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The State of South Carolina

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May 26, 1989

The Honorable Peden B. McLeod
Senator, District 45
305 Gressette Building
Columbia, South Carolina 29202

Dear Senator McLeod:

As you know, your letter dated May 15, 1989, to Attorney General Medlock was referred to me for response. By that letter you request an opinion from this Office concerning "whether specific licensing fee amounts have to be set out in regulation or statute or can a board establish a range so that changes in fees can be made without submitting the change to the General Assembly for approval."

Apparently, your inquiry is prompted by proposed regulations promulgated by the Board for Social Work Examiners and the Environmental Certification Board. The proposed regulation of the Board for Social Work Examiners, about which you inquire, would provide, in relevant part:

> As of March 12, 1989, the Appropriations Act requires the Board to set fees to try to generate 115% of its appropriations, and the Board's initial license and annual/renewal license fees are $50 for Independent Social Workers, $45 for Master Social Workers, and $40 for Baccalaureate Social Workers. The applicable South Carolina statutes and acts may require adjustments and changes in the future, but no license fee, renewal fee or reinstatement fee shall exceed $50. (See Section 40-63-150 of the Code as amended).

S.C. Code Ann. R 110-10 (proposed Feb. 16, 1989). The proposed regulation of the Environmental Certification Board, about which you inquire, would amend S.C. Code Ann. R 51-12 (vol. 24 1976 & 1988 Cum. Supp.) to provide:

> As provided in Section 40-23-80 (E), South Carolina Code of Laws, 1976, as amended, no fee charged by the Board shall exceed the mount of seventy-five dollars ($75.00) and shall not be increased by more than six (6) percent per year, unless otherwise mandated by the legislature. [Emphasis in original.]

S.C. Code Ann. R 51-12 (proposed Nov. 22, 1988).

Considering S.C. Const. art. I, §8 concerning separation of powers,[1] your inquiry raises a constitutional issue. Although this Office may comment upon potential constitutional problems, the courts of this State have the sole province to declare an act unconstitutional or to make necessary findings of fact prior to finding a legislative act unconstitutional. S.C. Att'y Gen. Op., Apr. 25, 1989. Of course, when the validity of a legislative act is questioned, the court will presume the legislative act to be constitutionally valid and every intendment will be indulged in favor of the act's validity by the court. Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988). This presumption also inures in favor of administrative regulations. S.C. Att'y Gen. Op., Feb. 15, 1989.

Axiomatically, legislative authority may not be delegated. State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982). Though the principle of constitutional law that power conferred upon the legislature to make law cannot be delegated by that body to any other body or authority must be given full force and effect and should not be improperly extended for any consideration of convenience or supposed necessity; nevertheless, that principle must not be construed too broadly, since by doing so, the court would hinder even the most commonplace functions of administrative government. De Loach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938).

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[1] The South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

S.C. Const. art. I, §8.

While the legislature may not delegate its power to make laws to an administrative agency, Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621, appeal dismissed, 372 U.S. 521 (1962), the legislature has the right to vest in administrative officers and bodies a large measure of discretionary authority, especially to make rules and regulations as to the enforcement of the law, and such rules when promulgated are valid, if they are not in conflict with or do not change in any way the statute conferring such authority. Fisher v. J.H. Sheridan Co., 182 S.C. 316, 189 S.E. 356 (1937). The degree of authority that may lawfully be delegated to an administrative agency must in large measure depend upon the circumstances of the particular case at hand. Cole v. Manning, supra

The legislature may not vest unbrided, uncontrolled or arbitrary power in an administrative agency. In determining whether a statute vests unbridled, uncontrolled or arbitrary power in an administrative agency, the court must consider the administrative actions the statute in question affirmatively permits, must examine the entire statute in light of its surroundings and objectives without being restricted to the ascertainment of standards in express terms if they may reasonably be implied from the entire statute, and must resolve all reasonable doubt in favor of constitutionality and follow a constitutional construction if such a construction is possible. Bauer v. South Carolina State Hous. Auth., 271 S.C. 219, 246 S.E.2d 869 (1978). No violence is done to the principle of separation of governmental powers when the law, complete in itself, declaring legislative policy and establishing primary standards for carrying it out or, with proper regard for protection of the public interest and with such degree of certainty as the case permits, laying down an intelligible principle to which the administrative agency must conform, delegates the power to the administrative agency to prescribe regulations for the administration and enforcement of that law within its expressed general purpose. Cole v. Manning, supra.

Your specific inquiry apparently raises a novel issue in the decisional law of South Carolina. In addition, other jurisdictions reveal a dearth of cases which address this precise issue. See Annotation, Constitutionality of license statute or ordinance as affected by delegation of authority as to amount of bond of licensee, 107 A.L.R. 1506 (1937) (Analyzing "the constitutionality of license statutes or ordinances under the terms of which authority to fix the amount of the bond of the licensee is delegated by the legislature to an administrative board or official," "[a] majority of the cases involving the question under the annotation have held that the license statutes

involved, which authorized administrative agencies to fix the amount of the licensee's bond, did not create an unconstitutional delegations of legislative or judicial power."). In fact, my research reveals only one case on point as to your inquiry.

In Atlantic City Casino Hotel Ass'n v. Casino Control Comm'n, 203 N.J. Super. 230, 496 A.2d 714, certification denied, 102 N.J. 326, 508 A.2d 205 (1985),[2] the Superior Court of New Jersey, Appellate Division, considered an appeal brought from amendments to regulations of Casino Control Commission assessing license and work permit fees, placing a cap on the fees charged to vendors and junket operators, and in making year-end assessment of casinos to recover a shortfall. In Atlantic City Casino, supra, the court stated:

> The Legislature as the constitutional body having the power of taxation may enact taxes including a license tax but may not delegate that right to a non-governmental body such as the Casino Control Commission. See Van Cleve, 71 N.J.L. at 583, 60 A. 214. The Legislature may of course delegate to a regulative administrative agency the authority to impose a license fee to defray the costs of review of applications and of regulation and control providing the delegation is with sufficient guidelines and standards. See Avant v. Clifford, 67 N.J. 496, 549-53, 341 A.2d 629 (1975). The sufficiency of such standards, as stated by the Commission, is to be determined by an examination of the entire enabling act, its surroundings and objectives. Ward v. Scott, 11 N.J. 117, 123, 93 A.2d 385 (1952).

Id. at ___, 496 A.2d at 718.

As to the specific regulations that prompt your letter, a court would need to examine the enabling legislation for both the

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[2] Citing Atlantic City Casino Hotel Ass'n v. Casino Comm'n, 203 N.J. Super. 230, 496 A.2d 714, certification denied, 102 N.J. 326, 508 A. 2d 205 (1985), as authority for the legislature to delegate to an agency the authority to impose fees, the Superior Court of New Jersey, Appellate Division, held in Lower Main Street Assocs. v. New Jersey Hous. and Mortgage Fin. Agency, 219 N.J. Super. 263, 530 A. 2d 324 (1987), that certain closing fees imposed by regulation upon the sale of a project were patently excessive and invalid. Lower Main Street Assoc., supra, does not appear to be precisely on point here.

Board for Social Work Examiners[3] and the Environmental Certification Board[4] in light of the test prescribed in Bauer supra, and Cole, supra. Assuming South Carolina would follow the reasoning in Atlantic City Casino, supra, the validity of the enabling legislation which delegated the authority to impose a license fee would depend on the specific circumstances of the case, including the surroundings and objectives of the enabling legislation.[5] Assuming that the particular regulation is properly promulgated,[5] a South Carolina court might conclude that the South Carolina General Assembly can lawfully, based upon the circumstances of the specific case, establish by enabling legislation certain guidelines and standards concerning the imposition of fees by an administrative agency and then delegate to that administrative agency the authority to make rules and regulations for the administration and enforcement of those guidelines and standards, which might include establishing a specific amount of a licensing fee from a range provided in the enabling legislation. See S.C. Att'y Gen. Op., Nov. 13, 1986 (Addressing the question of "[c]an the General Assembly, by passage of a regulation, delegate to a State agency the authority to establish a fee schedule and grant by such regulation the authority to the governing board of the agency to set and approve the amount of fees," this Office concluded that "this Office cannot say with any certainty that the General Assembly has unlawfully delegated its legislative authority to South Carolina Department of Health and Environmental [C]ontrol in its approval of Regulation 61-51."). Compare 1988 S.C. Acts 658, §129.39 (The

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[3] The enabling legislation for the State Board of Social Work Examiners is found at S.C. Code Ann. §§40-63-10 through 40-63-150 (1976 & 1988 Cum. Supp.). Section 40-63-150 provides: "No license fee, renewal fee, or reinstatement fee in excess of fifty dollars may be established by the board."

[4] The enabling legislation for the South Carolina Environmental Certification Board is found at S.C. Code Ann. §§40-23-10 through 40-23-170 (1976 & 1988 Cum. Supp.). Section 40-23-80(E) provides: "All assessments and licensing fees must be determined by the board and all fee increases must be approved by the General Assembly pursuant to Chapter 23 of Title 1."

[5] A particular regulation might be challenged on constitutional or other grounds besides impermissible delegation, e.g., due process; equal protection; failure to comply with requirements of the South Carolina Administrative Procedures Act, S.C. Code Ann. §§1-23-10 through - 400 (1976); vagueness; or being in conflicting with its enabling legislation. This Opinion does not address challenges based on such other grounds.

1988-89 appropriations act requires, inter alia: "Professional and Occupational Licensing Boards may adjust fees, if necessary, to generate revenue at least fifteen percent above the 1988-89 state appropriation.") and 1988 S.C. Acts 658, §129.43 (prohibiting increases of existing fees with certain exceptions)[6]

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[6] The 1988-89 appropriations act provides:

> (A) No state agency, department, board, committee, commission, or authority, may increase an existing fee for performing any duty, responsibility, or function unless the fee for performing the particular duty, responsibility, or function is authorized by statutory law and set by regulation except as provided in this paragraph.
>
> (B) This paragraph does not apply to:
>
> (1) state-supported governmental health care facilities;
> (2) state-supported schools, colleges, and universities;
> (3) educational, entertainment, recreational, cultural, and training programs;
> (4) the State Board of Financial Institutions;
> (5) sales of state agencies of goods or tangible products produced for or by these agencies;
> (6) charges by state agencies for room and board provided on state-owned property;
> (7) application fees for recreational activities sponsored by state agencies and conducted on a draw or lottery basis;
> (8) court fees or fines levied in a judicial or adjudicatory proceeding;
> (9) the South Carolina Public Service Authority or the South Carolina Ports Authority.
>
> (C) This paragraph does not prohibit a state agency, department, board, committee, or commission from increasing fees for services provided to other state agencies,

(Footnote 6 continues on next page.)

with S.C. Att'y Gen. Op., #78-198 (Nov. 21, 1978)("If there exists an irreconcilable conflict between the maximum fees specified with §§40-15-140, 40-15-250 and 40-15-270 of the South Carolina Code, 1976, the fees specified in Dental Board Regulations R 39-1, R 39-2, R 39-3 and R 39-4 and the mandatory proviso of §95, Part I, of the General Appropriations Act for fiscal year 1978-79,[7] then the prior permanent provisions are suspended for the time the Appropriations Act is in effect.").

To summarize, only a court can ultimately decide whether specific authority delegated by the South Carolina General Assembly to an administrative agency, such as the examples you cite in your letter, violate article I, §8 of the South Carolina Constitution. To reach that decision, a court would need to

(Continuation of footnote 6.)

> departments, boards, committees, commissions, political subdivisions, or fees for health care and laboratory services regardless of whether the fee is set by statute.
>
> (D) Statutory law for purposes of this paragraph does not include regulations promulgated pursuant to the State Administrative Procedures Act.

1988 S.C. Acts 658, §129.39.

[7] The 1978-79 appropriations act provided, in relevant part:

> Provided, That notwithstanding provisions of Sections 40-15-10 through 40-15-380, Code of Laws, 1976, all revenues and income from licenses, examination fees, other fees, sale of commodities and services, and income derived from any other Board or Commission source or activity shall be remitted to the State Treasurer as collected, when practicable, but at least once each week, and shall be credited to the General Fund of the State. Provided, Further, all assessments, fees and/or licenses shall be levied in an amount sufficient to at least equal the amount appropriated in this section.

1978 S.C. Acts 644, §95.

analyze the circumstances of the particular case at hand, including for example the enabling legislation and the impact, if any, of 1988 S.C. Acts 658, §§129.39 & 129.43.

In conclusion, a court would probably analyze a challenge based on impermissible delegation and determine that the South Carolina General Assembly can lawfully establish by enabling legislation certain guidelines and standards concerning the imposition of licensing fees by an administrative agency and then delegate to that administrative agency the authority to make rules and regulations for the administration and enforcement of those guidelines and standards, which might include establishing a specific amount of a licensing fee from a range provided in the enabling legislation. Of course, the court's determination would necessarily depend on the circumstances of the specific case, including the express language contained in the enabling legislation.

I hope the above will be of assistance to you. If I can answer any questions, please contact me.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Assistant Attorney General

SLW/fg

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