The State of South Carolina

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February 27, 1992

The Honorable William S. Houck, Jr., M.D.
Member, House of Representatives
314-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Houck:

By your letter of February 5, 1992, you enclosed a copy of H.4244 which would establish a State Health Services Cost Review Commission and prescribe its functions. You have asked that we examine this bill for "legal problems," specifying particularly that the manner of appointment of certain commission members has been questioned.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Proposed § 44-8-30 provides in relevant part:

> (A) There is established the State Health Services Cost Review Commission which consists of: ...
>
> (2) a representative of the South Carolina Hospital Association appointed by the Governor upon the recommendation of the association;

> (3) a representative of the South Carolina Medical Association appointed by the Governor upon the recommendation of the association; ....
>
> (D) The hospital association membership on the commission must alternate between a representative of a large, urban hospital and a smaller, rural, hospital. ....

The proposed statutes do not expressly require that those members nominated by the respective associations be members of the respective associations to be nominated. The issue under consideration is whether an unlawful delegation of power would occur in this instance.

Unlawful delegation challenges to the membership or appointment process relative to several boards or commissions have been made in a number of cases, among them Toussaint v. State Board of Medical Examiners, 285 S.C. 266, 329 S.E.2d 433 (1985); Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947); Gould V. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971); Gold v. South Carolina Board of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978); and Hartzell v. State Board of Examiners in Psychology, 274 S.C. 502, 265 S.E.2d 265 (1980). As noted in Hartzell,

> Article III, Section 1 of our State Constitution vests the legislative power in the "General Assembly of the State of South Carolina." This Court has interpreted that investiture to prohibit the delegation of the appointive power to a private person or organization. [Cites omitted.] ...
>
> In Gold, we struck down Section 40-9-30, Code of Laws of South Carolina (1976), because that Section on its face violated Article III, Section 1. The evil of that legislation was that it restricted the Governor's authority to appoint members to the Board of Chiropractic Examiners to a list of the members of an admittedly private organization, the South Carolina Chiropractors' Association. The statute we found

> facially invalid because by its very terms it usurped the appointive power[.] ...
>
> Here, while a private body, the South Carolina Psychological Association, submits a list of qualified candidates to the Governor who ultimately appoints members to the Board of Examiners in Psychology, there is nothing on the face of this statute which requires a qualified candidate to be a member of the private body which compiles the list. ...
>
> ... This Court has consistently approved the recommendation by private bodies with legitimate relationships to particular public offices of persons to fill those offices....

274 S.C. at 505-506.

Thus, the operative question is whether membership is required in the Hospital Association or Medical Association, respectively, for the two nominees in question. On the face of the proposed statute, no such membership appears to be expressly required. However, if these two members are to be representative of the respective associations, one must wonder how an individual not a member could represent the association in question; does the term "representative" thus infer that the nominee in question is to be a member of the nominating association? It is our opinion that proposed § 44-8-30(A)(2) and (3) would be ambiguous at best; though the presumption of constitutionality would nevertheless attach, it might be prudent to clarify those provisions to expressly provide that membership in the respective associations would not be a prerequisite to be nominated by the association. Otherwise, if § 44-8-30 should be adopted, it subsequently could be subject to constitutional attack, though of course, it would be presumed constitutional unless and until a court declared otherwise.

You have asked that we comment on other "legal problems" within the bill. A review of the bill reveals a number of potential challenges which an interested party could raise; regulations which would be adopted pursuant thereto undoubtedly could be subject to challenge, as has been the case in other jurisdictions. At this point it would be

premature and impossible to cover all of the possible legal challenges, however. If you have a specific question in mind, please advise and we will attempt to address it. Our research shows that a number of states have already created such hospital cost containment review agencies, which entities have been involved in litigation over a variety of issues; perhaps in response to a specific question we could locate some authority from another state to offer the guidance you seek.

With kindest regards, I am

Sincerely,

Patricia D Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

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