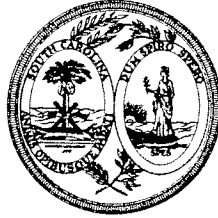


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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 13, 1997

The Honorable Mike Fair
Senator, District No. 6
P. O. Box 14632
Greenville, South Carolina 29610

Re: Informal Opinion

Dear Senator Fair:

You have requested "an unofficial opinion dealing with the new cabinet form of government we now have in place. For example, say you have a cabinet head who is over various boards and commissions and these boards and commissions have the authority to grant and remove licenses. Does this cabinet official have the right to reverse the decision that the board or commission has made with respect to licensing?"

Law / Analysis

The powers and duties of the various professional and occupational licensing boards are generally found in Title 40 of the Code. Over the course of several decades, these boards were created by their own enabling legislation and such boards have regulated their specific occupation or profession in South Carolina since that time. Depending upon the particular board or commission, the statutory powers and regulatory authority thereof has varied considerably.

Beginning with enactment of the Administrative Procedures Act, S.C. Code Ann. Sec. 1-23-10 et seq., however, the General Assembly has sought to impose a comprehensive system of procedures for state agencies, boards and commissions to follow in their decision-making. As our Supreme Court stated in Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 305 (1981),

Request Letter

[t]he Administrative Procedures Act ... was originally enacted in 1977. It purports to provide uniform procedures before State Boards and Commissions and for judicial review after the exhaustion of administrative remedies.

In 1993, another major administrative overhaul was undertaken by the General Assembly with the enactment of Government Restructuring. See Act No. 181 of 1993. Section 1-30-10 created the various departments of the executive branch of state government. Subsection (C) of § 1-30-10 mandates that "[e]ach department shall be organized into appropriate divisions by the governing authority of the department through consolidation or subdivision. Subsection (D) provides that "[t]he governing authority of a department is vested with the duty of overseeing, managing, and controlling the operation, administration and organization of the department."

Section 1-30-65 creates the Department of Labor, Licensing, and Regulation. Subsection (C) of Section 1-30-65 establishes within such Department the Division of Professional and Occupational Licensing Boards. Included within this Division are the various professional and occupational licensing boards which are authorized pursuant to Code provisions contained in Title 40. Section 1-30-65 provides in pertinent part that

[e]ffective on February 1, 1994, the following agencies, boards, and commissions, including all of the allied, advisory, affiliated or related entities as well as the employees, funds, property and all contractual rights and obligations associated with any such agency, except for those subdivisions specifically included under another department, are hereby transferred to and incorporated in and shall be administered as part of the Department of Labor, Licensing, and Regulation to be initially divided into divisions for Labor, State Fire Marshal, and Professional and Occupational Licensing

Based upon those statutory provisions, this Office, in an Informal Opinion, dated September 15, 1995, addressed the question of "whether the Director of the Department of Labor, Licensing, and Regulation exceeded his statutory authority when he refused to authorize travel at state expense for a member of the S.C. State Board of Dentistry." Our conclusion was that he did not. We stated:

[t]he plain and unambiguous language of § 1-30-10 and 1-30-65 grant the Director plenary authority to oversee, manage, and control the operation, administration, and organization of

the Department of LLR into which the Board of Dentistry has been transferred and incorporated. Therefore, since these statutes neither expressly nor implicitly limit the Director's authority in regard to approving or disapproving state authorized travel, this Office cannot say that the Director's actions in this matter exceed the powers conferred by the Legislature.

The question here, however, is how this supervisory and oversight authority, now found in the Restructuring Act, relates to a quasi-judicial licensure decision rendered by a professional or occupational licensing board. Reference must again be made to the Administrative Procedures Act. Section 1-23-310 defines "agency as "... each state board, commission, department or officer, other than the legislature or the courts, but to include the Administrative Law Judge Division, authorized by law to determine contested cases" Pursuant to 1-23-310(2), a "contested case" is

... a proceeding, including but not restricted to ratemaking, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;

Section 1-23-380(A) deals with judicial review of agency decisions. Pursuant thereto,

[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1 and Article 5 A preliminary, procedural, or, intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Subsection (B) further provides that

[r]eview by an Administrative Law Judge of a final decision in a contested case decided by a professional and occupational licensing board within the Department of Labor, Licensing, and Regulation shall be done in the same manner prescribed in (A) for circuit court review of final agency decisions, with the presiding Administrative Law Judge exercising the same authority as the circuit court; provided,

however, that a party aggrieved by a final decision of the Administrative Law Judge in such a case is entitled to judicial review of that decision by the circuit court under the provisions of (A) of this section and pursuant to Section 1-23-610(C). (emphasis added).

Of course, it is well recognized that, as a general rule, final decisions of an administrative agency are reviewable, but a court will not review determinations or decisions of an agency which are not or have not become final. 73A C.J.S. Pub. Adm. Law and Proced., § 205. As our Supreme Court has stated, "[i]t would be premature for a court to decide the merits of a dispute when the agency responsible for making the decision has not yet had an opportunity to decide the merits of the case." S.C. Baptist Hospital v. S.C. D.H.E.C., 291 S.C. 267, 270, 353 S.E.2d 277 (1987). Courts will not interfere with an administrative body at an intermediate point in its procedure and interim orders are not typically subject to judicial review. Id. In order to be final, an administrative order must leave nothing further for the agency to do. 2 Am.Jur.2d, Administrative Law, § 382. An agency decision is final where not the subject of any further proceedings at the agency. State of La. v. Dept. of Energy, 507 F.Supp. 1365, 1371 (W.D. La. 1981). Thus, your question is really what constitutes "final agency action" for purposes of judicial review with respect to decisions regarding licensure made by Title 40 boards and commissions.

Courts analyze a variety of factors in determining whether there is "final agency action" for purposes of APA judicial review. For example, in Jobs, Training and Services, Inc. v. East Texas Council of Governments, 50 F.3d 1318, 1324 (5th Cir. 1995), the Court enunciated such factors as

1. whether the challenged action is a definitive statement of the agency's position.
2. whether the action has the status of law with penalties for noncompliance.
3. whether the impact upon the plaintiff is direct and immediate.
4. whether immediate compliance is expected.

Moreover, in Pentax Corp. v. Myhra, 844 F.Supp. 611, 614 (D. Mont. 1994) the Court stated that for an agency decision to be final, it may not be preliminary, procedural or

intermediate and it must be final in the sense that available avenues of review within the agency must have been pursued and exhausted.

Of course, the particular statute in question is highly relevant in the eye of the courts to determine finality. See, Candlewick Lake Utilities Co. v. Ill. Commerce Comm., 65 Ill. App.3d 185, 382 N.E.2d 88 (1978); Western Colorado Congress v. Colorado Dept. of Health, 884 P.2d 1264 (Colo. Ct. App. 1992); Owen Steel Co., Inc. v. S.C. Tax Comm., 281 S.C. 80, 313 S.E.2d 636 (1984) [Tax Board of Review, not Tax Commission, is the agency from which there is judicial review].

Section 1-23-380(B) specifically refers to "[r]eview by an Administrative Law Judge of a final decision in a contested case decided by a professional and occupational licensing board within the Department of Labor, Licensing, and Regulation" This provision, although codified as part of the Administrative Procedures Act was enacted as part of the 1993 Restructuring legislation. Thus, it is apparent that the General Assembly intended to make the quasi-judicial decision of the professional and occupational licensing board regarding licensure the final agency decision for purposes of judicial review.

The South Carolina Court of Appeals' decision in Anonymous v. The State Board of Medical Examiners, ___ S.C. ___, 473 S.E.2d 870 (1996) is enlightening. This case, decided in 1996, three years after Restructuring, involved a decision by the Medical Board of Examiners to publicly reprimand a physician and place his license on probationary status. A hearing was held before a three-member panel of the Medical Disciplinary Commission. The Commission issued a certified report, which was then appealed to the Board. The "Board conducted a final order hearing." Id. Upon the issuance of the Board's final order, Anonymous then "appealed the Board's final order to the circuit court." The Court of Appeals, in reversing the circuit court which had reversed the Board, recognized that the Board's decision regarding licensure was the final agency action. Said the Court,

[t]he South Carolina Administrative Procedures Act (APA), S.C. Code Ann. § 1-23-310 et seq. (1986) governs the Board's action. Boggs v. State Bd. of Medical Examiners, 288 S.C. 144, 341 S.E.2d 635 (1986); see also S.C. Code Ann. § 1-23-310(1) (1986 and Supp. 1992) ("As used in this article ... '[a]gency means each state board ... authorized by law to make rules or to determine contested cases"); S.C. Code Ann. § 40-47-20 (1986 Supp. 1995) ("The Board shall adopt rules and regulations for its government, for the practice of medicine ..., for judging the professional and ethical

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competence of physicians and surgeons including a code of medical ethics, and for the discipline of physicians and surgeons").

Of course, the General Assembly is free to make licensing decisions of professional and occupational boards subject to review within the agency itself. This has been done in some states. See e.g., Obasi v. Dept. of Profess. Reg., 266 Ill. App.3d 693, 639 N.E.2d 1318 (1994) [Medical Disciplinary Board makes recommendations to the Director of Department of Professional Regulation]. See also, Waters v. S.C. Land Resources Conservation Comm., ___ S.C. ___, 467 S.E.2d 913 (1996) [appeal of decision of Land Resources Conserv. Comm. to Mining Council]. However, I am unaware of any present statute which requires review of a quasi-judicial licensing decision by a cabinet agency director or head. As referenced above, it appears that it is the Board's decision which is subject to judicial review as a "final agency" order. Accordingly, the Board's decision regarding licensure is the decision which is subject to review.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an