HENRY MCMASTER
ATTORNEY GENERAL

September 3, 2010

Herbert R. Hayden, Jr., Executive Director
South Carolina State Ethics Commission
5000 Thurmond Mall, Suite 250
Columbia, SC 29201

Dear Mr. Hayden:

We received your letter requesting an opinion of this Office concerning the Ethics Commissions' ability to rule on the constitutionality of a provision of the Ethics Act. You asked our Office to "confirm [your] understanding that the Commission may not rule on the constitutionality of a provision of the Ethics Act, notwithstanding the current appellate caselaw."

As a way of background, the Ethics Commission has been requested to write an advisory opinion on a constitutional issue. Specifically, the Commission was asked whether "a committee that engages exclusively in independent expenditures [is] subject to the $3,500 annual contribution limit to committees set forth in S.C. [Code] § 8-13-1322(A)." According to the request letter, the "committee intends to organize for the exclusive purpose of making independent expenditures as defined by S.C. Code Ann. § 8-13-1300(17). The committee will not coordinate its activities with any candidate for state or local office or with any party committee."

The request letter indicates that the South Carolina Ethics Commission is "currently involved in two federal cases in which the constitutionality of several sections of the campaign finance law is being challenged."

This opinion will address prior opinions, relevant statutes and caselaw to determine whether the South Carolina Ethics Commission may rule on a constitutional issue.

Law/Analysis

In an opinion of this Office dated June 24, 2003 we addressed the question of whether the State Ethics Commission has the authority to find a state statute unconstitutional. We concluded as follows:

> Like any other administrative agency, the **State Ethics Commission possesses no power to "declare" a statute unconstitutional**. Article I, § 8 of the South Carolina Constitution which requires separation of powers in the three branches of government mandates that **only a court may rule that a statute is unconstitutional**. . . . However, this does not resolve the inquiry of what action the Ethics Commission must take where a statute very similar to § 8-13-1354 [or S.C. Code § 8-13-1322(A) in this instance] has been held by the United States Supreme Court to be violative of the First Amendment. . . .

Op. S.C. Atty. Gen., June 24, 2003 (emphasis added). A copy of this opinion has been enclosed for your convenience.

The South Carolina Supreme Court explained powers of administrative agencies such as the Ethics Commission in S.C. Tax Commission v. S.C. Tax Board of Review. The court held that an "administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers nor has it any discretion as to the recognition of or obedience to a statute." S.C. Tax Commission v. S.C. Tax Board of Review, 278 S.C. 556, 559, 299 S.E.2d 489, 491 (1983) (quoting 2 Am.Jur.2d, Adm.Law., § 188, p. 21). The court went on to state that the Tax Board of Review's ruling that a statute violated the Constitution was "a power beyond its jurisdiction." S.C. Tax Commission, 278 S.C. 556, 560.

In Beaufort County Board of Education v. Lighthouse Charter School, the Supreme Court held that "[a]n administrative agency must follow the law as written until its constitutionality is judicially determined; an agency has no authority to pass on the constitutionality of a statute. S.C. Tax Commission v. S.C. Tax Board of Review, 278 S.C. 556, 299 S.E.2d 489 (1983). Accordingly, neither the Beaufort Board nor the State Board could have addressed the constitutional issue which was therefore properly raised for the first time in circuit court." Beaufort County Board of Education v. Lighthouse Charter School, 335 S.C. 230, 516 S.E.2d 655, 660-661 (1999).

The particular statutes in question in this instance are S.C. Code §§ 8-13-1322(A) and 8-13-1300(17). S.C. Code § 8-13-1322(A) states as follows:

> (A) A person may not contribute to a committee and a committee may not accept from a person contributions aggregating more than three thousand five hundred dollars in a calendar year.

S.C. Code § 8-13-1322(A).

S.C. Code § 8-13-1300(17) states as follows:

> (17) "Independent expenditure" means:

(a) an expenditure made directly or indirectly by a person to advocate the election or defeat of a clearly identified candidate or ballot measure; and

(b) when taken as a whole and in context, the expenditure made by a person to influence the outcome of an elective office or ballot measure but which is not:

(i) made to;
(ii) controlled by;
(iii) coordinated with;
(iv) requested by; or
(v) made upon consultation with a candidate or an agent of a candidate; or a committee or agent of a committee; or a ballot measure committee or an agent of a ballot measure committee.

Expenditures by party committees or expenditures by legislative caucus committees based upon party affiliation are considered to be controlled by, coordinated with, requested by, or made upon consultation with a candidate or an agent of a candidate.

S.C. Code § 8-13-1300(17).

The United States Supreme Court created a constitutional framework for campaign finance in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). The Supreme Court held that contribution limits were constitutional because of the state's interest in preventing corruption or the appearance of corruption. Buckley, 424 U.S. 1, 33. The Court explains that "'[n]either the right to associate nor the right to participate in political activities is absolute.' CSC v. Letter Carriers, 413 U.S. 548, 567, 93 S.Ct. 2880, 2891, 37 L.Ed.2d 796 (1973). Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. (citations omitted)." Buckley, 424 U.S. at 25. However, the Court also held that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures." Buckley, 424 U.S. at 45.

In other words, states are free to regulate the amount and source of direct contributions to candidates, but may not regulate the amount spent, or the source of independent spending. Buckley, 424 U.S. 1. See also, California Med. Ass'n v. Federal Elec. Com'n, 453 U.S. 182, 198-199, 101 S.Ct. 2712, 2723 (1981).

The Fourth Circuit Court of Appeals held that NC's $4,000 per election contribution limits to political committees could not be applied to an independent expenditure committee. North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 334 F.3d 418 (2003), aff'd on remand, 525 F.3d 274 (4th Cir. 2008).

Conclusion

It is the opinion of this Office that a court would likely find that the State Ethics Commission cannot rule on the constitutionality of a provision of the Ethics Act. While the Ethics Commission has the authority to interpret the Ethics Act[1], only courts have jurisdiction to determine the constitutionality of provisions in our code of laws.

Sincerely,

Henry McMaster
Attorney General

Leigha Blackwell

By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Deputy Attorney General

[1] Ops. S.C. Atty. Gen., March 6, 2008; August 24, 2006; November 2, 2005 (State Ethics Commission is specifically granted the authority to interpret the Ethics Act).