6) To pass upon the qualifications of applicants for a license to practice veterinary medicine in this State;

(7) To approve schools and colleges of veterinary medicine which maintain sufficient standards of training and reputability;

(8) To prescribe the subjects, character, manner, time, and place of holding examinations and the filing of applications for examinations and to conduct the examinations;

(9) To issue temporary permits or licenses to duly qualified applicants;

(10) To provide for, regulate, and require all persons licensed in accordance with the provisions of this article to renew their license annually;

(11) To conduct investigations and hearings upon complaints calling for discipline of a licensee or applicant for license;

(12) To take testimony on any matter under its jurisdiction and to administer oaths;

(13) To issue summons and subpoenas, including subpoenas duces tecum, for any witness, in connection with any matter within the jurisdiction of the board, which must be signed by either the chairman or the secretary-treasurer of the board;

(14) (Reserved);

(15) To inspect licenses;

(16) To conduct investigations of all alleged violations;

(17) To prosecute according to law or instigate the prosecution of all violators of this chapter;

(18) To adopt regulations for the sale and dispensing of prescriptions and controlled veterinary drugs, pharmaceuticals, and biologics in accordance with federal and state laws.

Section 40-69-140 further establishes the various grounds for which the Board "may deny, suspend, revoke, or restrict the license of a veterinarian or reprimand or discipline a licensee ...." Section 40-69-150 requires that "[s]pecific procedures relating to the filing and hearing of these charges shall conform to the State Administrative Procedures Act and must be detailed in the regulations promulgated by the Board."

As you indicate, an examination of the foregoing statutes suggest no authorization to create a body such as the IRC or any entity – particularly one including non-Board personnel – which is designed to make recommendations to the Board regarding the disposition of complaints made against veterinarians. Indeed, at least since 1997, the Board has had a Regulation which states that "[a] preliminary investigation may be made by an examiner and the results of that investigation presented to the Board. If the Board determines that the facts are not sufficient to support an alleged violation, the complainant will be notified, and the complaint dismissed." See, S.C. Code of Regulations R. 120-11. (emphasis added).

We must also examine the statutes governing the Department of Labor, Licensing and Regulation (LLR) in an effort to determine whether the creation of the IRC is authorized thereby. The powers and duties of LLR, relative to the administration of professional licensing boards, is set forth at § 40-1-10 et seq. Section 40-1-40(D) provides that LLR is "a member of the Governor's executive cabinet ...." Pursuant to § 40-1-50(A), "[t]he department is responsible for all administrative, fiscal, investigative, inspectional, clerical, secretarial, and license renewal operations and activities of the boards and commissions enunciated in Section 40-1-40. Of course, the Board of Veterinary Medical Examiners is included therein.

Section 40-1-50 also empowers the Director of LLR to "employ and supervise personnel necessary to effectuate the provisions of this article for each board provided for in Section 40-1-40. In addition, the Director is authorized to "enter into contracts and agreements the director considers necessary or incidental to carry out the provisions of this article ...." Section 40-1-50(F) further provides in pertinent part as follows:

> [a] board may elect to delegate to the department the authority to deny any authorization to practice to an applicant who has committed an act that would be grounds for disciplinary action under this article or the licensing act of the board, who has failed to comply with a final order of a board, or who has failed to demonstrate the basic qualifications or standards for practice authorization contained in the board's licensing act. ...

Pursuant to § 40-1-70, the power of a regulatory board to discipline "persons licensed under this article in a manner provided for in this article" is affirmed.

The conduct of investigations by LLR with respect to alleged violations of professional licensing laws is governed by § 40-1-80 and specifies as follows:

> (A) [i]f the director has reason to believe that a person has violated a provision of this article or a regulation promulgated under this article or the licensing act or regulation of a board or that a licensee has become unfit to practice the profession or occupation or if a person files a written complaint with the board or the director charging a person with the violation of a provision of this article or a regulation promulgated under this article, the director may initiate an investigation.
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> (B) In conducting the investigation, the director may subpoena witnesses, compel their attendance, take evidence, and require the production of any matter which is relevant to the investigation including, but not limited to, the existence, description, nature, custody, condition, and location of books, documents, or other tangible items and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence. Upon failure to obey a subpoena or to answer questions propounded by the director, the director may apply to an administrative law judge for an order requiring the person to comply.

Again, no express authority to create the IRC or any similar body appears to be contained in the foregoing statutory authorization relative to LLR's powers to administer licensing boards.

The specific procedure for IRC review of complaints filed against veterinarians may be found at LLR's website. See, http://www.llr.state.sc.us/POL/Veterinary/index.asp?file=complaint.htm. Subpart C of the Complaint Procedure provides as follows:

C. Official Complaint

(1) When a Complaint is received in the office, a letter is sent to the complainant and respondent by the administrator. This letter informs the complainant and respondent that the complaint is assigned to an investigator who will be communicating with the complainant and respondent in the near future regarding an investigation of the complaint.

(2) All complaints are investigated fairly and thoroughly by the investigator.

(3) At the completion of the investigation, the complaint is brought before the Investigative Review Committee (IRC) made up of the Board Administrator, Investigator, Board Attorney, three Consulting Veterinarians, and a consumer where evidence is reviewed in relation to the specific statutes which may have been violated. More serious complaints affecting public health and safety are given priority.

(4) The IRC makes a recommendation, which may range from dismissal of the complaint to a formal hearing.

5) The Investigator presents the complaint and the IRC's recommendation to the full Board in the form of a blind brief.

(6) The Board may choose to accept the presented recommendations, make its own recommendations or request further investigation. At each step in the process the identity of the licensee remains confidential, and only when a public disciplinary action takes place does the name of the licensee become public record. If the Board determines that the complaint should be dismissed, both the complainant and the licensee against whom the complaint was made are notified of the dismissal.

In State ex rel. Board of Governors of Registered Dentists v. Rifleman, 203 Okla. 294, 220 P.2d 441 (1950), the Oklahoma Supreme Court addressed the validity of a somewhat analogous procedure as is present here. There, the Board of Governors of Registered Dentists, the body which disciplined dentists in Oklahoma who were not members of the Registered Dentist Organization, appointed a Committee to make findings regarding charges filed against dentists and to recommend to the Board the appropriate action to take concerning the complaint. Defendant was not a member of such Organization. Defendant's attorney made at a special appearance at the Committee's meeting to contest that such committee "was not a duly and legally constituted Committee and as such, was without legal and statutory authority to conduct said hearing." 220 P.2d at 442. Defendant's objection to the Committee's authority was overruled, however, and, based upon the Committee's recommendations, the Board of Governors suspended the Defendant's license to practice dentistry.

On appeal, the Oklahoma Supreme Court held that the Board of Governors possessed no statutory authority to create the Committee, and that any action or recommendation of such committee constituted a "nullity." The Court opined as follows:

> [i]t is apparent from our examination of the Act that the Board of Governors acts in a dual capacity. It is the executive head of the Organization charged with the enforcement of the provisions of the Act and it also acts as a Board of Dental Examiners. Its duties and powers in each of these two capacities are specifically defined and the nature of th powers conferred and of the duties imposed show clearly a well-defined separation of those powers and duties. When the Board sits as a Board of Dental Examiners under Sections 273, 274, 275, and 276 its powers and duties are expressly defined and limited. When sitting as the Board of Governors of the Registered Dentists of Oklahoma it acts in an executive capacity under broad powers and may exercise quasi-judicial discretion. In none of the four Sections defining its powers and duties when sitting as a Board of Dental Examiners is there any express or implied authority for it to appoint committees, referees, or any of its members to act in disciplinary matters as it is authorized to do when sitting as the Board of Governors. When a complaint is filed against a member of the Organization it is filed with the Board in its executive capacity as the Board of Governors and it is in this capacity only that the Board is authorized to initiate proceedings against an accused member.

220 P.2d at 443. In contrast to the Board's specific statutory authority to appoint a Committee to make recommendations to it regarding disposition of complaints made in its capacity of Board of Governor's of the Registered Dentists of Oklahoma, the Court noted that no such Board authority existed in its capacity as Board of Dental Examiners. Thus, the case clearly stands for the proposition that such express statutory authority is necessary even with respect to the much broader authority of a Board exercising quasi-judicial discretion. Accordingly, the Court concluded that

> [w]e are of the opinion and hold that the hearing held before this purported investigating committee over the objection and protest of the accused is a nullity and that its findings and recommendations form no basis for the disciplinary action thereafter taken by the Board of Governors.

Id. at 444.

Other decisions have reached similar conclusions in related contexts. See, Daniels v. The Industrial Commission, 201 Ill.2d 160, 775 N.E.2d 936 (2002) [where Industrial Commission Chairman lacked statutory authority to appoint two acting Commissioners to serving on panel reviewing arbitrator's award of workers' compensation benefits, the panel's decision was thereby rendered void for lack of jurisdiction]; Vuagniaux v. Dept. of Professional Regulation, 208 Ill.2d 173, 802 N.E.2d 1156 (2004) [Medical Disciplinary Board, an administrative body possessing no

general or common law power, did not have implicit authority to make temporary appointments for a particular case where permanent Board member had recused himself; Medical Practice Act, which contained no express statutory authority to appoint temporary replacement members did not fairly imply such authority as an incident to achieving objectives for which Board was created].

An opinion of the Tennessee Attorney General is also instructive. In Op. Tenn. Atty. Gen., Op. No. 01-055 (April 10, 2001), the Attorney General of Tennessee concluded that the Division of Health Related Boards of the Tennessee Department of Health lacks the authority, absent specific legislation, to use screening panels for the various boards to assist with the processing and disposition of disciplinary cases. The Attorney General found that "[c]urrently, only the Board of Chiropractic Examiners, Board of Medical Examiners and Board of Nursing are authorized by statute to use screening panels in their investigative and disciplinary processes." Thus, the Attorney General reasoned as follows:

> 1. The statutes establishing the powers and duties of the Division of Health Related Boards of the Tennessee Department of Health are found at Chapter 1 of Title 63 of the Tennessee Code Annotated. These statutes convey upon the Division, by and through its director, concurrent authority with the various health related boards to enforce compliance with the laws regulating the practice of the healing arts within the State. See Tenn. Code Ann. §§ 63-1-120, 63-1-122, 63-1-132. They vest the director, inter alia, with the power, duty and responsibility to employ staff assigned to or performing duties for the agencies attached to the Division, ... and to assign personnel to staff the health related boards in order to assure the most efficient use of personnel. Tenn. Code Ann. § 63-1-132. However, the statutes include no provision for use of screening panels in the processing and disposition of disciplinary cases.
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> Administrative agencies derive their authority from the General Assembly; thus, their power must be based expressly upon a statutory grant of authority or must arise therefrom by necessary implication. Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 282 (Tenn. App. 1988) (citations omitted). We conclude that, absent specific statutory authority, which does not currently exist, the Division of Health Related Boards lacks the authority to use screening panels for the various boards to assist with the processing and disposition of disciplinary cases.

Likewise, the Attorney General of Texas, in Opinion No 98-009 (February 18, 1998), concluded that, absent express statutory authority therefor, the Commission of Licensing and Regulation could not create an advisory committee to aid in its regulation of the staff services industry. There, the Texas Attorney General opined:

> [t]here must therefore be some basis in state law for the creation of such a body. We know of no such basis here. An administrative agency, such as the

> commission, "has only such powers as are expressly conferred on it by statute together with those necessarily implied from powers and duties expressly given or imposed." 2 Tex. Jur. 3d, Administrative Law, § 11 (1979). The power to create advisory committees is not expressly given to the commission by statute, nor is it necessarily implicit in the commission's general rule-making authority .... Were it so implicit, there would have been no need for the legislature to have set up by statute the seven advisory boards and one council which now advise the commission. "The legislature is never presumed to do a useless act." State v. Broaddus, 952 S.W.2d 598, 601 (Tex. App.- -Houston [14th Dist.] 1997, pet. filed). Here, eight legislative acts would be presumptively unnecessary.
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> The commission therefore is without authority to create the body contemplated here. Such a creation is the province of the legislature.

Our research reveals that, typically, the power of a professional licensing board to subdelegate authority to a committee to make recommendations regarding disposition of disciplinary matters has been by express statutory enactment. The Tennessee Attorney General's opinion, referenced above, indicates that in Tennessee statutes had been enacted as to certain licensing boards bestowing such authority. Such has been the case elsewhere as well. See e.g., Op. Tex. Atty. Gen., Op. No. 96-116 (October 30, 1996); Op. Or. Atty. Gen., Op. No. 7600 (April 5, 1978). And, as noted above, the Rifleman case, decided by the Oklahoma Supreme Court, emphasized the fact that the Board of Governors possessed express statutory authority to appoint a committee to review complaints in its capacity as executive head of the Registered Dentists Organization. See also, Op. S.C. Atty. Gen., February 19, 1974 [legislative delegation possesses no authority to appoint an investigating committee; such authority must be expressly bestowed by General Assembly].

It perhaps could be argued that § 40-69-210 provides the necessary enabling authority for the establishment of the IRC. Such provision states in pertinent part that

> [n]o member of the board or its committees, special examiners, agents, and employees may be held liable for acts performed in the course of official duties, except where actual malice is shown. For the purpose of any investigation or proceeding under the provisions of this article, the board or any person designated by it may administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any documents or records which the board deems relevant to the inquiry. (emphasis added).

We read this provision, however, as relating not to the appointment of private citizens, but employees or agents of the Board. A number of other licensing laws possess similar provisions and, in our view, this statute provides no general authority to create a body such as the IRC, which includes private citizens.

Likewise, we are not convinced that a provision in the Restructuring Act, § 1-30-10(D), is sufficiently specific to authorize creation of a body such as the IRC. Section 1-30-10(D) provides in pertinent part that the governing authority of an agency (such as LLR) "has the power to create and appoint standing or ad hoc advisory committees in its discretion or at the direction of the Governor to assist the department in particular areas of public concern or professional expertise as is deemed appropriate." Of course, the IRC has been created primarily to assist the Board of Veterinary Examiners as opposed to LLR itself. Moreover, § 1-30-10(D) encompasses all cabinet agencies, not just LLR. Thus, it is unlikely that the Legislature intended § 1-30-10(D) to apply to the situation present here. And, even if the Legislature did intend this provision to constitute a delegation of authority to create a quasi-judicial committee such as the IRC, such delegation without sufficiently specific standards is constitutionally inadequate. See, Op. S.C. Atty. Gen., May 26, 1989 [legislature may not vest unbridled, uncontrolled or arbitrary power in an administrative agency."; Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962); S.C. Hwy. Dept. v. Harbin, 266 S.C. 585, 86 S.E.2d 466 (1955); Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972) [legislature may not delegate power to make laws to administrative agency]. Thus, we doubt whether § 1-30-10(D) provides the requisite authority necessary to establish the IRC's creation.

In marked contrast, we note that other statutes relating to other advisory committees are expressly provided for by statute. For example, § 40-5-40 provides that the "Supreme Court may appoint boards or committees to examine all applicants for admission to the bar, and boards or committees to act as administrative agencies of the court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the court and to hear all causes involving discipline, disbarment, suspension and reinstatement of attorneys and to make recommendations thereon to the Supreme Court ...." This provision represents the kind of express statutory authority necessary to create a committee such as the IRC. See also, § 40-13-10 [Advisory Committee to the State Board of Cosmetology created to meet with the Board "quarterly to discuss problems, make recommendations and hear reports of board policy affecting the industry."]; § 40-47-540 [Respiratory Care Committee to State Medical Board created]; § 40-47-560 [Committee "may recommend regulations regarding respiratory care necessary to perform its duties which must be reviewed and approved by the board prior to adoption."]; § 40-47-590 [Committee "shall evaluate the qualifications and supervise the examinations of applicants for licensure and shall make appropriate recommendations to the board."; § 40-47-630(A) ["the committee may recommend to the board that it revoke, suspend, issue a public or private reprimand, or impose any other reasonable limitation where the unprofessional, unethical, or illegal conduct of the respiratory care practitioner is likely to endanger the health, welfare, or safety to the public."][1]

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[1] Also, there is the question of whether the IRC's recommendations are covered by the confidentiality provisions of § 40-69-60, which states that "[i]nformation received by the Board through inspections and investigations must be confidential and must not be disclosed except in a proceeding involving the issuance, denial, renewal, suspension, or revocation of a license." See also,

(continued...)

Conclusion

We have located no statutory provision which expressly grants authority fort the creation of the Investigative Review Committee of the Board of Veterinary Examiners, nor are we aware of any statute from which such authority may be reasonably implied. It is thus our opinion that a court would most likely conclude that there is no current statutory authority for the creation of the IRC. Of course, our opinion is, by definition, advisory and only a court could definitively conclude that the IRC is lacking in statutory authority. However, absent such express statute authorizing the creation of the IRC, and legislation specifying the composition, powers and duties of such a body, a court is unlikely to uphold the validity of the Committee as presently constituted. Furthermore,

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[1](...continued)
S.C. Code of Regulations, R.120-11.4 ["Unless and until otherwise ordered by this board, all proceedings and documents relating to complaints and hearings thereon and to proceedings in connection therewith will be confidential, unless the respondent shall in writing request that they be public."] There is little doubt that the IRC would be considered a "public body" for purposes of the Freedom of Information Act. See, § 30-4-20(a); Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) [review committee created by city manager to make recommendations regarding evaluation of proposals submitted to City for towing contract was "public body" subject to FOIA]. Thus, the Committee would be required to comply with the FOIA. While § 40-69-60 makes information received by the Board "through inspections and investigations" confidential, it is at least questionable whether this provision encompasses the actual recommendations to the Board of disciplinary actions by the IRC. Certainly, the fact that these recommendations are submitted to the Board by the investigator is not decisive. Further, in view of the fact that the General Assembly did not create or authorize the IRC, it would be reasonable to assume that § 40-69-60 does not apply to its recommendations to the Board. Moreover, while the IRC's recommendations certainly do not constitute the "final action" of the Board itself, the IRC as a "public body" would be required by the FOIA to formally adopt its actions in open sessions. Courts typically view the creation of advisory committees as inviting their becoming a de facto substitute for the parent body; thus, these committees usually must follow the FOIA to the same extent as the parent board. See, Ark. Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W.2d 350, 354 (1975) [court notes that committee recommendations "'are often accepted by public bodies at face value and with little discussion.'"] Inasmuch as the FOIA requires any exceptions to be narrowly construed, we believe a court may well deem § 40-69-60 to be inapplicable to the IRC's recommendations to the Board. See, Burton v. York County Sheriff Dept. 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) [information concerning activities of deputy sheriffs while on duty not per se exempt under FOIA].

we have identified no duly promulgated regulation of the Board which incorporates the IRC into the complaint process.

It is true that the IRC's role is advisory; the Committee serves to make recommendations to the Board of Examiners as to the disposition of complaints concerning violations of the law regulating veterinarians. Moreover, it is also the case that such bodies are increasingly becoming more common as a means of further separating the adjudicatory and investigative functions of a licensing board in order to meet the requirements of due process. See, Garris, supra; Baldwin v. S.C. Dept. of Highways and Public Transp., 297 S.C. 232, 376 S.E.2d 259 (1989). Nevertheless, it is well recognized that the authority for such an advisory committee must be found in existing statutes. Our research reveals that committees of this type are usually expressly authorized by statutory law because the creation of such bodies which exercise discretionary duties is a function of the Legislature rather than an administrative agency. Case law and opinions of other Attorneys General conclude that, absent specific statutory authority for the creation of these committees, no power exists therefor. In our view, this is a sound rule and one which is faithful to the fundamental principle that only the General Assembly may enact the law.

Here, the Committee obviously exercises discretionary functions, albeit in an advisory capacity. Of particular concern is the fact that the IRC is made up, in part, of "three consulting veterinarians," members who are neither Board members or employees of the Board. Such private membership renders the IRC's status even more problematical. See, Neb. Op. Atty. Gen., Op. No. 02024 (August 20, 2002) [authority to create "enforcement committee" consisting primarily of non-Board personnel is particularly questionable where such committee would exercise discretionary functions]. The authority for the creation of such a body must thus, in our judgment, come from the General Assembly. Accordingly, finding no express authority for the creation of the IRC, we doubt whether a court would conclude that such authority exists or may be implied from existing law.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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