HENRY MCMASTER
ATTORNEY GENERAL

August 5, 2010

Garrison Walters, Executive Director
South Carolina Commission on Higher Education
1333 Main Street, Suite 200
Columbia, South Carolina 29201

Dear Mr. Walters:

We received your letter requesting an opinion of this Office concerning licensure of nonpublic post-secondary institutions. You asked "whether or not the Commission can deny eligibility for an initial licensure when it is found that owners seeking licensure previously owned a school that was found in violation and had its license revoked while the licensing function was under the jurisdiction of the S.C. Department of Education (SDE)."

As a way of background, you provided that "the owners who are seeking licensure previously owned a school that had its license revoked in 1985. The license was revoked by SDE which at the time had jurisdiction for licensing proprietary non-degree training providers. Issues upon which revocation was based included failure to make refunds, employment of unqualified instructors, and lack of equipment and supplies." You suggest that "regulatory language [S.C. Regulation 62.6(J)] prohibits the Commission from licensing a new school under the direction of these owners."

This opinion will address prior opinions, relevant statutes, regulations and caselaw to determine whether the Commission may deny eligibility for licensure based on a violation that occurred when another entity had jurisdiction.

Law/Analysis

In 1992, the South Carolina Code of Laws was amended to repeal Chapters 46 and 59 of Title 59, which related to degree-granting nonpublic educational institutions and to proprietary schools respectively. Those chapters were replaced with Chapter 58 of Title 59 which governs nonpublic post-secondary institution licensing. 1992 Act No. 497 § 1. Prior to 1992, the licensing function of

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proprietary schools[1] was under the jurisdiction of the S.C. Department of Education. S.C. Code § 59-59-10 et seq. (Supp. 1991). Currently, S.C. Code § 59-58-10 et seq. governs the Commission on Higher Education and the licensing of nonpublic post-secondary institutions.

S.C. Code § 59-58-40 states that the "commission is the sole authority for licensing nonpublic educational institutions established in South Carolina," and the "commission may promulgate those regulations as may be necessary for the administration and enforcement of this chapter." Hence, the SC Commission on Higher Education has vast authority to set forth regulations for licensing, so long as the standards include, but are not limited to, "course or program offerings, adequate facilities, financial stability, competent personnel, educational resources, refund policies, and legitimate operating practices." S.C. Regulations 62-1 to 62-100 regulate the Licensing of Nonpublic Post-secondary Educational Institutions. Specifically, S.C. Reg. 62-6 provides the licensing criteria.

In relevant part, S.C. Regulation 62-6 states as follows:

> The Commission may license the institution after due investigation has revealed that the institution and its programs have met the following criteria:
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> . . . (J) The **institution's owners and directors are appropriately experienced and educated and are of good reputation and character**. Site directors should be credentialed at the same level as the highest degree conferred at the site. . . . Exceptions must be documented and approved by the Commission. . . . A person is considered to be of **good reputation** if:
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> (1) The person has no felony convictions related to the operation of a school and the person has been rehabilitated from any other felony convictions;
> (2) The person has no convictions involving crimes of moral turpitude;
> (3) Within the last ten years, the person has never been successfully sued for fraud or deceptive trade practices;
> (4) The person is not a plaintiff or defendant in litigation that carries a significant risk to the ability of the institution to continue operation;
> (5) The person does not own a school currently violating legal requirements; **has never owned a school with habitual violations; or has never owned a school that closed with violations including, but not limited to, unpaid refunds**;[2] or

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[1] "Proprietary schools" are now referred to as "nonpublic institutions"

[2] The term "violation" is referenced in S.C. Reg. 62-22 to refer to violations of the *current* chapter 58 of Title 59. S.C. Reg. 62-22(A) reads, "The Commission may revoke, suspend or refuse to issue a permit to any agent for any of the following: 1) Violation of any provision of the act or any

(continued...)

(6) The person has not knowingly falsified or withheld information from representatives of the Commission.

S.C. Regulation 62-6(J) (emphasis added).

As explained by the South Carolina Court of Appeals, the "words of a statute or regulation 'must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.'" Sloan v. Greenville County, 356 S.C. 531, 563, 590 S.E.2d 338, 355 (2003) (quoting Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

The statute plainly gives the SC Commission on Higher Education the authority to license nonpublic educational institutions, and the regulations plainly explain that one of the criteria for licensure is the institution's owners must be experienced, educated and of good reputation and character.

This office is not a fact-finding entity; "investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court." Op. S.C. Atty. Gen., September 14, 2006; April 6, 2006. However, the request letter explained that "the owners who are seeking licensure previously owned a school that had its license revoked in 1985. The license was revoked by SDE which at the time had jurisdiction for licensing proprietary non-degree training providers. Issues upon which revocation was based included failure to make refunds, employment of unqualified instructors, and lack of equipment and supplies."

In relevant part, S.C. Regulation 62-6(J) defines a person of "good reputation" as one who "does not own a school currently violating legal requirements; **has never owned a school with habitual violations; or has never owned a school that closed with violations including, but not limited to, unpaid refunds.**" S.C. Regulation 62-6(J)(5) (emphasis added).

"Unpaid refunds" is listed in the statute as an example of a violation; the facts mentioned in the request letter explain that the school's "failure to make refunds" was one of the reasons the school had its license revoked in 1985.

In an opinion of this Office dated November 2, 2005, we stated as follows:

> Remedial or procedural statutes provide an exception to the rule of prospective application. "A principal exception to the . . . presumption [of prospective effect] is that remedial or

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[2](...continued)
regulation **of the Commission** . . . ." S.C. Reg. 62-6 (emphasis added). See also, S.C. Code § 59-58-130. One could argue that the term "violation" in S.C. Reg. 62-6 was also intended to refer just to violations of the *current* statute and regulation. But, on the other hand, the statute does not indicate an intent to wipe the slate clean as to the past history of a school.

> procedural statutes are generally held to operate retroactively." Hercules Inc. v. S.C. Tax Commission, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). In Smith v. Eagle Const. Co. Inc., 282 S.C. 140, 318 S.E.2d 8 (1984), the Supreme Court of South Carolina commented upon the "remedial" exception as follows:
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>> Statutes are remedial and [retroactive]; in the absence of directions to the contrary, when they create new remedies for existing rights . . . enlarge the rights of persons under disability, and the like, unless [they] violate some contract obligation . . . Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts."
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> 282 S.C. at 143, 318 S.E.2d at 9, citing Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843, 846 (1941).

Op. S.C. Atty. Gen., November 2, 2005.

In another opinion of this Office, dated November 13, 1986, we stated as follows:

> The General Assembly is presumed to have fully understood the import of words used in a statute. Powers v. Fidelity and Deposit Comany of Maryland, 180 S.C. 501, 186 S.E. 523 (1936). It is not for the courts or this Office to inquire into the motives of the legislature or what may have motivated the General Assembly. Scovill v. Johnson, 190 S.C. 457, 3 S.E.2d 543 (1939). The legislature is presumed to know the law and not to do a futile thing. Graham v. State, 109 S.C.301, 96 S.E. 138 (1918). It must be presumed that the legislature knew its own intention and that when such intention is couched in unambiguious terms, the act expresses that intention. In enacting a statute or resolution, it must be presumed that thte legislature acted with deliberation and with full knowledge of the effect of the act and with full information as to the subject matter and existing conditions and relevant facts. 82 C.J.S. Statutes Section 361; 73 Am.Jur.2d Statutes Section 28.

Op. S.C. Atty. Gen., November 13, 1986.

There is a presumption that the legislature intends the effect of statutes created. The General Assembly simply stated that owners did not meet the "good reputation" criteria if he or she owned a school that was in violation of legal requirements, owned a school with habitual violations, or owned a school that was closed because of violations. There was no indication in the regulation or statute that a violation found by the SDE should be considered less valid than a violation discovered by the S.C. Commission on Higher Education. Statutes are repealed and replaced frequently; if the General Assembly wanted to restrict the licensing criteria by time or by department or agency, then it could have. However, the General Assembly kept the criteria broad.
S.C. Code § 59-58-40 is clear that the "commission is the sole authority for licensing nonpublic educational institutions established in South Carolina," and the "commission may promulgate those

regulations as may be necessary for the administration and enforcement of this chapter." Hence, S.C. Regulations 62-1 to 62-100 govern the Licensing of Nonpublic Post-secondary Educational Institutions. Specifically, S.C. Reg. 62-6 provides the licensing criteria that must be followed. S.C. Reg. 62-6 is clear that the owners of an institution must be of good character and reputation, which is defined by S.C. Reg. 62-6(J). According to the facts mentioned in the request letter, the owners in question are in clear violation of S.C. Reg. 62-6(J)(5) because the owners of the school seeking a license are also the previous owners of a school that had its license revoked in 1985 due to violations. The fact that the violations were discovered by SDE has no effect on the application of S.C. Reg. 62-6(J)(5) to the situation at hand. The General Assembly acted intentionally when repealing Chapters 46 and 59 of Title 59 and replacing them with Chapter 58; hence S.C. Code § 59-58-40 and S.C. Reg. 62-6 should be given its plain and ordinary meaning, effectuating the intent of the legislature. See, Sloan v. Greenville County, 356 S.C. 531, 563 (2003); Op. S.C. Atty. Gen., October 27, 2006.

Conclusion

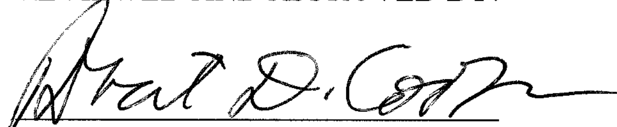
It is the opinion of this Office that the S.C. Commission on Higher Education may consider whether to deny eligibility for an initial license when the owners seeking licensure do not meet the "good reputation" criteria set forth in S.C. Reg. 62-6(J)(5). Based upon the information provided, the owners previously owned a school that was in violation of legal requirements and had its license revoked. We find no implication in the governing Regulation or Statute that any revocation may not be considered solely because SDE had jurisdiction over licensing at the time of the violation. Of course, determinations of the "good reputation" criteria is a factual matter, beyond the scope of an opinion of this Office, and would be for determination by the Board based upon all the facts and circumstances.

Sincerely,

Henry McMaster
Attorney General

By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



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