The State of South Carolina

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The Honorable John I. Rogers, III
Member, House of Representatives
505-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Rogers:

By your letter of February 20, 1987, you have asked the following questions of this Office:

1. What agency of State government has the authority to regulate or control advertising by proprietary schools of real estate?

2. Is Section 105-200 of the Rules and Regulations of the S. C. Real Estate Commission a valid regulation?

3. Does the Education Director of the S. C. Real Estate Commission have the authority to create and appoint members to the S. C. Real Estate Commission Instructors Committee, or any other committee, designed to give input, advice or consultation to the S. C. Real Estate Commission, or the Education Director of the S. C. Real Estate Commission?

4. What authority, if any, does the S. C. Real Estate Commission have with regard to regulating advertisement by proprietary schools of real estate?

Questions 1, 2 and 4 raise similar issues, therefore, these inquiries will be addressed together. Following that, Question 3 will be discussed.

DISCUSSION

Section 59-59-30(a) of the 1976 S. C. Code of Laws, as amended, provides that the State Board of Education (Board) has the authority to license proprietary schools meeting the standards prescribed by the Board. Section 59-59-20 sets forth the definition of a proprietary school:

> (1) "Proprietary school" means any person offering resident or correspondence courses to students upon the payment of tuition or fees.
>
> (2) The definition of a proprietary school shall not include the following:
>
> (a) A school or educational institution supported entirely or partly with State funds.
>
> (b) A parochial or denominational school or institution or members of the South Carolina Independent School Association, Incorporated.
>
> (c) A school or training program which offers instruction primarily in the field of an avocation, recreation, health, or entertainment, as determined by the State Board of Education.
>
> (d) Courses of instruction or study sponsored by an employer for the training and preparation of its own employees.
>
> (e) Courses of instruction or study sponsored by recognized trade, business, or professional organizations for the instruction of their members.
>
> (f) Private colleges and universities which award an associate, baccalaureate, or higher degree.

(g) A school offering a program only for children twelve years of age or younger.

(h) A school which is regulated and licensed under an occupational licensing act of the State.

(i) Courses of instruction or study where the tuition charge does not exceed twenty-five dollars for the complete course of instruction.

(j) Private school offering courses of instruction to resident and/or day students of legal school age at the elementary and secondary level.

As you are aware, this Office, in Opinion No. 78-134, dated July 12, 1978, determined that real estate schools, unless they come within one of the exclusions allowed by Section 59-59-20(2), are proprietary schools. That determination is affirmed.

As proprietary schools, real estate schools must meet the standards established by the Board. By the provisions of Section 59-59-30(a), the Board is authorized to set standards which include, but are not limited to, "course offerings, adequate facilities, financial stability, competent personnel and legitimate operating practices."

The operating practices or the operations of a business are "the whole process of planning for and operating a business or other organized unit." 29-A Words and Phrases, pp.446, 1972. It would seem to follow that because the very existence of a real estate school depends upon its ability to attract students to receive instruction, the "operating practices" of a school would, of necessity, include its efforts to advertise or sell itself to prospective students; whether such efforts take the form of signs, media announcements or the employment of salesmen.

Support for this conclusion may be found in the case of People v. Benc, et al., 288 N.Y. 318, 43 N.E.2d 61 (1942). At issue in Benc was whether the defendants were "operating" a laundry within the meaning of an ordinance which made the operation of a laundry without a license a criminal offense.

In support of its conclusion that the defendants had not operated a laundry, the Court found, among other things, that no signs were displayed calling attention to the presence of the machine in the building owned and maintained by the defendants. Benc, supra, at page 62. In other words, the lack of any effort on the part of the defendants to advertise, contributed to the Court's determination that they were not operating a laundry.

The converse of that argument would appear to lead to the conclusion that advertising falls within the scope of a business' operations or operating practices. Therefore, the Board, invested by Section 59-59-30(c) with the authority to establish standards for the operating practices of proprietary schools, has the authority to regulate the advertising practices of such schools. This conclusion is reinforced by the provisions of Section 59-59-30(c), in which the Board is expressly granted the authority to formulate standards for the approval of salesmen, etc....of proprietary schools. Moreover, the Board pursuant to its statutory authority, has promulgated an extensive set of regulations governing the advertising practices of proprietary schools (see 1976 S. C. CODE, Volume 24, R 43-124).

Coupled with the determination that the legislature has placed the authority to regulate advertising by proprietary schools of real estate within the province of the Board, is an apparent absence of any legislative intent to grant such authority to the Real Estate Commission (Commission). Nevertheless, the Commission has promulgated regulations by which it attempts to govern the advertising practices of proprietary schools of real estate (see: 1976 S. C. Code, Volume 27, R 105-200). These regulations generally prohibit proprietary schools of real estate from: (a) advertising any affiliation with any real estate company, real estate franchise or licensee of the Commission; (b) advertising in the real estate sales or help wanted columns of newspapers or directories; (c) representing that successful completion of their course of study will guarantee passing any state real estate examination or obtaining any real estate license.

In general, the authority of an administrative agency to prescribe rules and regulations extends only to such matters as are, by legislative enactment, within the province of the agency. 73 CJS, Public Administrative Law and Procedure, Section 88, pp.580, 1983. An agency may not use its delegated power to enlarge its powers beyond the scope intended by the legislature. Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 380 (1948).

In Beard-Laney, the S. C. Supreme Court applied the above-mentioned principles in the context of determining whether the Public Service Commission, which, unquestionably, had the authority to grant franchises to carriers, also had the authority to permit the holder of a franchise to transfer a portion of that franchise to another carrier. The Court stated that, in the absence of an express statutory limitation, an administrative body:

> "....possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the powers admittedly possessed by it....
>
> ....But, there is a fundamental distinction between an attempted broadening of the scope of the jurisdiction of the Commission and (as here) the formulation of a rule which merely takes into consideration the action heretofore taken by the Commission on the propriety of the granting of a franchise to a particular individual...."

Beard-Laney, supra, at page 567.

An examination of the issue raised by your question in light of the distinction formulated by the Court in Beard-Laney, appears to indicate that there is little doubt but what that any suggestion that the Commission, by virtue of a statute which confers upon it the authority to license real estate brokers, etc..., also has the authority to regulate the operations of proprietary schools of real estate, would be an impermissible attempt to broaden the scope of the Commission's jurisdiction.

This Office, in the previously mentioned Opinion No. 78-134, stated that:

> "The Real Estate Commission had broad power under § 40-57-10, et seq. of the 1976 Code of Laws, as amended, to regulate and license real estate

> brokers, counsellors, salesmen, etc. § 40-57-100, as amended, gives the Commission power to approve many prerequisites for taking the examination for a real estate license, one being the requirement that the institution be approved by the Real Estate Commission.
>
> There is no indication in the Act that the Legislature intended to grant the Real Estate Commission authority to regulate and license real estate schools." (emphasis supplied).

The conclusion reached in the language quoted above is affirmed insofar as it indicates that a grant of authority to license real estate brokers, counsellors, etc.... who have studied at schools "approved" by the Commission does not translate into a grant of authority to regulate or control such schools. As opposed to an ability to control, to approve means "to commend; to be satisfied with; to confirm, ratify, sanction, or consent to some act or thing done by another, to sanction officially; to ratify; to confirm; to pronounce good; think or judge well of; admit the propriety or excellence of; be pleased with." Western Hospital Association, et al. v. Industrial Accident Board, et al., 51 Idaho 334, 6 P.2d 845, (1931). Also, see 3A Words and Phrases, "Approve".

It might be argued that the authority to approve infers the authority to regulate or control. However, there is persuasive authority to the effect that an exercise of administrative power may not be based upon inferences drawn from statutory provisions. Siler v. Louisiville and N. R. Co., 213 U.S. 175, 29 S.Ct. 451, 53 L.Ed. 753 (1909); Piedmont and Northern Railway Company v. Scott, 202 S.C. 207, 24, S.E.2d 353, (1943).

In Piedmont, the S. C. Supreme Court, setting out the principles governing the regulatory authority of administrative bodies, held that the powers of such agencies:

> "....are not to be derived from mere inference. They must be founded upon language in the enabling acts which admits of no other reasonable construction.

> Such bodies, being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted."

It seems clear that the power granted by the legislature to the Commission to license real estate brokers, counsellors, etc...., does not necessarily imply a grant of authority to regulate proprietary schools of real estate, particularly when the legislature has, by express provision, vested that authority in another body (the Board). Therefore, in the absence of an express grant of such authority to the Commission, it must be concluded that the Commission has no authority to regulate the advertising practices of proprietary schools of real estate and, as a result, Section 105-200 of the Rules and Regulations of the S. C. Real Estate Commission is of questionable validity.

Your final question concerns the authority of the Education Director of the Commission to appoint and receive input and advice from a Real Estate Commission Instructors Committee or any other committee. By the provisions of Section 40-57-80, the legislature has authorized the Commission to appoint a Real Estate Commissioner to administer the provisions of Chapter 57. The Commissioner is empowered to employ such additional assistants as may be authorized by the Commission and to prescribe such duties for his assistants as may be necessary in the discharge of the duties required. Pursuant to this statutory authorization, the Commissioner has employed an Education Director. For purposes of this discussion, it is assumed that one of the duties prescribed for the Director by the Commissioner is the responsibility of soliciting input and advice from interested persons on the Commission's efforts to carry out its mission. It is also assumed that the committees appointed by the Education Director to render such advice and input are composed of private persons rather than employees or officials of the Commission.

The issue raised by your question is one of delegation of power; in this instance, the power to legislate. Article III, Section 1 of the S. C. Constitution vests the legislative power of the State in the General Assembly.

It is settled law in South Carolina that the legislature cannot, constitutionally, delegate the power to make law to any other body, (Deloach v. Scheper, et al., 188 S.C. 21, 198 S.E. 409, (1938)); or to private persons or corporations, (State v. Watkins, 259 S.C. 185, 191 S.E. 2d 135, (1972)). However, in Davis v. Query, 209 S.C. 41, 39 S.E. 2d 117, at page 121 (1946), the S. C. Supreme Court recognized that:

> "A legislative body may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purpose and spirit of the legislation and carry it into effect; and the action of the legislature in giving such rules and regulations the force and effect of laws does not violate the constitutional inhibition against delegating the legislative function".

Clearly, the legislature can, as it has done by virtue of the provisions of Chapter 57, authorize the Commission to "fill up the details" by prescribing rules and regulations governing real estate brokers, counsellors, etc. More to the point, however, is whether the Commission, in the person of its Education Director, can consult with, or receive input on its regulatory efforts from committees of private persons.

Decisions of the S. C. Supreme Court in cases involving constitutional challenges to the functions of professional licensing boards shed some light on this issue. In Gold v. S. C. Board of Chiropractic Examiners, 271 S.C. 74, 245 S.E. 2d 117, (1978), the Court examined a statute that required membership in the Chiropractic Association, a private organization, as a condition to membership on the Board. The Court found that such a requirement allowed the Association to control the appointment, and thus, was an unconstitutional delegation of the power of appointment which belonged to the Governor.

In Toussaint v. State Board of Medical Examiners, et al., 285 S.C. 266, 329 S.E. 2d 433, (1985), a doctor

challenged the disciplinary function of the State Board of Medical Examiners on the basis that the statute prescribed membership in the Medical Association, a private group, as a prerequisite to membership on the Board. Adhering to the reasoning in Gold, supra, the Court held that the statute, which essentially allowed the private group to control the appointment, was an unconstitutional delegation of the appointive power.

Also instructive on this issue is the Court's decision in Hartzell v. State Board of Examiners in Psychology, 274 S.C. 502, 265 S.E. 2d 265, (1980). Unlike the statutes in Gold and Toussaint, the statute in Hartzell did not restrict the field of candidates for appointment to the Board to only those persons who were members of the Psychological Association. Consequently, the Association did not control the power of appointment and the statute was not violative of Article III, Section 1. The Court stated that it:

> "....has consistently approved the recommendation by private bodies with legitimate relationships to particular public offices of persons to fill those offices." Hartzell, supra, at page 267.

The circumstances underlying your question do not involve an attempted statutory delegation of power. Nevertheless, it might be argued that the principles set forth in Gold, Toussaint and Hartzell are applicable because the Education Director's consultations with the committees amounts to a "de facto" delegation of the authority conferred on the Commission by the legislature. As in Gold, Toussaint and Hartzell, the issue turns on whether the committees, in fact, control the power which Article III vests in the General Assembly and which the General Assembly is allowed to confer on the Commission. Davis v. Query, supra.

The answer to this question would necessarily require an examination of the nature of the relationship between the Commission and the committees. If the relationship were such that the recommendations made by the committees were, as a matter of course, accepted by the Commission, in whole, and without any attempt to exercise the discretion to accept, modify or reject such recommendations, then these circumstances would arguably constitute an unconstitutional delegation of power to private persons. On the other hand, if the Commission's practice was to give consideration to

the recommendations of the committees while retaining full control over the authority granted it by the legislature, there would seem to be no violation of Article III, Section 1.

CONCLUSIONS

It is the opinion of this Office that:

1. The legislature has placed the authority to regulate or control advertising by proprietary schools within the province of the State Board of Education.

2. Section 105-200 of the Rules and Regulations of the S. C. Real Estate Commission is probably not a valid regulation.

3. The Education Director of the S. C. Real Estate Commission is not prohibited from creating and appointing members to a S. C. Real Estate Commission Instructors Committee, or any other committee, designed to give input advice or consultation to the S. C. Real Estate Commission, or the Education Director of the S. C. Real Estate Commission, so long as the Commission retains full control of the authority granted to it by the legislature.

4. The legislature has not granted to the S. C. Real Estate Commission the authority to regulate advertising by proprietary schools of real estate.

Respectfully submitted,

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WEJ/fc

APPROVED BY:

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Opinions

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[1]This Office, in previous opinions, has considered the applicability of the Freedom of Information Act, Section 30-4-10, et seq., to advisory committees made up of private persons. See, for example, Opinion No. 84-125, October 26, 1984). Although the issue of delegation of power was not examined in these opinions and in the cases cited therein, the courts in those cases seem to have, at least, implicitly recognized the validity of committees of private persons appointed or convened to provide input to public bodies.