1981 WL 158246 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 23, 1981

***1** Ms. Kit Smith
Research Assistant
Senate Medical Affairs Committee
Brown Office Building
Columbia, South Carolina

Dear Kit:
We have reviewed the memorandum as you requested from the Medical Affairs Committee concerning policies governing 'sunset' reauthorization legislation. Those policies appear to be consistent with the Constitution. As to Policy I(A.) specifically, the Supreme Court has held that the statutory selection process for licensing board members may provide for nomination of such members by a private professional association, so long as 'nothing . . . requires a qualified candidate to be a member of the private body which [makes the nominations.]' Hartzell v. State Board of Examiners in Psychology, 274 S.C. 502, 265 S.E.2d 265 (1980). Although it is not free from doubt as to how this rule would be applied in a future case, it would appear that the proposed policy is consistent with Hartzell insofar as the nomination process employed by a private association is not restricted to association members. Of course, the safest procedure as far as constitutional requirements are concerned would be to provide that a nomination from a private association would not be binding on the Governor. See Gold v. S.C. Board of Chiropractic Examiners, 721 S.C. 24, 245 S.C.2d 117 (1978). This would avoid any constitutional problem arising from a subsequent judicial determination that the delegation of the appointive power had actually been made to a private organization in violation of Art. III, § 1, S.C. CONSTITUTION. Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971).

You have asked also whether the gubernatorial appointment powers contain an implied power to reject any nominee found 'unfit.' This question would arise in the case of a binding nomination to the Governor. It is the opinion of this Office that the Governor could most probably be restricted by the express terms of a statute which limited his appointment powers.

Although making an appointment to a public office involves an act of discretion, 63 Am.Jur.2d, 'Public Officers and Employees' § 89, the statutes empowering an official to make appointments may prescribe the manner in which such appointments are to be made. Supra at § 99, citing Calvert County v. Monnett, 164 Md. 101, 164 A.155, 86 A.L.R. 1258 (1933). The general grant of power to the executive contains no inherent right to exercise the power of appointment. Heyward v. Long, 178 S.C. 351, 183 S.E. 165 (1935); 63 Am.Jur.2d, 'Public Officers and Employees,' § 90. Rather, that power is exercised pursuant to an express grant of authority from the legislature. Thus the Governor's power of appointment could, most probably, be limited by express terms of the statute conferring the power on him. Blalock v. Johnston, 180 S.C. 40, 49, 185 S.E. 51, 54 (1936). He could, therefore, not reject a nominee if the statute provided that it was binding. If it were a binding nomination from a private association, however, it would be somewhat more likely that the court could find that the private association was exercising its nominating powers in an unconstitutional manner, restricting its nominating process to association members in violation of Article III, § 1, S.C. CONSTITUTION. Gold v. South Carolina Board of Chiropractic Examiners, supra. If the Governor were free to reject a nomination, however, the likelihood would be reduced that a court would find an unconstitutional delegation of the appointment power.
Sincerely yours,

***2** David C. Eckstrom
Assistant Attorney General

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