1980 WL 120914 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 6, 1980

***1 RE: Act No. 501 of 1980**

P. L. Meek, Colonel
South Carolina Highway Patrol
Post Office Box 191
Columbia, South Carolina 29202

Dear Colonel Meek:
You have requested advice as to whether the amendment to Code of Laws of South Carolina §56-1-370 as embodied in Act No. 501 of 1980 is constitutional. That Act amended §56-1-370 so as to permit implied consent hearings held pursuant to subsection (e) of § 56-5-2950, to be held, in the discretion of the licensee, before a magistrate in the county where the licensee was arrested, and that such magistrate could rescind an order of the Department concerning suspension, cancellation or revocation of a license, or modify or extend the suspension, cancellation or revocation of such license. It is the opinion of this office that this amendment is unconstitutional because it violates the separation of powers clause of the South Carolina Constitution.

Article 1, § 8 of 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 function of one said department shall assume or discharge the duties of any other.

The separation of powers mandate is followed by Articles III, IV and V which delineate the authority and functions of the three departments of governments in South Carolina. Its primary purpose is to prevent the concentration of power in the hands of few and provide a system of checks and balances. State ex rel. McLeod vs. Yonce, 261 S.E.2d 303 (1979). This principle operates in a broad manner to confine the power of making laws to the Legislature, the power of enforcing laws to the Executive Department, and the power of interpreting laws to the Judiciary. The rule is generally recognized that constitutional constraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another; offices of one branch of the government may not usurp or exercise the powers of either of the others and as a general rule, one branch of government cannot permit its powers to be exercised by another branch. 16 Am Jur. 2d, Constitutional Laws § 210. It is the opinion of this office that this Act imposes upon the Judiciary responsibilities which are not judicial in nature, and infringes upon the powers of the Executive branch of government.

It is important to note that the magistrate courts are included within the State's unified Judicial system. State ex rel. McLeod vs. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978). Additionally, the act of suspension for refusing to submit to a breath/alcohol test, pursuant to Code of Laws of South Carolina § 56-5-2950 is administrative in nature. Op. Atty. Gen. 3017 (1970); See also Parker vs. State Highway Department, 224 S.C. 263, 78 S.E.2d 382 (1953). The provision of magisterial review of suspensions under the implied consent law, only substitutes the magistrate for the Department's duly-authorized agent. The scope of the hearings is still limited to the three issues enumerated in the statute. In essence, the magistrate is a judicial officer conducting an administrative hearing. This is precisely the type of circumstance which the separation of powers provision was deemed to have prohibited in the recent case of State ex rel. McLeod vs. Yonce, supra. In that case, the court permanently enjoined circuit judges from sitting on the Public Service Commission hearings and ruling on questions of evidence in the conduct of

the case. This office can find no factual distinction between the principles embodied in that case and the General Assembly's actions in this circumstance.

***2** A statute may be constitutional in one part and unconstitutional in another part and if the invalid part is severable the portion which is constitutional may stand while that which is unconstitutional is stricken out. Dean vs. Timmerman, 106 S.E.2d 665 (1959). The question as to whether constitutional portions shall be upheld while other divisible portions are eliminated is one of Legislative intent. The entire purpose of Act 501 was to amend the statute to allow for magisterial review in addition to Departmental review. It was the intention of the General Assembly that the Department have the power possessed previously, but not exclusively. If the unconstitutional portions are retained it will read exactly as the section is found in the 1976 Code. It is, therefore, the opinion of this office that the entire act must be stricken. Since § 56-1-370 has not been constitutionally amended nor repealed, its language and effect is the same as it was prior to Act 501 of 1980.

If I can be of any further assistance, please let me know.
Sincerely,

Richard D. Bybee
Assistant Attorney General

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