

1984 S.C. Op. Atty. Gen. 322 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-135, 1984 WL 159941

Office of the Attorney General

State of South Carolina

Opinion No. 84-135

November 26, 1984

*1 The Honorable James L. Solomon, Jr.
Commissioner
South Carolina Department of Social Services
Post Office Box 1520
Columbia, South Carolina 29202-9988

Dear Commissioner Solomon:

You have requested our advice as to whether either the State Board of Social Services (or its Commissioner) or the county DSS board possesses the authority to impose disciplinary sanctions on a county director of social services upon receipt of a report of alleged violations of State DSS policies and procedures. We would advise that while there exists no express authority for the State DSS board or its Commissioner to discipline a county director, clearly the county DSS board possesses such authority and has a mandatory duty to enforce all state DSS policies and procedures.

Of course, our advice herein is simply a commentary upon your legal question as to the authority to discipline and, it goes without saying, we are not here condoning or commenting upon any reports of alleged wrongdoing by any individual. In addition, as with any legal advice rendered by this Office, we are not advocating any particular position in the matter, in this instance either for or against the State Board or the county boards of social services. Consistent with our statutory authority, we have only attempted to analyze and resolve the legal question presented. It should also be made clear at the outset that our conclusion herein regarding the authority of State DSS does not in any way undermine the fact that, under existing law, the county DSS board possesses the clear statutory authority and duty to correct any alleged deviations from State DSS policies and procedures.

Background

In responding to your inquiry, we have examined all relevant statutes, particularly Chapters 1 and 3 of Title 43, Code of Laws of South Carolina (1976); regulations of the Budget and Control Board concerning state personnel; case law; opinions of the Attorney General dating back to the creation of the old Department of Public Welfare in 1937; and documents and policies relative to internal procedures of the State Department of Social Services. In none of the above is the precise question as to the authority of State DSS to discipline a county director addressed or directly commented upon. Moreover, we can find no direct or express provision of law granting the authority about which you have inquired to the State Board or Commissioner. Further, it would appear that such disciplinary action taken by the State Board against a county director would be unprecedented; at least we are unaware of any such previous action. Thus, any conclusion that the State Board or Commissioner possesses such authority would have to be reached either by inference, implication, or extrapolation of existing statutes. Any conclusion that the State Board does not have such authority does not mean that authority to discipline a county director does not exist elsewhere, however.

*2 An examination of the relevant statutes reveals that, almost without exception, the statutes are identical to those resulting from Act No. 318, 1937 Acts and Joint Resolutions, which Act created the state and county Departments of Public Welfare. It must be recognized that these statutes were enacted decades ago, in an era when the administration of social welfare functions was located more at the county level and was less centralized overall. In response to your specific question, therefore, we have identified several loopholes or gaps in the law, to be pointed out below. Those loopholes having been identified, the General Assembly may wish to correct or clarify the statutes expeditiously.

County Boards of Social Services

The administration of social services in each county is carried out by a county board of social services appointed by the Governor pursuant to [Section 43-3-10 of the Code](#). Powers and duties of each county board are specified in Section 43-3-60 *et seq.* and include administering welfare activities, using funds, enforcing laws to protect children by Section 43-3-60; budgetary activities and employing personnel by Sections 43-3-70 and -80; and maintaining standards set by the State Department of Social Services, Keeping records, and making reports, by Sections 43-3-90, -100, and -110.

By Section 43-3-40, each county board is empowered to employ or select a county director; that section provides: Subject to rules and regulations of the State Department, each county board shall select a director . . . to discharge the duties of such office. The salaries of county directors shall be fixed by the State Department. In fixing the salaries of the various county directors the State Department shall consider the individual qualifications of the respective directors and the possibilities of their individual positions. The county director shall be the chief executive officer of the county board electing him and shall perform such duties as are directed by the county board, in conformity to the general policies of the State Department or as directed by law.

Thus, the county board is authorized to select the county director, but such authorization is subject to State rules and regulations;¹ this limitation was probably placed in the law to insure uniformity in qualifications and to preserve the State's interest in efficient and effective operations at the county level. However, it is significant, in our judgment, that the statute does not provide that the selection of the county director be made at the State level; had the legislature intended such selection to be made at the State level, the legislature could easily have so provided. It should also be noted that the county director is expected to act in conformity and consistently with general policies of the State Department, but the county board exercises ultimate control and direction over the county director, again consistently with State policies and procedures.

*3 Because the power to remove one so employed or appointed is generally incidental to the power to appoint, 63 Am.Jur.2d [Public Officers and Employees](#) § 179, it appears that only the county board could terminate the employment of the county director; due to the assignment of these powers to the county board, it is difficult to place disciplinary authority elsewhere, as well. Regulation 19-707.09 D, concerning dismissals of state employees,² provides:

(1) A dismissal is the action taken by the appointing authority against an employee to separate the employee from State service.

(2) An appointing authority may dismiss any employee for cause.

An amendment to this regulation in 1983 substituted the term 'appointing authority' for the term 'agency head.' Because the county board is the appointing authority vis-a-vis the county director, pursuant to the above regulation only the county board would be empowered to separate the county director from State employment. This regulation is thus consistent with general law as stated above.

Also consistent is the policy of the State Department concerning discipline of employees, found in Volume III, Chapter 12 of the Manual of Personnel Administration, effective February 1, 1984. The provisions of Chapter 12 make it clear that the supervisor, and in some instances the appointing authority, of an employee are responsible for his discipline. In the case of a county director, the supervisor and appointing authority would be the county board. The supervisor's role in disciplinary action taken against an employee is stated in Section 12.10 ('When an employee disregards professional or personal standards the Department provides a basis for supervisor discipline. . .'); Section 12.22 ('If disciplinary action is necessary, it is the supervisor's responsibility to initiate the action. . . Supervisors must rely on their judgement to determine proper disciplinary action . . .'); and Section 12.23

and all subsections as to actions to be taken by supervisors or the appointing authority. Nowhere in this disciplinary scheme is the State Board or the Commissioner given responsibility or authority to discipline a county director or any other county employee. Thus, again it would appear that the county board is the appropriate body responsible for disciplining or terminating the county director.

Moreover, [Section 43–3–90 of the Code](#) makes it clear that county boards have the responsibility of maintaining standards established by the State Department:

The respective county boards shall maintain such standards of work, procedure and records as are required by the State Department in the discharge of their functions or in the use of any funds provided by the State Department.

The use of the term ‘shall’ connotes mandatory action by the county boards in maintaining standards. 2A [Sutherland Statutory Construction](#) § 47.23. Furthermore, the mechanism to ‘maintain’ such standards is enforcement of those standards. Cf., [Kendrick & Roberts, Inc. v. Warran Bros. Company](#), 110 Md. 47, 72 A. 461 (1909). While the State Department has established those standards, it remains the responsibility of the county boards to enforce those standards.

*4 Another legislative enactment militating against reposing disciplinary authority in the State Board is found as a proviso in Part I, Section 42 of Act No. 512, 1984 Acts and Joint Resolutions (the Appropriations Act): Provided, Further, That the administrative organization and operation of the State Office of the Department of Social Services shall not interfere with nor encroach upon the statutory authority of the County Social Services Boards.

This proviso, or a substantively identical proviso, has been a part of annual appropriations acts since at least 1974 and recognizes and preserves the autonomy of the county board in the exercise of its statutory authority. A court construing this proviso in the context of disciplining a county director and also considering the State Department's disciplinary policy, could easily conclude that such disciplinary action is left up to the county boards and is not to be interfered with by the State Board.

An Opinion of the Attorney General, No. 77–219 dated July 12, 1977, repeats the relationship of the county departments of social services to the State Department of Social Services, citing many of the same statutes already noted herein. The conclusion of the 1977 opinion is that the State Department of Social Services is the supervisory agency of the county departments and that all rules, policies, and regulations adopted by the State Department are binding on the county departments. The 1977 opinion deals with the promulgation of regulations, audits, reports, budgets, and so forth. In particular, that opinion provides:

§ 43–3–40 provides that subject to the rules and regulations of the State Department a county board shall select a director who shall be the chief executive officer of the board and he is required to perform such duties as directed by the county board, but in conformity to the general policies of the State Department or as directed by law. Thus, the county director is through his board bound to adhere to the policies and procedures of the State Department.

It is, therefore, the opinion of this Office that the State Department of Social Services is the supervisory agency of the County Departments of Social Services, it being directed by statute to supervise and administer the public welfare activities and functions of the State. All rules, policies and regulations adopted by the State Department are binding on the County Departments. Further, the County Boards serve as agents of the State Department and as such may only administer such activities as provided by law or directed by the State Department. The County Boards are the supervisory bodies of the State welfare programs at the county level and are directly responsible to the State Department and subject to and bound by its rules and regulations. [Emphasis in original.]

These statements thus made in the 1977 opinion are unequivocally true; however, the 1977 opinion does not expressly answer your narrow question. Nevertheless, it would appear from this 1977 opinion that the county board, rather than the county director, is directly answerable to the State Department or Board; moreover, the opinion specifically states that ‘. . . the county director is through his board bound to adhere to the policies and procedures of the State Department.’ (Emphasis added.)

*5 On the basis of the above factors, it would appear that the direct relationship established by the applicable statutes is between the State Department and the county board and not between the State Department (or Board) and an employee such as a county director. Too, pursuant to these statutes, it appears to be the responsibility of the county board, rather than the State Board, to maintain and enforce standards established by the State Department. A gap or loophole in the statute is thus evident; there is no provision in the law to deal with a situation in which a county board refuses to insure that standards established by the State Department are maintained. Because this gap in the law exists, it would probably be appropriate for the legislature to provide definitive answers through the legislative process. Unquestionably however, regardless of whether or not the State Board or Commissioner possesses the authority to discipline a county director, the county board does possess such authority; indeed, by statute the county board has the mandatory duty to maintain and enforce all policies and procedures promulgated by State DSS. Failure to act in accord with this mandatory duty might subject local board members to removal procedures or be considered as grounds for non-reappointment by the appointive authority. Of course, this Office defers to the local solicitor as to any criminal wrongdoing unless there is a conflict of interest.

State Department of Social Services

Authorization for creation of the State Board of Social Services was provided in Act No. 318 of 1937, supra, now codified as Section 43-1-10 et seq. of the Code. The State Commissioner is selected by the State Board as its chief executive officer pursuant to [Section 43-1-50 of the Code](#) and is to execute policies of the Board and see that laws relative to the Board are carried out. Powers and duties of the State Board and Department are specified by Sections 43-1-80 et seq. and include the formulation of policies such as the disciplinary policy referred to, supra. See Section 43-1-80. The State Board and the Commissioner thus have only those powers as granted by statute or those powers and duties reasonably and necessarily implied therefrom. Nowhere in the applicable statutes, Department policies, or case law is there purported direct or express authority for the Commissioner or the State Board to discipline a county director and, given the comprehensive disciplinary scheme, whether such authority is reasonably or necessarily implied is questionable.

On the basis of general agency law, an argument could perhaps be made that the State Board or Commissioner, as principal, may discipline a sub-agent, the county director. Clearly, the county board is an agent of the State Department, Board, or Commissioner. Section 43-3-60 provides in relevant part that

[t]he respective county boards shall act as the representatives of the State Department in administering such welfare activities within the county as are provided for by law or as are directed and required by the State Department when not otherwise provided for by law. . . . Each county board shall serve as the agent of the State Department in the performance of such functions as the State Department may delegate to it.

*6 See also 79 Am.Jur.2d Welfare Laws § 49 ('a county acts as an agent of the state') and Op. Atty. Gen. No. 77-219, discussed supra. Because the county director would be the agent of the county board appointing him, the county director would be the subagent of the State Board and thus responsible to the State Board just as any other agent of the State Board would be. See 3 Am.Jur.2d Agency § 7 and Restatement (Second) of Agency § 406.

It is generally recognized agency law that a principal has various remedies against an agent or subagent who has violated or threatened to violate the mandate established by his principal, such remedies including the rescission of an employment contract. See Restatement (Second) of Agency § 399; 3 Am.Jur.2d Agency § 329 et seq.; Seavey, Agency § 54 (1964); and [Wolf v. Title Guarantee & Trust Company](#), 296 N.Y.S. 800, aff'd 277 N.Y. 626, 14 N.E.2d 193 (1938).

While the State Board or Commissioner might attempt disciplinary action against a county director, applying general agency law, such action would not be without legal risks. Express or direct (i.e., statutory) authority appears to lie with the county boards, whereas any comparable authority for the State Board or Commissioner to so act would be derived entirely from general

agency law or by implication or inference from statutes cited above. A court might not find such implied authority to exist, but would instead probably conclude that the county board possesses the sole authority to take such disciplinary action.³

Conclusion

In summary, it is our advice that there exists no express provision of law authorizing the State Board or Commissioner of Social Services to take disciplinary action directly against a county directed of social services. To the contrary, several statutes appear to place such authority solely in the hands of the appointing agency, the county board of social services. While an argument might be made for such authority also to reside in State DSS, under general agency law, no statute so expressly provides. Accordingly, the State Board or Commissioner would be at legal risk at this time in taking disciplinary action. Nevertheless, it is clear that the county DSS board does possess the authority to take such disciplinary action; the county board has indeed a mandatory duty to maintain and enforce all policies and procedures promulgated by State DSS.

The various statutes in question have remained on the books virtually unchanged since 1937. We have identified several gaps and loopholes in the law, including the fact that there is no provision in the law to deal with a situation in which a county board refuses to insure that standards established by the State Department are maintained. Accordingly, the General Assembly may wish to consider immediately closing the gaps in the law identified herein.

Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

- 1 The specifications statements prepared by the Human Resources Management Division of the Budget and Control Board for the positions of County Social Services Director I, II, and III, class codes 5304, 5305, and 5306, also provide that '[t]he County Social Services Director works at the direction of the County Social Services Board subject to State and Federal policies and regulations.'
- 2 For purposes of our advice, it is assumed that a county director is a state employee. According to the Human Resources Management Division, the position of county director is classified. See footnote 1. Furthermore, the county director is paid by the State and receives state employee benefits, two factors strongly indicative that one is a state employee. See 81A C.J.S. States § 81 and Ops. Atty. Gen. dated May 6, 1982 and June 8, 1972.
- 3 This opinion does not address the procedural safeguards which should be considered and followed for the protection of both the State Board or Commissioner and the county director should the Board or Commissioner elect to take disciplinary action against the county director.

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