7498 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 24, 2003

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

Dear Mr. Hayden:

At the request of the State Ethics Commission, you seek an opinion regarding the following matter:

> [d]uring a recent hearing before the Commission an attorney offered as a defense that the specific section of state law in question was unconstitutional as it was applied to his client. He asked the Commission to find the section unconstitutional and dismiss the charges. The Commission continued the case pending receipt of an Attorney General's opinion.

Thus, the specific question which you wish this Office to address is as follows: "[d]oes the State Ethics Commission have the authority to find a state statute, or any part thereof, unconstitutional and dismiss a charge against a public official as a result?"

We are advised that the particular statute in question is S. C. Code Ann. Sec. 8-13-1354. This provision requires a candidate, committee or other person making an expenditure in the distribution, posting, or broadcasting of a communication to voters supporting or opposing a public official, candidate or ballot measure to place his name and address on the printed matter or have his name spoken clearly on a broadcast so as to identify accurately the person and his address. It is the agency's concern that this provision may be unconstitutional in light of the United States Supreme Court decision of McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511 (1995). In McIntyre, the Court struck down as unconstitutional an Ohio statute which prohibited the distribution of anonymous campaign literature, concluding that "Ohio has not shown that its interest in preventing the misuse of anonymous election– related speech justifies a prohibition of all uses of that speech." McIntyre, supra, 514 U.S. at 358. Therefore, the Ohio law was deemed by the Court to violate the First Amendment.

Your question thus concerns the authority and duty of the State Ethics Commission in light of McIntyre as well as general law. You wish to know whether the Ethics Commission would possess the power to declare the South Carolina statute unconstitutional.

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

Law / Analysis

We begin with the basic principle set forth by the South Carolina Supreme Court in S.C. Tax Comm. v. S.C. Tax Bd. of Review, 278 S.C. 556, 559, 299 S.E.2d 489, 491 (1983). In that case, the Court addressed the powers of an administrative agency such as the Ethics Commission. There, the Court cautioned that

> [a]n 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. Quoting, 2 Am. Jur. 2d, Adm. Law, § 188, p. 21.

Moreover, it has also been stated that 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. 16 C.J.S., Constitutional Law, § 217. An administrative officer may apply only the policy declared in the statutes with respect to the matter with which he purports to act and he may not set different standards or change the policy. 73 C.J.S., Public Administrative Law and Procedures, § 32.

In addition, it is well settled that administrative agencies are not courts and may not exercise purely judicial powers of a court. In State v. Huber, 129 W.Va. 198, 40 S.E.2d 11 (1946), the Court concluded that administrative agencies possess no power to function as a part of the judiciary. And, in Schwartz v. Mt. Vernon-Woodberry Mills, Inc., 206 S.C. 227, 33 S.E.2d 517 (1945) our own Supreme Court addressed the powers of the Industrial Commission, the predecessor to the present Workers' Compensation Commission, concluding that the Commission was not a court. Quoting from 71 C.J. 917, par. 655, Workers' Compensation Acts, Schwartz, stated as follows:

> "[a]lthough under some statutes it has been held that the compensation board exercises judicial functions and is a judicial body, as a general rule it has been held that such a board is an administrative body belonging to the executive department of the state government through which the state functions with regard to employees who are entitled to compensation for injuries received in the course of their employment, or, as has been said, that it is a ministerial and administrative body, and that although some of its powers are quasi judicial or judicial in their nature, and although it may perform some incidental judicial functions, it has no judicial power within the general acceptation of that term or in the sense in which the term is used in constitutions, and the members are not considered as judicial officers, nor as a judicial body, nor as a court of general nor even of limited common-law jurisdiction."

33 S.E.2d at 521.

In applying these basic principles, our Supreme Court has consistently ruled that administrative agencies possess no power to rule on the constitutionality of a statute or to declare a statute unconstitutional. In S.C. Tax Commission v. S.C. Tax Bd. of Review, supra, the Court held that the Tax Board of Review's ruling that a statute violated the Constitution was "a power beyond its jurisdiction." 299 S.E.2d at 560. And, in Bft. Co. Bd. of Ed. v. Lighthouse Charter School, 335 S.C. 230, 516 S.E.2d 655 (1999), the Court concluded 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. South Carolina Tax Comm'n v. South Carolina Tax Bd. 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.

516 S.E.2d at 660-661.

Further, the Supreme Court has also dealt with this question in the context of the authority of Administrative Law Judges. In Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000), the Court expounded at some length upon the lack of power of Administrative Law Judges to rule upon the constitutionality of state statutes. There, the Court stated:

> in Video Gaming Consultants, Inc. v. South Carolina Department of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000), we held that as a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling. The basis for our decision was that Administrative Law Judges (ALJ's) come under the executive branch and must follow the laws as written. Allowing ALJ's to rule on the constitutionality of a state statute would violate the separation of powers doctrine.
>
> In Video Gaming, we held agencies and ALJ's could not rule on the validity of a statute. However, an agency or ALJ can still rule on whether a party's constitutional rights have been violated. Thus, contrary to the State's argument, merely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling.

538 S.E.2d at 247. Therefore, the Court opined that if the sole issue in a particular case is the constitutionality of a state statute, a party is not required to exhaust his or her administrative remedies because it would be futile to do so in view of the inability of the Administrative Law Judge to rule on the constitutionality of the statute. In the Court's view, quoting Video Gaming, supra, "[h]ere, declaratory relief should not be refused as there is no other effective remedy under the circumstances. The agency and the ALJ cannot rule on the constitutionality issue." Id., at 247-248. See also, Great Games, Inc. v. S.C. Dept. of Revenue, 339 S.C. 79, 529 S.E.2d 6 (2000).

Cases in other jurisdictions are in accord. See, Kaufman v. State of Kansas Dept. of Social and Rehabilitation Services, 248 Kan. 951, 811 P.2d 876 (1991); Dow Jones and Company v. State of Oklahoma, 787 P.2d 843, 845 (Okl. 1990) ["... as an administrative agency, it is powerless to strike down a statute for constitutional repugnancy .... The power assigned to boards and commissions is not coextensive with that which is vested in the courts. ... Every statute is hence constitutionally valid until a court of competent jurisdiction declares otherwise."]; Albe v. Louisiana Workers' Compensation Corp., 700 So.2d 824 (1997); Hoh Corp. v. Motor Vehicle Industry Licensing Bd., 736 P.2d 1271, 1276 (Haw. 1987) [if the administrative agency could rule on the constitutionality of a statute," there would be no judicial review of the pertinent legislative and administrative actions."]; State ex rel. Mallory v. Public Employees Retirement Bd., 694 N.E.2d 1356 (Ohio, 1998) [Public Employees Retirement Board, like other administrative agencies, lacks jurisdiction to rule on the constitutional validity of statutes].

Thus, our Supreme Court, as well as numerous courts elsewhere, have clearly held that an administrative agency, such as the State Ethics Commission, may not declare a statute enacted by the General Assembly to be unconstitutional. Such a ruling by a board or agency which is part of the executive branch, contravenes Art. I, § 8 of the Constitution which mandates a separation of powers among the legislative, executive, and judicial branches of government.

This does not end the inquiry, however. The more fundamental issue is what is the duty of an administrative body whose members not only are required to enforce state statutes, but who take an oath to uphold the federal and state constitutions as well. In this instance, the agency's dilemma is whether to enforce the state law as written, and possibly violate the federal Constitution, or adhere to its oath to uphold the Constitution and refuse to enforce the state statute. This dilemma is particularly problematical where the United States Supreme Court has already ruled that a virtually identical statute to § 8-13-1354 violates the First Amendment.

In prior opinions of this Office, we have attempted to reconcile the dilemma faced by administrative officers who are required to enforce state statutes but who may be liable for doing so as follows:

> [g]enerally, a public officer . . . may not decline to enforce laws found on the statute books until the courts have declared such enactments unconstitutional. . . . [citations omitted] . . . . However, a governmental officer who takes an oath to uphold the United States Constitution may act on the ruling of the Attorney General as to the doubtful constitutionality of a particular statute if the courts have not acted. . . . . This is consistent with the federal case law that would permit a governmental official to be held personally liable in a suit for money damages if he violates a person's clearly established constitutional rights. See, Harlow v. Fitzgerald, 73 L.Ed.2d 396 (1982). [and other cases]. . . . A court may deem such rights to be clearly established based upon the above analysis. This provides further authority for you, as well as any other South Carolina public official to decline to enforce the state statute. O'Shields v. Caldwell, [207 S.C. 194 219, 35 S.E.2d 184, 194 (1945)].

Op. S.C. Atty. Gen., July 12, 1984; Op. S.C. Atty. Gen., Op. No. 83-11 (April 7, 1983). See also, Dept. of State Highway v. Baker, 290 N.W. 257 (N. D. 1940) [auditor may rely upon fact that issue is one of great public importance, as well as upon opinion of the Attorney General that statute is unconstitutional, in declining to enforce statute.].

In O'Shields v. Caldwell, supra, the South Carolina Supreme Court held that the rule that an administrative officer may not decline to enforce a statute upon the ground that he believes the law to be unconstitutional is subject to the exception that the officer may raise the question of unconstitutionality if "he [is] liable to be injured pecuniarily." 207 S.C. at 219.

Moreover, in Thompson v. S.C. Commission Alcohol and Drug Abuse, 267 S.C. 463, 299 S.E.2d 718 (1976), the Court concluded that peace officers charged with the duty of enforcing criminal laws of the state possessed the requisite standing to bring an action challenging the constitutionality of the Uniform Alcoholism and Treatment Act which contained criminal penalties. The Court noted that

> [w]hile it is the general rule, as stated in Greenville County Fair Assn. v. Christenberry, 198 S.C. 338, 17 S.E.2d 857 (1941), that public officials may not contest the validity of a statute, the rule is not an inflexible one and we are of the opinion that the question involved [is] . . . of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action.

267 S.C. at 467. Likewise, in Henry v. Horry County, 334 S.C. 461, 514 S.E.122 (1999), the Court held that the Horry County sheriff possessed standing to challenge as special legislation the constitutionality of a statute removing the control of the jail from the sheriff's authority. In the Court's view, not only did the Sheriff possess "an economic interest in the fees connected with the housing of prisoners," but "he has several statutory duties with regard to the prisoners of Horry County." 334 S.C. at 463. See also, S.C. Tax Comm. v. United Oil Marketers, Inc., 306 S.C. 384, 412 W.E.2d 402 (1991) [declaratory judgment action brought by South Carolina Tax Commission to determine the constitutionality of statute providing for a tax incentive for gasoline blended with ethanol produced from gasoline blended with ethanol products grown within the State]; Harrison v. Lancaster, 204 S.C. 318, 28 S.E.2d 835 (1944) [magistrate may raise the question of the constitutionality of a statute which removed magistrate's right to appoint special constables for the service of papers]; Fed. Express Corp. v. Skelton, 265 Ark. 187, 578 S.W.2d 1, 4 (1975) [public officer may question the constitutionality of a legislative enactment "where public rights have matured and public interest is involved . . . ."; "an officer of the executive branch cannot be forced to comply with the provisions of an unconstitutional enactment of the State Legislature . . . ."]; Bd. of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

In Bd. of Ed. v. Allen, supra, the Supreme Court of the United States recognized that the Board of Education possessed standing to challenge the constitutionality of a New York statute

requiring school districts to purchase and loan textbooks to students enrolled in parochial as well as public and private schools. Holding that the Board had standing to sue, the Court stated:

> [a]ppellants have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step--refusal to comply with § 701--that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)

392 U.S. at 241, n.5.

As noted above, the South Carolina Supreme Court has recognized in O'Shields v. Caldwell, supra, that an administrative officer must consider the issue of liability for a violation of the constitution in determining whether to enforce what is perceived to be an unconstitutional statute. In Wilson v. Layne, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), the Supreme Court of the United States articulated the parameters of a public officer's liability under 42 U.S.C. § 1983 for that officer's alleged violation of an individual's federal constitutional rights by reiterating the standard for immunity from liability for an unconstitutional act. There, the Court stated:

> government officials performing discretionary functions generally are granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S., at 818, 102 S.Ct. 2727. What this means in practice is that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citing Harlow, supra, at 819, 102 S.Ct. 2727); see also Graham v. Connor, 490 U.S., at 397, 109 S.Ct. 1865.
>
> In Anderson, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S., at 639, 107 S.Ct. 3034. "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id., at 640, 107 S.Ct. 3034 (citations omitted); see also United States v. Lanier, 520 U.S. 259, 270, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

526 U.S. at 614-615. Of course, it may be argued that the State Ethics Commission is a quasi-judicial body and thus members thereof are entitled to the same absolute immunity under § 1983 as a judge would possess. See, Butz v. Economou, 438 U.S. 478 (1978). However, at least one court has refused to grant summary judgment in favor of a local Ethics Board on the basis that it possessed absolute immunity from liability. In Borne v. Chauffe, 1992 WL 211539 (E.D.La. 1992), the Court expressed concern that the proceedings before the city of Slidell's Ethics Board were "private" and may not have been required to be transcribed. Thus, the Court could not at the summary judgment stage conclude that the Ethics Board possessed the same absolute immunity as a judge. Therefore, it is not clear that a court would conclude that the Ethics Commission is absolutely immune from suit. If that is the case, then the issue would be whether enforcement of § 8-13-1354 by the Ethics Commission infringed upon a "clearly established" constitutional right thus making such action not entitled to even the qualified immunity defined in Harlow v. Fitzgerald.

Even if members of the Ethics Commission are absolutely immune, however, the United States Supreme Court has held that such absolute immunity does not protect even a judge from being enjoined to prevent future violations of the Constitution. If such injunctive relief is granted, the Court has held that absolute judicial immunity is no bar to the award of attorneys fees against the judge under 42 U.S.C. § 1988. Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). In Pulliam, the Court recognized that "Congress has made it clear in § 1988 its intent that attorneys fees be available in any action to enforce a provision of § 1983." 462 U.S. at 544. Thus, notwithstanding the immunities which may be available to members of the Ethics Commission – whether absolute or qualified – the risk of liability in any enforcement of an unconstitutional statute clearly remains.

In light of McIntyre, § 8-13-1354 is clearly constitutionally suspect. That statute deems it a criminal offense if a candidate, committee or other person does not place his name and address on campaign literature or have his name spoken clearly on a broadcast so as to "identify accurately the person and his address." As the Court recognized in McIntyre, the decision to remain anonymous with respect to a pamphlet or other literature "like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom protected by the First Amendment." 514 U.S. at 342. The Court rejected Ohio's argument that its provision, very similar to § 8-13-1354, was designed to serve the State's important and legitimate interest "in preventing fraudulent and libelous statements and its intent in providing the electorate with relevant information to be sufficiently compelling to justify the anonymous speech ban. Id., at 348. With respect to Ohio's interest in providing information to the voters, the Court concluded that this interest "does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." In addition, the Court found that "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message." Id., at 348-349.

Concerning Ohio's interest in preventing fraud and libel, the Court concluded that while that interest was stronger than the provision of information to the voters, it likewise fell short of

constituting the important governmental interest necessary justify the legislation under the First amendment. Justice Stevens wrote for the majority that

> [a]s this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. . . . It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. . . . . It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. . . . . It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code. Nor has the State explained why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection. We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here.

514 U.S. at 351-352. As noted, there is a close similarity between § 8-13-1354 and the Ohio provision struck down as unconstitutional in McIntyre. Thus, § 8-13-1354 is of doubtful constitutionality.

This being the case, the question arises as to what options the Ethics Commission has before it. Clearly, based upon the weight of authority referenced above, the Commission cannot itself "declare" or rule that the statute is constitutional. On the other hand, the Commission members are sworn to uphold the United States Constitution. As noted in previous opinions of this Office, public officers may decline to enforce state laws which are deemed unconstitutional by an opinion of the Attorney General and which might subject them to liability under 42 U.S.C. § 1983. See, Op. S.C. Atty. Gen., July 12, 1984; Op. S.C. Atty. Gen., Op. No. 83-11 (April 7, 1983; O'Shields v. Caldwell, supra.

Accordingly, in view of the dubious constitutionality of § 8-13-1354, and in light of the fact that the State Ethics Commission may already have before it a "contested case" involving the issue of whether or not § 8-13-1354 is constitutional, one approach would be to have the matter resolved by declaratory judgment. As referenced above, our Supreme Court has held in a number of cases that an administrative agency possesses the requisite standing to challenge the constitutionality of a statute where "the questions involved [is] of wide public concern. . . ." Thompson v. S. C. Commission on Alcohol and Drug Abuse, supra. See also, Henry v. Horry County, supra; S. C. Tax Comm. v. United Oil Marketers, supra. The issue here is indeed one "of wide public concern" and raises the question of fundamental constitutional rights versus the state's interest in protecting the sanctity of the election

process. Clearly, the Ethics Commission would need to have a court determine the scope of its authority in this area. While this Office can advise the Commission that the statute in question will likely not survive constitutional scrutiny, only a court can make a judicial declaration to that effect or enjoin § 8-13-1354's enforcement.

Another legal option is available for your consideration. While it is clear that the Ethics Commission may not declare § 8-13-1354 unconstitutional, this does not mean that the individual presenting the case before the Commission may not "nol pros" or dismiss the case because of an apparent unconstitutional statute. Our Supreme Court has held that the purpose of Art. I, § 22 of the South Carolina Constitution which prohibits the same person from serving as prosecutor and adjudicator in an administrative proceeding is to insure fairness and impartiality. Ross v. Medical Univ. of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997). Thus, in order to guarantee due process, these functions must remain separate in any administrative proceedings. Garris v. Governing Bd. of S. C. Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998); Baldwin v. S.C. Dept. of Highways and Public Transp., 297 S. C. 232, 376 S.E.2d 259 (1989).

Accordingly, while the Commission itself cannot rule that the statute is unconstitutional, it is logical to conclude that the "prosecutor" could dismiss a charge on that basis. Our Supreme Court has consistently held that a prosecuting officer can "nol pros" or dismiss a case for any reason other than a corrupt reason. cf. State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977). This would include a nol pros or dismissal by the prosecutor on the basis that application of a law "would be unconstitutional under decisions of the Supreme Court of the United States." State v. Harvey, 106 N.H. 446, 213 A.2d 428 (1965). In our opinion, this approach would not contravene the decisions of the South Carolina Supreme Court to the effect that an administrative agency may not declare a statute to be unconstitutional.

Conclusion

(1) 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.

(2) However, this does not resolve the inquiry of what action the Ethics Commission must take where a statute very similar to § 8-13-1354 has been held by the United States Supreme Court to be violative of the First Amendment. If a public officer violates a "clearly established" federal constitutional right, that officer could be liable pursuant to 42 U.S.C. § 1983. Even if the officer is entitled to absolute immunity, he or she could be liable for attorney's fees under 42 U.S.C. § 1988 if the statute is declared unconstitutional and any future enforcement is enjoined by the court. South Carolina case law as well as previous opinions of this Office have recognized that state officials may decline to enforce unconstitutional laws in reliance upon an opinion of the Attorney General where such enforcement could result in personal liability.

(3) Section 8-13-1354 is of doubtful constitutionality in light of the United States Supreme Court decision McIntyre v. Ohio, supra and would likely be declared unconstitutional by a court.

(4) In light of the potential for personal liability if the Ethics Commission enforces § 8-13-1354, the Commission possesses several options. Of course, as an administrative agency, the Commission is required to apply a statute in a constitutional rather than an unconstitutional manner. Accordingly, we assume that the Commission has addressed the possibility of narrowing the statute's scope to conclude that, based upon the particular facts, no violation occurred.

(5) If the Commission has exhausted this option, other options still remain. The Commission could enforce the statute subject to an appeal from its ruling. This would probably open the door for a § 1983 suit against Commission members. Secondly, if the aggrieved party does not appeal, the Commission could itself seek a declaratory judgment asking the Court to declare the statute unconstitutional. Our Supreme Court has recognized in a number of cases that an administrative agency or officer possesses the standing to challenge a statute's constitutionality where the issue is one of public importance and where the duties of the officer are affected by the constitutional question involved. Such would undoubtedly be the case here.

(6) As an alternative, the person "prosecuting" the case before the Commission could, like any other prosecuting officer, choose to dismiss or "nol pros" the case based upon McIntyre and other U.S. Supreme Court precedents as well as the opinion herein. This would not be inconsistent with the state Supreme Court cases recognizing that an administrative agency cannot "declare" a statute unconstitutional.

(7) It would be up to the Ethics Commission as to which of these options it chooses. This opinion only sets forth the law in this area as we understand it. We make no attempt to recommend a particular course of action.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an