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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

December 31, 2004

The Honorable Brian White
Member, House of Representatives
436-A Blatt Building
Columbia, South Carolina 29211

Dear Representative White:

You have asked for clarification regarding the enactment of Act No. 289 of 2004. In particular, your questions concern the waiver from the Continuing Professional Education requirement found in Section 42-2-250. Your first question relates to whether Act No. 289 of 2004 applies retroactively to Certified Public Accountants currently on waiver from the Continuing Professional Education (CPE) requirement. By way of background, you state the following:

[u]nder the prior law, accountants were able to elect a waiver of Continuing Professional Education (CPE) hours based on practicing as a Certified Public Accountant in the State of South Carolina. The license period under the prior law ran from July 1st of a given year to June 30th of the next year in accordance with the State fiscal year. In the instant law, by virtue of a CPA on CPE waiver having renewed their license under the prior law effective July 1, 2004, that licensing period would end June 30, 2005. Under the new law, the licensing period commences January 1st and runs for a calendar year. My reading of the law suggests that the person currently on CPE waiver for the period July 1, 2004 to June 30, 2005 status would not change until January 1, 2006 when they would need to start complying with the mandatory forty (40) hour CPE per year for calendar year 2006 in order to maintain their license under the law as restated by S 687. The Board of Accountancy has, by letters to each CPA, PA and Accounting Practitioner, sought to retroactively apply the law and make it effective for the current licensing period which I feel is inappropriate as the law was effective upon its signing by Governor Sanford on July 22, 2004 and has no retroactivity provision.

Your second question concerns whether the revocation of an Accountant's license upon failure to complete the requisite CPE hours now required as a result of the passing of Act No. 289 of 2004 constitutes a violation of due process or an unconstitutional taking under the Fifth Amendment. You note that:

[t]he prior law for a period in excess of twenty (20) years has allowed CPE waiver. Without discussion or qualification by way of grand-fathering the people who have a CPA certificate and have enjoyed the status of being on CPE waiver for number of years, the new law suddenly takes the position that the CPA certificate must either be surrendered or the CPE house completed. Let me remind you that the CPA certificate is not a license but a certificate. Each CPA certificate is numerically controlled and is unique to the individual it was issued to. Black's Law dictionary defines "certificate" as a written assurance, or official representation, (a) that some act has or has not been done, or some event occurred, or some legal formality has been complied with. I know for a fact that continuing professional education waivers are alive and well in other licenses issued by the State of South Carolina, including insurance brokers' licenses and real estate brokers' licenses. It seems to me that taking away the position that had been attained and maintained by some individuals in excess of twenty (20) years is a violation of due process and equality under the law. As you know, the CPA certificate is issued only upon rigorous educational requirements, two years apprenticeship, and the passage of a three-day exam, which averages six times for the average applicant to pass. It seems to me that such a rigorous requirement for obtaining this certificate makes it more than a piece of paper to hang on the wall, but an entitlement such as a graduate degree in my thinking. For the State to allow the Board of Accountancy to summarily take away the status of CPE waiver and insist on CPA certificate holders to either submit to the continuing education hours they do not desire or need as they are not practicing as such, or to give their certificates back to the State, appears to me to be a taking under the 5th Amendment that would require compensation that the State cannot and does not need to be forced to pay.

Law /Analysis

With respect to your first question as to whether the statute applies retroactively with respect to fulfilling the CPE requirements, we are of the opinion that it does. Generally speaking, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there exists a specific provision or a clear legislative intent to the contrary. Hercules Inc. v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45 (1980). Statutes are not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978). However, if a statute is remedial, it may be applied retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability, unless it violates a contractual obligation, creates a new right, or divests a vested right. Hooks v. Southern Bell Telephone and Telegraph Company, 291 S.C. 41, 351 S.E.2d 900 (1986).

In this instance, Act No. 289 of 2004 contains express language which emphasizes the General Assembly's intent to apply the terms of the statute retroactively. Section 2(C) of the Act provides as follows:

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A certified public accountant or a public accountant, who is currently on waiver, or holding an inactive or retired inactive license, has one hundred eighty days from this act's effective date to apply to the Board of Accountancy for permanent emeritus status, as provided for in Section 40-2-270 of the 1976 Code, as amended by Section 1 of this act, or to reactivate the license with no penalty.

A court would most likely construe this express language to reflect an intent on the part of the General Assembly that the Act apply to those individuals holding a valid CPE waiver prior to the Act's being signed into law. The result would be that those individuals who had secured a valid CPE waiver under the old law would no longer enjoy the rights of that waiver after January 1, 2005. Those individuals, according to the language of the statute, would possess two options: either they could apply for permanent emeritus status pursuant to Section 40-2-270 or reactivate their license without penalty.

Even should a court find that the foregoing express language does not mandate application to those presently holding a valid CPE waiver, we are, nevertheless, of the opinion that the statute is remedial in nature and therefore should still apply to those persons. We have previously concluded that a licensing statute is remedial in nature and should be liberally construed in order to effectuate the Legislature's purpose. Op. S.C. Atty. Gen., March 30, 2004. Moreover, courts have held that licensing of professions is generally regarded as a valid exercise of the State's police power. South Carolina State Board of Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946). Furthermore, it lies within the State's police power to require continued education to individuals already practicing within a particular profession. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, 188 (1956); See also, Hawker v. People of New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1989). Because State regulation of professional licensing is a valid exercise of police power, we believe that a court would consider the terms of Act 289 to be remedial in nature and, therefore, find that the Act should be applied to require that Section 2(C) be met. The result would be that those individuals who held a valid waiver prior to the enactment of Act No. 289 of 2004 would be affected by the passage of the statute and would be required to meet the CPE requirements. Therefore, either by virtue of the State's valid exercise of its police power or by way of the above-referenced express statutory language contained in Act 289, it is very likely that the Act was intended to apply to those individuals holding a valid CPE waiver prior to provision's passage. We believe it is very likely that a court would so conclude.

With respect to your second question concerning the revocation of the CPE waiver as an unconstitutional taking, we are of the opinion that the statute does not deprive the affected individuals of any vested rights and is therefore not unconstitutional. In South Carolina, legislative acts are presumed constitutional. An act of the legislature will be upheld as constitutional unless language in the Act plainly reveals conflict with the Constitution. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, 188 (1956). The rationale employed to analyze this question closely resembles that used by the courts in the video poker cases. The United States Supreme Court has held that an interest that depends totally upon regulatory licensing is not a property interest which is a compensable under the taking clause. Mitchell v. United States, 7 F.3d 212 (Fed.Cir. 1993). The right to operate video poker machines were deemed completely dependent upon the regulatory

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scheme and not inherent rights. Mibbs v. South Carolina Department of Revenue, 337 S.C. 601, 606, 524 S.E.2d 626; See also Rick's Amusement, Inc. v. State, 351 S.C. 352, 570 S.E.2d 155. Therefore, gaming devices are recognized as being legitimately within the State's police power and are subject to control or to being subjected to forfeiture. Westside Quick Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270.

Employing a similar rationale, courts from other jurisdictions have held that no person can acquire a vested right to continue to practice in a business, trade, or profession, which is subject to the State's police power. State v. Hovorka, 100 Minn. 249, 110 N.W. 870, 871, 8 L.R.Q., N.S., 1272, 1273. The South Carolina Supreme Court has adopted this view and has held that when the granting of a license to practice a profession is the method undertaken by the State, it is within the police power of the State to make further regulations and restrictions for the public good. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, 188 (1956). As mentioned earlier, the State may, as a valid exercise of its police power, require that those professionals licensed in the trade must receive continuing education. Id. Thus, we are of the opinion that nothing in the language of the statute plainly conflicts with the Constitution. Furthermore, the rights of accountants or other professionals to continue to practice their trade or profession is not deemed by the courts to be a vested right and, therefore, application of statutory changes regarding the requirement for licensure may constitutionally be applied to those already licensed. See, e.g. Romero v. Selcke, 216 Ill.App.3d 138, 576 N.E.2d 276 (1991) [application of statute requiring foreign-educated nurses to pass foreign nurses examination as prerequisite to taking state exam for licensure to nurses who had already passed state licensing exam did not violate due process]; Wineblad v. Dept. of Registration & Education, 161 Ill.App.3d 827, 515 N.E.2d 705 (1987) [retroactive, application of statute requiring physician's assistants to achieve national certification as condition of retaining their licenses did not violate due process rights of physician assistants licensed before amendment of statute]; Ficarra v. Dept. of Regulatory Agencies, Div. of Ins., 849 P.2d 6 (Colo. 1993) [Division of Insurance's nonrenewal of bail bondsman licenses because bail bondsman incurred felony convictions or served sentence upon such conditions in past ten years impaired no vested rights of bail bondsmen and, thus, was not an unconstitutional retrospective application of Bail Bondsman Act].

Therefore, consistent with the rationale employed in the video poker cases, as well as that used in other jurisdictions with respect to professional licensure requirements, we conclude that the State validly may, as an exercise of its police power, eliminate the CPE waiver without violating the constitutional rights of those possessing the waiver. As there is no vested right to practice one's profession, there is no vested right to possess a CPE waiver. See Gersch v. Ill. Dept. of Profess. Regulation, 308 Ill.App.3d 649, 720 N.E.2d 672 (1999) [social worker's substantive due process rights not violated by omission of "grandfather clause" exempting him from educational requirements, right to licensure is not a "fundamental right" and establishment of mandatory advanced educational requirements is rationally related to legitimate state interest of protecting public health and safety].

Even if a court were to find that accountants had some property interest in practicing their profession or in holding a right to waive continued education, the provisions found within the statute and actions taken by the South Carolina Board of Accountancy would suffice to provide those

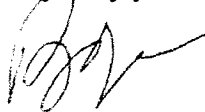
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individuals affected with sufficient due process if their license were to be revoked for failure to comply with the CPE requirement. Courts have found no violation of due process was when notice of further education requirements for real estate brokers was published twice in local newspapers and accompanied by notification letters sent to real estate offices, approved schools, and boards of realtors but not sent directly to the brokers themselves. Graham v. New Jersey Real Estate Commission, 217 N.J.Super. 130, 524 A.2d 1321 (1987). Similarly, courts have found no violation of due process when an Accountant's recertification was denied because he failed to meet his continued education requirements. Sullivan v. Carignan, 733 F.2d 8 (1st Cir. 1984). Here, the statute provides that an individual will be given one hundred eighty days to either apply for emeritus status or reactivate his license. Thus, in one sense the Act is not really retroactive at all, but delayed somewhat to allow time for compliance. Even presuming, however, that the statute is retroactive in the sense that it changes the terms of licensure of those with valid CPE waivers, you indicated that letters had been sent to all CPA's, PA's and Accounting Practitioners, informing them of the recent changes to the law. Pursuant to the new law, accountants enjoying waiver are merely obligated to conform to valid requirements if they wish to continue practicing in South Carolina. The statute provides persons with what a court is likely to find is a reasonable opportunity to comply with the new law (180 days) and provides ample notification in that the changes were mailed directly to all accountants. Based upon our reading of the statute, as well as the steps taken by the board to notify those affected, it is our opinion that a court would likely conclude that there is no violation of due process or other constitutional rights..

Conclusion

We are of the opinion that CPA's, PA's, and Accounting Practitioners neither possess a vested right in the continued practice of their profession nor a vested right in the possession of a CPE waiver. The right to licensure is not a fundamental right and thus is subject to reasonable exercises of the State's police power. Because the State has, pursuant to its police power, validly exercised its right to modify a professional licensing statute, it may apply the terms of that statute to those currently enjoying CPE waiver status either by express language contained within the statute or by virtue of the fact that the statute is remedial in nature. See, State of Indiana ex rel. Indiana State Bd. of Med. Examiners v. Judd, 554 N.E.2d 829, 832 (Ind. 1990) [licensing statute is remedial in nature, seeking "to cure the mischief caused by dentists whose knowledge is outdated"] Accordingly, we find that it is constitutional for the those individuals currently enjoying CPE waiver status to be required by virtue of the passage of Act No. 289 of 2004 to comply with the terms of the statute, as discussed above, or risk possible forfeiture of their accounting license.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General