ALAN WILSON
ATTORNEY GENERAL

September 9, 2011

Thomas J. Smith, Executive Director
South Carolina Commission for Minority Affairs
6904 North Main Street, Suite 107
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Dear Mr. Smith:

In a letter to this office you have requested an opinion interpreting several provisions of the State Commission for Minority Affairs ("Commission") regulations regarding "State Recognition" for Native American Indian entities.

By way of background, you state the following:

> First, Section R. 139-104 (F) of the regulations states that, "No entities formed after January 1, 2006 shall be granted State recognition as a "Tribe." It has been presumed that "formed" means chartered with the Secretary of State's Office as a non-profit corporation. However, Section R. 139-105 (A) of the statute does not specify having a non-profit corporation status through the Secretary of State's office. Given that in Section R. 139-105 (C) (2) the statute does require a charter from the Secretary of State's office, it has also been presumed that an entity's "formation," in compliance with Section R. 139-105 (A), may be proven with other documents. The Commission would like clarification on what it means to be "formed" in regards to a Native American entity. Additionally, if the charter from the Secretary of State's Office is not the only evidence to prove "formation," what other evidence would be needed?
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> Secondly, Section R. 139-105 (A) (B) (C) specifically outline the requirements for Recognition of "Tribes," "Groups," and "Special Interest Organizations" which are used by the State Recognition Committee, Staff and Board to determine State Recognition of Native American entities. [I]n 2006, several changes were made to the legislation. The Commission has been asked if any entity could be grandfathered under the first statute and guidelines. It has been the practice of the State Recognition Committee to allow an entity to withdraw its application prior to a final vote being taken to send a report to the Board of the Commission with recommendations. Given that this has been the practice, an entity that applied for "Tribal" status in 2005 withdrew their application with

the understanding that they could reapply during the next cycle. Before they were able to reapply, changes were made to the statute. The entity did not obtain "Tribal" status and chose to apply as a "Group." They are currently recognized as a "Group" and wish to apply under the original statute for "Tribal" status. Additionally, in 2009 the Board of the Commission voted to recognize a "Group" as a "Tribe" under the current application process. This entity was first recognized as a "Group" in 2005 under the first statute, and then reapplied in April 2009 for "Tribal" status under the current statute. Can the Commission "grandfather" an entities recognition application under the first statute?

The Commission seeks guidance and clarification in regards to the authority the Commission/State of South Carolina has over recognition after an entity has been recognized. The statute does not address this within its sections, but it is presumed that the Commission would have the authority to remove, review or reassign status after an entity has been recognized. Can information submitted in a petition application for Recognition be reviewed or can information be added to the petition after the entity has been recognized? If the Commission has the authority to do this, how should the process of review/audit occur and does the statute need to be changed to reflect this process? If the Commission reviews documents and information submitted and finds something fraudulent, would the Commission or the State of South Carolina then have the authority to correct information or act on the entity's recognition status? If an entity dissolves its status as a non-profit and/or is no longer acting in accordance with the recognition criteria of Section R. 139-105 (A) (B) (C), does the Commission have the authority to remove recognition status? If so, how should the process of removal occur and does the statute need to be changed to reflect this process?

Law/Analysis

The Commission was established by Act of the Legislature, now codified at S.C. Code Ann. §1-31-10 *et seq.* Among the Commission's powers and duties, the Legislature afforded it the power to "determine, approve, and acknowledge by certification state recognition for Native American Indian entities...." §1-31-40 (A) (6). In addition, the Legislature gave the Commission the authority to "promulgate regulations as may be necessary to carry out the provisions of this article including, but not limited to, regulations regarding State Recognition of Native American Indian entities in the State of South Carolina." §1-31-40 (A) (10). Regulations pertaining to the Commission's ability to recognize Native American Indian entities can be found in Chapter 139 of the South Carolina Code of Regulations.

Generally, courts, as well as this office, must as a matter of law afford considerable latitude to an agency's discretion in promulgating regulations. See Ops. S.C. Atty. Gen., January 30, 2002; November 27, 1995; August 21, 1991. Such regulations are deemed to stand and have the force and effect of law unless they are clearly in contravention of or lacking in statutory authority, or are inconsistent with the federal or state Constitutions. Faile v. S.C. Employment Security Comm'n, 267 S.C. 536, 230 S.E.2d 219

(1976). An agency's regulations carry with them a presumption of validity. University of South Carolina v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978). Further, an administrative regulation is deemed valid as long as it is reasonably related to the purpose of the enabling legislation. James v. Anne's, Inc., 390 S.C. 188, 701 S.E.2d 730 (2010); cf. Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54, 58 (2011) [stating that "an agency may not make rules that 'conflict with, or . . . change in any way the statute conferring such authority.'" (quoting Fisher v. J.H. Sheridan Co., 182 S.C. 316, 189 S.E. 356, 360 (1936))] We presume that the Commission's regulations have been properly promulgated for purposes of this opinion.

In answer to your first question, we note the Commission's regulations provide for limitations on entities seeking Native American Indian State Recognition. See 27 S.C. Code Ann. Regs. 139-104 (Supp. 2010). To prevent entities from seeking State Recognition as a "Tribe" after having separated or divided into numerous sub-entities of the same Indian Nation or people, new language was added to the regulations in 2006 intending to limit who can seek State Recognition. The amendment also created a cut-off date regarding any future request for State Recognition as a "Tribe." Specifically, Reg. 139-104 (F) provides that:

> [s]plinter groups, political factions, communities or groups that separate from the main body of a currently State acknowledged tribe or who claim the same ancestors, history, genealogy, institutions, establishments, or other primary characteristics of a currently recognized tribe, may not be acknowledged under these regulations. However, entities that can establish clearly and on a substantially continuous basis that they have functioned throughout the past one hundred years until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or as having been associated in some manner with an acknowledged South Carolina Indian Tribe. No entities formed after January 1, 2006 shall be granted State recognition as a "Tribe."

Ideally, the regulations promulgated by the Commission would provide a definition of an "entity." See Reg. 139-102 ["Definitions"]. Regardless of the absence of a definition, however, "it is well-recognized that courts give great deference to an agency's interpretation of its own regulations even in circumstances where there may be more than one interpretation and even if such interpretation is not the one that the court would adopt in the first instance." Op. S.C. Atty. Gen., August 12, 1986. This Office, like the courts of this State, "generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836, 838 (2003); see Ops. S.C. Atty. Gen., January 23, 2009; August 21, 1991; May 1, 1990. A court will reject an agency's interpretation only when the plain language of the regulation is contrary to the agency's interpretation. "Construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons." William C. Logan & Associates v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986). Based on our reading of Reg. 139-104 (F), no entity formed after January 1, 2006, as set forth under the particular above, may be granted State Recognition as a "Tribe." Otherwise, whether a particular entity is formed under either tribal or State law, this office will not attempt to legislate or interpret the intent of the Commission. Additionally, to make the determination as to application of the regulations to a specific entity would require us to

investigate and determine facts, which are beyond the scope of an opinion of this office. See Op. S.C. Atty. Gen., November 28, 2005.

You refer in your second question to the 2006 amendments to Regs. 139-105 (A), (B), and (C) ["Criteria for State Recognition"]. You ask whether an entity recognized as a "Group" prior to these amendments may be "grandfathered in" under the prior regulations when it applies for State Recognition as a "Tribe." Pursuant to Reg. 139-105 (A) (the 2006 amendments are indicated below by underlining):

> Native American Indian Tribe - requirements 1 through 9 must be satisfactorily met to achieve State Recognition. Requirements 10 and 11 are optional.
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> (1) The tribe is headquartered in the State of South Carolina and indigenous to this State. The tribe must produce evidence of tribal organization and/or government and tribal rolls for a minimum of five years.
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> (2) Historical presence in the State for past 100 years and entity meets all of the characteristics of a "tribe" as defined in R. 139-102 (D).[1]
>
> (3) Organized for the purpose of preserving, documenting and promoting the Native American Indian culture and history, and have such reflected in its by-laws.
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> (4) Exist to meet one or more of the following needs of Native American Indian people - spiritual, social, economic, or cultural needs through a continuous series of educational programs and activities that preserve, document, and promote the Native American Indian culture and history.
>
> (5) Claims must be supported by official records such as birth certificates, church records, school records, U.S. Bureau of the Census records, and other pertinent documents.
>
> (6) Documented kinship relationships with other Indian tribes in and outside the State.
>
> (7) Anthropological or historical accounts tied to the group's Indian ancestry.

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[1]Reg. 139-102 (D) defines a "Tribe" as "an assembly of Indian people comprising numerous families, clans, or generations together with their descendents, who have a common character, interest, and behavior denoting a separate ethnic and cultural heritage, and who have existed as a separate community, on a substantially continuous basis throughout the past 100 years. In general, core members of the tribe are related to each other by blood. A tribal council and governmental authority unique to Native American Indians govern them."

> (8) A minimum of one hundred living descendents who are eighteen years of age or older, whose Indian lineage can be documented by a lineal genealogy chart, and whose names, and current addresses appear on the Tribal Roll.
>
> (9) Documented traditions, customs, legends, etc., that signify the specific group's Indian heritage.
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> (10) Letters, statements, and documents from state or federal authorities, that document a history of tribal related business and activities that specifically address Native American Indian culture, preservation, and affairs.
>
> (11) Letters, statements, and documents from tribes in and outside of South Carolina which attest to the Indian heritage of the group.

We advise that, ordinarily, it could be concluded that in the absence of a specific provision for "Groups" already recognized prior to June 23, 2006 (the effective date of the amendments), no provision for "grandfathering" such "Groups" for purposes of State Recognition as a "Tribe" would be inferred. See Op. S.C. Atty. Gen., August 18, 1993. The intent of the amendments was to prevent splinter entities created within the past five years from seeking State Recognition as a "Tribe." The new language also prevents families with large numbers of children from splintering off and starting a new entity, then later seeking tribal status. Further, the amendments require each entity seeking tribal status to identify specific traditions, customs, legends, etc., which are unique to their nation of people and not generic to any group of Native American Indians. We are unaware of any provision regarding "grandfathering" of entities existing prior to these amendments. As stated above, however, the construction of this regulation by the Commission must be considered. Its interpretation will also be given deference by this office and the courts. Certainly, if the State Recognition Committee recommends that a "Group" recognized prior to the 2006 amendments be "grandfathered" under the previous regulation for State Recognition as a "Tribe," we will defer to the Commission's judgment in this regard.

To answer your third question, we note that as a creature of statute, the Commission has only those powers that are specifically granted to it by statute or which may be reasonably implied therefrom. Nucor Steel v. S.C. Public Service Comm., 310 S.C. 539, 426 S.E.2d 319 (1992); Piedmont Public Service Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996); see also Op. S.C. Atty. Gen., February 11, 1993 [stating that ". . . administrative agencies, as creatures of statutes, possess only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged:" (citing Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991))]. Therefore, we look to the authority specifically given to the Commission by the Legislature. As mentioned above, among the Commission's powers and duties, the Legislature afforded it the power to "determine, approve, and acknowledge by certification state recognition for Native American Indian entities...." §1-31-40 (A) (6).

In dealing with the power of the Commission after State Recognition, we note the South Carolina Supreme Court has stated that a governmental body of limited power is not in a strait jacket in the

administration of the laws under which it operates, because it also possesses powers which may be inferred or implied in order to effectively exercise the expressed powers possessed by it. In Beard Laney, Inc. v. Darby, 13 S.C. 380, 49 S.E.2d 564 (1948), the Court in ruling that the Public Service Commission had certain implied powers which grew out of their general power to regulate the operation of motor carriers held that, in the absence of implied or express restricting limitations of public policy or express prohibition of law, a governmental body possesses not only such powers as are conferred upon it by the laws under which it operates but, also, possesses such powers which must be inferred or implied so as to enable such entity to effectively exercise its express powers. The Court stated that "to say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions." Id., 49 S.E.2d at 567. Also, we note that in Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111, 121 (1947), it was determined the power to issue such regulations and orders as may be necessary to carry out the purposes and provisions of a particular act ". . . may itself be an adequate source of authority to delegate a particular function, unless by express provision of the act or by implication it has been withheld."

The validity of specific rules and regulations must of course depend on the actual content of the rules and regulations, but the authority of an administrative body to enact rules and regulations within the scope of the law governing the administrative agency is clearly established. Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972). The duties of the State Recognition Committee ("Committee") include the collection and review of information submitted from entities seeking State Recognition as a "Tribe," "Group," or "Special Interest Organization," and to make a recommendation to the Commission regarding each entity. The Commission's function is to then either reject or accept the recommendation of the Committee. Reg. 139-109; see Ops. S.C. Atty. Gen., July 22, 2011; December 13, 2004. To carry out the express duties in §1-31-40 (A) (6), it is a logical conclusion that the Commission implicitly has authority to subsequently review (*i.e.*, remove) State Recognition of an entity. It would seem that such authority would be sufficiently connected to the Commission's initial approval authority so as to come within the "implied powers" principal enunciated by the Darby Court.

Of course, the Commission would have to utilize some "measuring stick" to remove State Recognition, as this authority should not be utilized in a vacuum. The Commission would thus need to decide which standards to adopt by which it would thereafter regulate these entities. For example, Reg. 139-103 (B) sets out procedures for notification to an entity of an unfavorable recommendation from the Committee. The regulation further provides for a procedure for an appeal of the recommendation before the Commission. Any such regulations regarding subsequent review of State Recognition for existing entities adopted by the Commission would need to be promulgated in accordance with the provisions of the Administrative Procedures Act. The Commission would have a certain amount of discretion in adopting such regulations under its authority, but these regulations must not conflict with or change any statute conferring powers upon the Commission. As the South Carolina Supreme Court cautioned in McNickles, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 629, 503 S.E.2d 723, 725 (1998), "[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute. . . . A rule may only implement the law...." See also Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984); Hunter and Walden Co. v. South Carolina State Licensing Bd. for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978).

Closely related thereto is the fundamental principle that an administrative agency may not exercise legislative power. As we stated in an opinion dated November 10, 2004, ". . . the power to make laws is a legislative power and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the effect of legislation, or otherwise. Similarly, the power to alter or repeal laws resides only in the General Assembly and executive officers may not by means of construction, rules and regulations, orders or otherwise, extend, alter, repeal, set at naught or disregard laws enacted by the Legislature."

Conclusion

The Commission is granted broad authority to "determine, approve, and acknowledge by certification" State Recognition for Native American Indian entities. Pursuant to its authority, the Commission has promulgated regulations governing State Recognition. Consistent with prior opinions of this office, we will defer to the Commission's interpretation of its own regulations. Reg. 139-104 (F) provides that "[n]o entities [as discussed therein and] formed after January 1, 2006 shall be granted State recognition as a 'Tribe.' " However, we leave it to the Commission to decide whether other such entities formed under either tribal or State law may receive State Recognition as a "Tribe." Further, because the regulations provide no "grandfather" provisions, we defer to the Commission's decision regarding a request for State Recognition as a "Tribe" by a "Group" recognized before the 2006 amendments to the regulations. State Recognition as to a particular entity typically requires a factual determination by the Commission which is beyond the scope of an opinion of this office. Finally, we believe it is logical to conclude that implicit with the power to approve State Recognition, the Commission has authority to subsequently review (*i.e.*, remove) State Recognition of an entity based upon circumstances determined by the Commission. It is the opinion of this office that the Commission should adopt standards to further regulate these recognized entities, provided such do not conflict with or change any existing statute conferring powers upon the Commission.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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