



HENRY McMASTER
ATTORNEY GENERAL

September 16, 2010

Hubert F. Harrell, Director
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212-3540

Dear Mr. Harrell:

In a letter to this office you indicated that the State Law Enforcement Training Council is reviewing the Administrative Procedures Act (hereinafter "the APA") in considering the establishment of an agency level due process hearing (contested case hearing) procedure with regard to law enforcement officer certification decisions. Such would arise, for instance, where there has been some type of misconduct by a certified officer that would be reviewed for possible license revocation, suspension, etc. You indicated that guidance is requested "as to whether having such a due process hearing at the agency level would comply with the requirement of the APA if the hearing panel was made up with representatives for the Training Council members or other individuals who are not Training Council members or representatives of Training Council members." You indicated that for purposes of the question, it is to be assumed that the full Training Council would review a recommendation from the panel members following the hearing and would decide whether to adopt the panel recommendations, reject the panel recommendations, amend the panel recommendation, or send the case back to the hearing panel for additional evidence. In a telephone call to Ms. Brandy Duncan, she indicated that your agency would promulgate a regulation authorizing such a procedure prior to its implementation.

Pursuant to S.C. Code Ann. § 23-23-80, the State Law Enforcement Training Council

...is authorized to...(6) certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the council;....

The manner for withdrawal of certification of a law enforcement officer is set forth in Department of Public Safety Regulation 38-106.

Enclosed please find a copy of a prior opinion of this office dated January 27, 2005 which is responsive to your inquiry. That opinion dealt with the question of the legality of an entity called the IRC (Investigative Review Committee) operating in conjunction with the BOE (Board of

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Veterinary Medical Examiners) within the Department of Labor, Licensing and Regulation. Reference was made to the fact that

The BOE is the duly authorized and appointed body that licenses and disciplines the practice of veterinary medicine in South Carolina. Apparently, LLR has assumed its 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 recommendations to BOE whether to move forward with hearings.

As referenced in that opinion, “[g]overnmental agencies...can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly inherently or impliedly.” Moreover, as set forth, “...an administrative agency - either through regulation or policy - may not amend, modify or add to a statute.” The opinion further states that

[o]ur 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.

Reference was made to the fact that in specified instances cited in the opinion, authority relating to other advisory committees is expressly provided for by statute. The opinion concludes as follows:

We have located no statutory provision which expressly grants authority for 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, 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

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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.

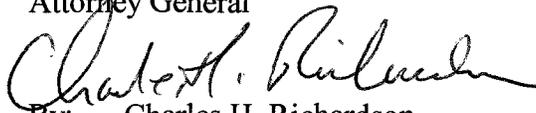
Here, the Committee obviously exercises discretionary functions, albeit in an advisory capacity. Of particular concern is the fact that the IRC is made up, in part, of "three consulting veterinarians," members who are neither Board members or employees of the Board. Such private membership renders the 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.

Consistent with such opinion, in the opinion of this office, the State Law Enforcement Training Council would not be permitted to authorize the establishment of an agency level due process hearing (contested case hearing) procedure separate from the Training Council with regard to law enforcement officer certification decisions. If such is desired, the better course would be to seek legislation specifically authorizing such a procedure.

With kind regards, I am,

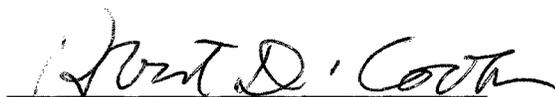
Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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