1977 WL 46008 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 31, 1977

MEMO

SUBJECT: J. U. A.

***1** Victor S. Evans
Deputy Attorney General

The question has been presented as to whether or not Act No. 306 of the 1975 Acts and Joint Resolutions of South Carolina violates Article I, §22 of the South Carolina Constitution, or any other State law.

Act No. 306 provides for a Joint Underwriting Association, to be called into operation by the Insurance Commission when an emergency exists because of the unavailability of medical malpractice insurance. The portions of the Act subject to question are Sections 16 & 17, which make the South Carolina Insurance Commissioner chairman of the board of directors of the Joint Underwriting Association, ex officio, and requires him or his designee, to preside at all board meetings and to vote only in case of a tie. Section 17 provides that:
Appeals-judicial review.-Any applicant for insurance through the association, any person insured pursuant to this act, or his representative, or any insurer adversely affected, or claiming to be adversely affected, by any ruling or decision by or on behalf of the association, may appeal to the Commissioner within thirty days after any such ruling, action or decision.

All orders of the Commissioner made pursuant to this act shall be subject to judicial review as provided in Section 37-70 of the 1962 Code.

An examination of State ethics laws and dual office holding laws reveals no prohibition against Sections 16 & 17. However, a much closer question is presented by Article I, Section 22, of the Constitution. This Section reads as follows:
Procedure before administrative agencies; judicial review.
No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudiciation; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review. (1970 (56) 2684; 1971 (57) 315.)

The question remaining for decision, simply stated, is whether the Insurance Commissioner's involvement in the decision making process of the J.U.A. and his position as appeal officer from decisions of the J.U.A., violates the mandate of Article I, Section 22.

Act No. 306 also places these additional duties upon the Commissioner:
1) compute “net direct premiums”;

2) promulgate a plan of operation consistent with the purpose of this act;

3) approve amendments to the plan of operation; hearing;

4) make amendments to the plan after public hearing;

5) promulgate a statistical data plan;

6) require production of loss, claim or expense data;

7) approve policy forms, classifications, rates, rating plans and rating rules;

8) prescribe format of annual statement to be filed by association.

***2** The specific portion of Article I, §22 is as follows:
. . . nor shall he be subject to the same person for both prosecution and adjudication. . .

In an effort to ascertain the intent of this language, the minutes of the Constitutional Revision Committee were examined. Two portions of these documents were helpful. Starting on page 34 the Section 22 language is discussed generally. Beginning on page 896 it is considered in more detail. These minutes indicate that the proposed Kentucky Constitution contained similar language, and that the apparent originator of the language was Professor Robert Rankin of Duke University, in his short work State Constitutions, The Bill of Rights, published by the National Municipal League in 1960.

A summary of the drafter's minutes reveals that one primary thrust of Section 22 was to insure that the same administrative agent would not act in any appellate or review capacity over decisions which he himself made, or participated in making. The intent is to provide, as far as possible, an unprejudiced and unbiased forum for reviewing administrative decisions prior to such decisions becoming the final word of the agency.

Professor Rankin's book treats this subject in some detail and expands on the reasons for including such a section in a state constitution. These reasons are based on the continually expanding role of administrative agencies in controlling and regulating everyday life. Such a power to control mandates a concurrent process for fundamental fairness in evaluating administrative decisions. One element of fundamental fairness is the right to an impartial review of administrative decisions.

It has been learned that the State of Kentucky has not enacted its new constitution, and therefore the language borrowed therefrom has not been subject to interpretation. Nevertheless the evidence which is available is adequate to interpret Section 22.

The terms “prosecution” and “adjudication” should be given a meaning consistent with their use in administrative law settings, and not in their narrower, criminal law usage. “Prosecution” in the administrative arena should mean the development, establishment, advancement or advocacy of a particular policy, decision, or proposed course of action. “Adjudication” should mean a determination on the merits of a particular policy, decision, or proposed course of action.

Such interpretations are arguably consistent with the traditional dictionary definition of the terms. “Prosecute” means, according to Webster's New World Dictionary, Second College Edition, 1974:
1. To follow up or pursue (something) to a conclusion 2. to carry on; engage in; 3. a) to institute legal proceedings against. . .

Black's Law Dictionary, Fourth Edition, 1968, defines the term in part:
To follow up; to carry on an action or other judicial proceeding;

Webster's supra, defines “adjudicate”, in part, as “to hear and decide (a case)”;. Black's supra, defines the term as “to settle in the exercise of judicial authority. To determine finally.”

***3** These definitions give credibility to the meanings attributed above to these words, as the words are used in Section 22.

By comparison, a more restricted definition of “adjudication” and “prosecution” produces arbitrary and undesirable results. If the terms applied only to a specific cause of action brought against a specific individual, resulting or to result in any individual or personal detriment, the vast majority of agency decisions would escape the protection of Article 1, §22. For example, an individual licensed to sell real estate would be entitled to a separate prosecutor and adjudicator, but a property owner desiring to protest a zoning change would not be entitled to the separate treatment. Such a result is arbitrary and capricious and does not conform to the intent expressed by the drafters and Professor Rankin.

It is therefore the Opinion of this writer that the portion of Section 17 of Act No. 306, making all decisions of the J.U.A. subject to review by the Insurance Commissioner, is in contravention of Article I, Section 22 of the South Carolina Constitution. The Commissioner is too deeply involved in the workings of the J.U.A., (promulgating its plan of operation, establishing its premium rates and voting on ties) to enable him to be a neutral appellate officer in harmony with Article I, Section 22 requirements.

Examples of this defect are readily apparent. If a decision is made by the J.U.A. board, and the vote is split, the Commissioner makes the decision. On appeal he is reviewing his own decision. If the vote is not split, but is adverse to the Commissioner, he can have someone with standing appeal the decision, and overturn it on appeal. Such results are clearly abhorent to the intent of Section 22.

Assuming that portion of Section 22 is unconstitutional which makes the Commissioner the appellate officer, the next question becomes whether the defective provision is serverable. Under generally accepted principles of statutory interpretation, the constitutionally defective portions of such statutes are severable, if the remaining provisions conform with legislative intent. See, Thompson, et al. v. S. C. Comm. on Alcohol and Drug Abuse, et al., Opinion No. 20295, filed October 26, 1976, and authority cited therein.

Section 17 provides for an appeal first to the Commissioner and then to the Circuit Court as provided for in the case of all Orders of the Commissioner. Vitiating the Commissioner's appellate authority still leaves review of the decision in the Circuit Court. Although there is no order of the Commissioner to appeal from, the fact that its absence is due to constitutional infirmities should cause the Court to realize the decision is a final one and is therefore ripe for judicial review. Also, a disappointed party has a right to judicial review of a final administrative decision in a contested case under 1977 Act No. 176, better known as the Administrative Procedure Act.

***4** It became abundantly clear that the unconstitutional appeal to the Commissioner can be removed from the statute without doing any real damage to the legislative intent of the whole statute. Therefore, the statute can stand intact after the unconstitutional portion is removed. See Thompson, et al., supra and authority cited therein.

A final comment should be made concerning Article I, Section 22. The mandate of this Section should be incorporated within a statute of this state to insure that all public agencies are made aware of the need to conform their methods of operation with Section 22. An appropriate vehicle would be the State's new Administrative Procedures Act, No. 176 of 1977 Acts and Joint Resolutions. This law could be amended to include the requirement that no individual be subjected to the same officer for adjudication and prosecution. Guidelines could be set forth to minimize the expense and inconvenience involved, while still providing the minimum requisites of due process required under Article I, Section 22.

If the Administrative Procedures Act is not a viable choice, an entirely new law could be proposed to the General Assembly to accomplish this purpose.

George C. Beighley

1977 WL 46008 (S.C.A.G.)

End of Document