

1977 S.C. Op. Atty. Gen. 283 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-356, 1977 WL 24695

Office of the Attorney General

State of South Carolina

Opinion No. 77-356

November 9, 1977

\*1 TO: Calvin L. Stewart  
Director  
Analysis and Examinations-Market Conduct Division  
South Carolina Department of Insurance

QUESTIONS PRESENTED:

1. Is the Patients' Compensation Fund a State agency?
2. Can the Patients' Compensation Fund contract with the South Carolina Medical Association whereby certain functions and duties of the Patients' Compensation Fund are delegated to the South Carolina Medical Association for its handling?

AUTHORITIES:

Act No. 674, 59 Acts and Joint Resolutions 1773 (1976);

[Kerr v. Enoch Pratt Free Library](#), 54 F.Supp. 514 (D.Md. 1944);

[Ex Parte York County Natural Gas Authority](#), 238 F.Supp. 964 (D.S.C. 1965);

[Trustees of Dartmouth College v. Woodward](#), 4 Wheat. 578, 671, 4 L.Ed. 629;

[Bush v. Aiken Electric Cooperative, Inc.](#), 226 S.C. 442, 85 S.E.2d 716 (1955);

2 Am.Jur.2d, [Administrative Law](#), Section 221, p. 51, Section 224, p. 55;

[Beard-Laney, Inc., et al. v. Darby, et al.](#), 213 S.C. 380, 49 S.E.2d 564 (1948);

[Fleming v. Mohawk Wrecking and Lumber Co.](#), 331 U.S. 111, 91 L.Ed. 1375, 67 S.Ct. 1129 (1947);

73 C.J.S., [Public Administrative Bodies and Procedure](#), Section 57, pp. 381–382;

[Gaddis v. Cherokee County Road Commission](#), 195 N.C. 107, 141 S.E. 358 (1928).

DISCUSSION:

It is the opinion of this Office that the Patients' Compensation Fund (hereinafter referred to as the PCF) may be considered to be an agency of the State exercising certain public functions. The PCF was created by Act No. 674, 59 Acts and Joint Resolutions 1773 (1976) (hereinafter referred to as the act) to pay that portion of any medical malpractice claim, settlement, or judgment in excess of one hundred thousand dollars per incident or in the excess of three hundred thousand dollars in the aggregate of

one year. Pursuant to this act, the PCF is a legal entity operated and managed by a Board of Governors composed of various individuals appointed by the Governor. These members are selected on a representative basis from among several pertinent and representative groups. The fund itself, and any income generated from it is by statute designated to be deposited in the Office of the State Treasurer, and is to be handled in a similar manner as all other State funds. All records of the PCF are open to public inspection and are subject to audit by the State Auditor. Furthermore, the Board of Governors is given the express authority to promulgate any such rules and regulations as may be necessary to carry out the provisions of the act establishing the PCF.

Based on the above, it is established that the PCF is a legal entity. It can be further stated that the PCF is a public or state entity, as opposed to a private entity, in that it is subject to control by public as opposed to private authority.

In [Kerr v. Enoch Pratt Free Library](#), 54 F.Supp. 514 (D.Md. 1944), the District Court held that:

\*2 The legal test between a private and a public corporation is whether the corporation is subject to control by public authority, state or municipal. To make the corporation a public one, its managers, whether trustees or directors, must be not only appointed by public authority but subject to its control. 54 F.Supp. at 523 (Emphasis Added). See also Ex Parte [York County Natural Gas Authority](#), 238 F.Supp. 964 (D.S.C. 1965).

In explanation of the above, the Court cited the case of [Trustees of Dartmouth College v. Woodward](#), 4 Wheat. 518, 671, 4 L.Ed. 629, where the United States Supreme Court had similarly stated that:

When [a] corporation is said at the bar to be public, it is not merely meant, that the whole community may be proper objects of the bounty, but that the government has the sole right, as trustees of the public interest to regulate, control, and direct the corporation, and its funds, and its franchises at its own good will and pleasure. 4 L.Ed. at 667 (Emphasis Added). (In [Ex Parte York](#), *supra*, in a footnote, it was noted that the words 'public or private corporation' are applicable to 'authority' or 'agency'.)

In [Bush v. Aiken Electric Cooperative, Inc.](#), 226 S.C. 442, 85 S.E.2d 716 (1955), the South Carolina Supreme Court determined that although the particular cooperative did serve a public purpose, it was not a government entity since it was not controlled by the State in any manner.

In the particular situation involving the PCF, this particular entity is established by statutory law, has its Board of Governors appointed by the Governor, and is fiscally managed by the State as earlier indicated. Thus based on these State interests and controls, it can reasonably be indicated that the PCF is a legitimate public agency of the State.

The Board of Directors of the PCF has by contract dated July 1, 1977, entered into an agreement with the South Carolina Medical Association (hereinafter referred to as the SCMA) for the purpose of having the SCMA 'handle all administrative functions of the PCF.' The SCMA is, according to the minutes of the June 25, 1977 meeting of the Operations Committee of the PCF, to perform a minimal caretaker service.

As to the question of whether it was proper for the PCF to enter into such a contract with the SCMA, it is the opinion of this Office that such contract is proper. However, the interpretation of the authority given the SCMA under the contract should be limited as hereinafter expressed.

While the act establishing the PCF does not specifically empower the Board of Governors to contract with the SCMA as previously described or with any entity, the power to so contract is necessarily implied by the act creating the PCF. The act mandates that a Board of Governors is created to manage and operate the fund. Thus, it may necessarily be implied that such Board has the power and duty to employ whatever necessary administrative services as are necessary to carry out the purposes of the PCF.

\*3 Express authority to delegate is not necessary in all cases, since the authority to delegate within the agency, even as to discretionary and quasi-judicial functions, may be deemed implied or contained in certain provisions of the statute, such as an

express power to appoint such employees as are deemed necessary to carry out the functions of the agency . . . 2 Am.Jur.2d, Administrative Law, Section 221, p. 51.

Similarly in [Beard-Laney, Inc., et al. v. Darby, et al.](#), 213 S.C. 380, 49 S.E.2d 564 (1948), the South Carolina Supreme Court in ruling that the Public Service Commission had certain implied powers which grew out of their general power to regulate the operation of motor carriers held that in the absence of implied or express restricting limitations of public policy or express prohibition of law, a governmental body possesses not only such powers as are conferred upon it by the laws under which it operates but also possesses such powers which must be inferred or implied so as to enable such entity to effectively exercise its express powers. The Court stated that ‘to say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.’ 213 S.C. at 389.

The PCF Board of Governors is, as earlier indicated, empowered to promulgate such rules and regulations as may be necessary to carry out the provisions of the act creating the PCF. In [Fleming v. Mohawk Wrecking and Lumber Co.](#), 331 U.S. 111, 91 L.Ed. 1375, 67 S.Ct. 1129 (1947), it was determined that the power to issue such regulations and orders as may be necessary to carry out the purposes and provisions of a particular act ‘. . . may itself be an adequate source of authority to delegate a particular function, unless by express provision of the act or by implication it has been withheld.’ 91 L.Ed. at 1385.

While the Board's action in making the contract may be deemed proper, the authority possessed by the SCMA under such a contract is limited. Admitting that agencies are deemed on occasion to have the authority to delegate even discretionary functions, it should be emphasized that for this particular situation, the SCMA has no authority to perform or assist in any capacity involving judgmental discretion. Absent any authority indicating otherwise, the SCMA should be deemed to only have that authority necessary to assist the Board in matters of an administrative or ministerial capacity.

In general administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, and they cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or other officers or tribunals. Although mere ministerial functions may be delegated, in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another, powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment; and subordinate officials have no power with respect to such duties. 73 C.J.S., Public Administrative Bodies and Procedure, Section 57, pp. 381–382

\*4 In [Gaddis v. Cherokee County Road Commission](#), 195 N.C. 107, 141 S.E. 358 (1928), the North Carolina Supreme Court noted that an administrative board exercising public functions cannot by contract deprive itself of any right to exercise the discretion delegated to it by law in performing public duties.

Article 5 of the July 1, 1977 contract details that the SCMA is ‘. . . to review claims with potential PCF liabilities and to make the necessary reports to the PCF Claims Committee.’

The rule that requires an officer to exercise his own judgment and discretion in making an order does not preclude him from utilizing, as a matter of practical administrative procedures, the aid of subordinates directed by him to investigate and report the facts and their recommendation in relation to the advisability of the order. 2 Am.Jur.2d, Administrative Law, Section 224, p. 55.

The duty of the SCMA under the contract however should not be broadly construed or interpreted in any way which would enable the SCMA to exercise any judgmental discretion. Thus the contract between the SCMA and the PCF should be strictly construed to enable the SCMA to only carry out duties of a strictly administrative or ministerial capacity. Any matters involving judgmental discretion should be left to the authority of the PCF.

#### CONCLUSION:

It is the opinion of this Office that the Patients' Compensation Fund is a legitimate public agency of this State. Furthermore, this Office is of the opinion that the July 1, 1977 contract between the Patients' Compensation Fund and the South Carolina Medical Association whereby certain functions and duties of the Patients' Compensation Fund are delegated to the South Carolina Medical Association for its handling is proper, subject to the limitation that such contract should not be construed to assign any responsibilities other than that of an administrative or ministerial capacity to the South Carolina Medical Association.

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