The State of South Carolina

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John H. Holladay, Jr., Boxing Commissioner
2nd Congressional District
State Boxing Commission
Bonham Center-Suite C-100
914 Richland Street
Columbia, South Carolina 29201

Dear Mr. Holladay:

You have asked this Office to advise on the constitutionality and legality of two proposed amendments to S.1017.

A new Section 52-7-145 is proposed as follows:

> Section 52-7-145. The Athletic commission and its members shall be immune from any civil liability which may arise as a result of regulations or actions by the commission. In addition, the participants, promoters, and buildings involved in the events regulated by this section may contract as to their respective liabilities.

You also forwarded the following alternative:

> No member of the commission, or its committees, officials, referees, inspectors, agents and employees shall be held liable for acts performed in the course of official duties, or for the health and safety of participants and spectators at wrestling and boxing events.

Constitutionality

The State and Federal Constitutions are not grants of authority to the legislatures, but rather are limitations on their inherent

authority. That which the Constitutions do not forbid, they allow. Furthermore, the Courts presume that statutes are constitutional and do not hold otherwise without compelling reasons.

There is a dearth of case law addressing the constitutionality of such statutory immunity provisions for public bodies and their agents, perhaps because such provisions were basically unnecessary until common law sovereign immunity was abolished by the Supreme Courts of the various states which have done so.

There have, however, been several state statutes immunizing parole or mental health officials from liability for injuries resulting from releasing inmates or patients. The state and federal courts have uniformly failed to find these statutes to be unconstitutional.

For instance, "Section 845.8 (a) of the California Government Code Annotated (West Supp. 1979) provides:

> Neither a public entity nor a public employee is liable for:
>
> (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

The California courts held that this statute provided appellees with a complete defense to appellants' state-law claims. They considered and rejected the contention that the immunity statute as so construed violated the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." The United States Supreme Court also upheld the constitutionality of the complete statutory immunity, holding that the statute did not deprive the ex-convicts victim of her life or her property without due process of law. Martinez vs. California, 444 U.S. 277, 281 (1980). Furthermore, the California and U. S. Supreme Courts found that there "'is a rational relationship between the state's purposes and the statute' in that the California Legislature could reasonably conclude that judicial review of a parole officer's decisions 'would inevitably inhibit the exercise of discretion'". Id. 282 and 283. See also Graves vs. Cox, 559 F.Supp. 772, at 776 (4th Cir. 1983) citing Martinez and Logan vs. Timmerman, 455 U.S. 422, 102 S.Ct. 1148, 71 L.E.2d 265 (1982), for the principle that "the state remains free to create substantive immunities for use in adjudication--just as it can amend its welfare or employment programs" in upholding a Virginia tort claims procedure as providing the full and adequate process due under the Fourteenth Amendment, despite the existence of a governmental immunity defense.

In addition to California, at least New York and Pennsylvania have similar statutory immunity for paroling officials for acts committed by parolees. Significantly, in Armstrong vs. Pennsylvania Board of Probation and Parole, 46 Pa.Cmwlth. 33, 405 A.2d 1099 (Cmwlth. Ct. of Pa. 1979) the court held that the statute [granting immunity] was not unconstitutional because it acted retroactively to bar suits that would otherwise have been allowed by virtue of the judicial abolition of sovereign immunity, and that, therefore, the Commonwealth and the board continued to enjoy immunity from suit. 6 A.L.R. 4th 1166 citing Armstrong, id.

Similar statutes granting government immunity from liability for injuries caused by negligently released mental patients exist at least here in South Carolina (Section 44-17-900, Code of Laws of South Carolina, 1976, it's constitutionality was not addressed in Sharpe vs. S. C. Department of Mental Health, ___ S.C. ___, 315 S.E.2d 112 (1984)), and in California, and Michigan. The Michigan Supreme Court, which had also abolished sovereign immunity in general, declined to hold this specific statutory governmental immunity unconstitutional in Allen vs. State Department of Mental Health, 79 Mich. App. 1700, 26 N.W.2d 247, 248 (1977); citing Puttnam vs. Taylor, 398 Mich. App. 41, 247 N.W.2d 512, 515 n. 8 (1976), citing Thomas vs. St. Highway Department, ___ Mich. App. ___, 247 N.W. 530 (1976).

Thus, in the discovered cases, the courts have upheld the constitutionality of a statute granting specific and absolute governmental immunity where the state supreme courts had abolished sovereign immunity in general. Furthermore, the South Carolina Supreme Court case which abolished sovereign immunity in South Carolina, McCall vs. Batson, ___ S.C. ___, ___ S.E.2d ___, (S.C. S.Ct. Op. #22290, April 18, 1985) stated that it did not "abolish the immunity which applies to all legislative, judicial and executive bodies and to public officials who are vested with discretionary authority, for action taken in their official capacities;" holding that "[t]hese discretionary activities cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by public officials.... The exercise of discretion includes the right to be wrong."

In addition to the specific statutory grant of governmental immunity in Section 44-17-900 there are a number of other statutes which grant immunity to South Carolina boards and commissions, as your letter points out.

Specifically, Section 40-37-300 of the Chapter on the Board of Examiners in Optometry and Section 40-38-240 of the Chapter on the Board of Examiners in Opticianry provide that "[n]o member of the Board, or its Secretary, its committees, special examiners, agents

and employees shall be held liable for acts performed in the course of official duties except where actual malice is shown."

Although these were passed effective June 3, 1982, prior to the abolition of sovereign immunity in general, April 18, 1985, their passage was probably in anticipation of it, and the Pennsylvania and Michigan cases and McCall itself would indicate that enacting such a statute after McCall's abolition of sovereign immunity in general would not create any problems per se. These cases, in conjunction with Martinez, do not indicate any constitutional problems.

While arguments could perhaps be made that the proposed amendment does not treat all public officials or board members uniformly with respect to their liability, such a decision is a matter primarily for the General Assembly. So long as the decision to provide absolute immunity is rationally related to the Legislature's purpose, it would be constitutional.

It also appears that the phrase "for the health and safety of participants and spectators at wrestling and boxing events" has been added because of the provision of Section 52-7-30 that "[t]he commission shall promulgate regulations as necessary for the protection of the health and safety of participants and spectators". There does not appear to be any constitutional or legal problem with this in light of the analysis above and because this is a codification of, or in line with, the immunity for discretionary and quasi legislative acts which McCall did not abolish.

In short, there do not appear to be any constitutional or other major legal problems with the proposal which you have referenced.

Other Possible Legal Problems

The proposal however raises some legislative and drafting issues. The proposed immunity for the commission itself may conflict with pending legislative proposals regarding governmental entities in the Tort Claims Act. Immunity is not specifically limited to acts performed in the course of official duties, although this is probably intended. Furthermore, the proposal does not extend protection to those officials, referees, inspectors, agents and employees to which the Athletic Commission refers.

The last sentence, which provides that "[i]n addition, the participants, promoters and buildings involved in the events regulated by this section may contract as to their respective liabilities" raises several questions. It is ambiguous and you may wish to consider whether the provision is necessary and appropriate. Moreover it appears to be unrelated to the primary purpose of the immunity provision.

I believe that this sentence is designed to address a problem which the wrestling promoters anticipate will arise from proposed regulations addressing promoter's responsibility for the health and safety of participants and spectators. Any such problem should also be addressed in any such regulation, with language such as: "nothing herein shall be interpreted to prohibit a promoter licensed under this chapter from contracting with third parties regarding their responsibilities and obligations to provide for the health and safety of participants and spectators in wrestling and boxing events."

Conclusion

In short there are no apparent constitutional or other significant legal problems with the second proposed amendment.

Sincerely,

James W. Rion /st.

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REVIEWED AND APPROVED BY:

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