1976 WL 30405 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 6, 1976

***1 RE: THE POWERS OF THE SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL AND THE DIVISION OF HEALTH AND SOCIAL DEVELOPMENT OF THE OFFICE OF THE GOVERNOR VIS-A-VIS COMPREHENSIVE HEALTH PLANNING AND HEALTH FACILITIES FRANCHISING IN SOUTH CAROLINA.**

The Honorable Lachlan L. Hyatt
Chairman
South Carolina Board of Health and Environmental Control
Post Office Box 4088
Spartanburg, South Carolina 29303

Dear Mr. Hyatt:
You have asked for an opinion on several questions concerning the above-captioned topic. As you will note, I have taken the liberty of rephrasing some of your questions for the sake of brevity and clarity. Also, my discussion of the issues may not appear in the same sequence as the questions in your letter of July 22, 1976. This is because some of the questions present basically the same legal issues and I thought it best to consolidate my discussion where possible. I shall set out those specific questions as subheadings within this opinion.
CONSIDERING THE PROVISIONS OF SECTIONS 32-501, ET SEQ., OF THE SOUTH CAROLINA CODE, AND OF P.L. 93-641:
A. DOES THE DIVISION OF HEALTH AND SOCIAL DEVELOPMENT OF THE OFFICE OF THE GOVERNOR HAVE THE AUTHORITY UNDER STATE LAW TO ASSUME AND CARRY OUT STATE HEALTH PLANNING FUNCTIONS?

B. WHAT RESPONSIBILITIES DOES THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL HAVE FOR HEALTH PLANNING IN SOUTH CAROLINA?

Sections 32-501, et seq., of the Code of Laws of South Carolina, as amended, is the codified version of Act No. 1001 of the 1968 Acts and Joint Resolutions for South Carolina. That Act quite clearly established the South Carolina State Board of Health (whose functions and authorities have been granted by law to the South Carolina Department of Health and Environmental Control) as '—the single and official State agency for administering the State's health planning functions as defined in The Federal Act.' (Section 32-503) (Emphasis added.) Further, it is provided that, [t]his agency [State Board of Health] shall accept, retain, and administer on behalf of the State any funds appropriated by the Congress and allocated to the State for use in health planning.' (Id.)

The cited Federal authority for the health planning functions alluded to in the proposed 'Memorandum of Agreement Between South Carolina Department of Health and Environmental Control and South Carolina Division of Health and Social Development' is P.L. 93-641 (The National Health Planning and Resources Development Act of 1974). The 'Federal Act' referred to in Section 32-503 of the Code is P.L. 89-749 (the Partnership for Health Act of 1966) as amended by P.L. 90-174 and P.L. 91-515. Section 32-503 originally referred only to P.L. 89-749, but was amended in 1971 to include references to the later Federal acts. That section has not been amended since.

Congressional legislative authority for pre-1974 programs for health planning and resources development (including P.L. 89-749, P.L. 90-174 and P.L. 91-515) expired on June 30, 1974. After that time the programs' functions were funded with released impounded monies or under continuing resolutions. P.L. 93-641 created a new program of State and areawide health planning and development which endeavored to combine the best features of those existing programs. [See U.S. Code Congressional and Administrative News, Vol. 4, 1974 at pp. 7842-9001, Legislative History].

***2** The question of the Board of Health and Environmental Control's responsibilities under Section 32-503 of the Code is to a large extent dependent on whether the State Comprehensive Health Planning Act can stand since P.L. 89-749, P.L. 90-174 and P.L. 91-515 have expired.

It is a clear proposition of law in South Carolina that one South Carolina statute or any provision thereof may be made a part of another South Carolina statute through incorporation by reference of the adopted statute. University of South Carolina v. Mehlmen, 245 S.C. 180, 139 S.E.2d 771 (1964); Wellington v. Clinton-Newberry Natural Gas, 224 S.C. 417, 71 S.E.2d 7 (1952). The same applies to a Federal statute and rules and regulations. It has been so declared by our Supreme Court in at least one case: Santee Mills, et al., v. Query, et al., 122 S.C. 158 (1922). In that case the Court rejected an attack on the State's Income Tax Law claiming an unconstitutional attempt to give the force of statute law to the Federal Income Tax Law and certain regulations through adoption by reference into the State act. The Court said at page 167: 'In the absence of express constitutional inhibition, therefore, we see no reason why a Federal statute and rules and regulations of the United States Government having the force and effect of law cannot be made a part of the statute law of this State by adequate reference thereto as fully and effectively as a preexisting statute of the State could be so adopted.'

The question left then is what effect a subsequent modification or repeal of the provisions of a statute adopted by reference has upon the adopting statute. There are two general rules: (1) the adoption of a statute by reference is an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted; (2) a subsequent amendment or repeal of an adopted statute has no effect upon the antecedent law (adopting statute) unless such intent is expressed or arises by necessary implication. (See 168 A.L.R. 627-636.) Thus, the determination of whether the adoption is restricted to the law at the time of its adoption or includes subsequent modifications, repeals or revisions is fundamentally a question of legislative intent and purpose.

Section 32-503 of the Code incorporates the various Federal enactments by specific reference. It is generally held that when a statute makes such a specific adoption, such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute unless it does so by express intent. 168 A.L.R. 627, 631 (1947). While there are no South Carolina cases precisely on point, Santee Mills v. Query, supra at pp. 168-169, contains dicta implying that position.

Thus, we are left with the possible result that the Board of Health and Environmental Control's responsibilities under Section 32-503 of the Code are directed to the accomplishment of the State's health planning functions as they are defined by P.L. 89-749 as amended by P.L. 90-174 and P.L. 91-515. (P.L. 90-174 and 91-515, which merely extended P.L. 89-749 and added minor provisions, are also adopted into 32-503 by specific reference.)

***3** This position is tempered somewhat by the further statement in Section 32-503 that, 'This agency [State Board of Health] shall accept, retain, and administer on behalf of the State any funds appropriated by the Congress and allocated to the State for use in health planning.' [Emphasis added]. This could be construed as a legislative statement of express intent that subsequent additions or modifications of the incorporated federal acts are to be included. But, the fact that the Legislature did in 1971 specifically amend the Act to incorporate subsequent federal amendments militates against placing too much reliance on this proposition. In any case, it is the clear intent of the Legislature to vest fiscal control

over all federal health planning funds coming into South Carolina to the Board of Health and that provision cannot be repealed by an action of the Governor's Office. It is a clear principle of constitutional law that the power to make laws is a legislative power, and may not be exercised by executive officers, either by means of rules, regulations or orders having the force and effect of legislation or otherwise. Similarly, the power to alter or repeal laws is a legislative power, and executive officers may not by means of construction, rules and regulations, orders or otherwise, extend, repeal or disregard laws enacted by the Legislature. 16 C.J.S. Constitutional Law § 169 at pp. 849-851.

Likewise, even though the Board's specific health planning functions may be directed to the requirements of earlier federal legislation, since P.L. 93-641 apparently merely incorporated the best elements of much of that earlier federal legislation, and expanded the details thereof, it is possible that most of the planning functions described in P.L. 93-641 can be accomplished by the Board without legislative change. While the Board's health planning authority is unclear, it is clear that the Division of Health and Social Development presently has no independent legislative authority for assuming and carrying out State health planning functions.

CAN THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL ENTER INTO A MEMORANDUM OF AGREEMENT WITH THE DIVISION OF HEALTH AND SOCIAL DEVELOPMENT OF THE OFFICE OF THE GOVERNOR PURSUANT TO SECTION 1-49.5 OF THE CODE?

If the Division of Health and Social Development is to accomplish health planning functions through some current legislative vehicle, it must do so via the provisions of Act No. 932 of the 1974 Acts and Joint Resolutions (as embodied in Section 1-49.5 of the Code). This Act grants general authority for the Department of Health and Environmental Control, among others, to enter into agreements with other State entities, whether created by statute or executive order, to insure effective and efficient implementation of comprehensive development programs. There are, however, two provisos in that legislation which affect the Division's ability to bring itself within the statute's terms:

***4** 'Provided, however, that no agency shall commit any funds by contract unless previously appropriated by the General Assembly.

Provided, that any State agency which is created by executive order, and exercising the provisions of this section shall contain at least four members of the Legislature on its governing board—.'

You have indicated your belief that the first proviso creates a prohibition against the obligation of federal funds through such an agreement as contemplated. The provisions of a legislative enactment must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policies of the lawmakers. Truesdale v. SCHD, 264 S.C. 221, 213 S.E.2d 740 (1975); Peoples National Bank of Greenville v. S. C. Tax Commission, 250 S.C. 187, 156 S.E.2d 769 (1967). It is true, also, that however plain and ordinary the meanings of words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended, or would defeat plain legislative intention, and will, if possible, construe statutes so as to escape absurdity and carry the intention into effect. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

A literal reading of this proviso would support your view, but it would be unreasonable to believe the Legislature intended to prohibit agencies of the State from committing federal funds by contract. The more probable intent of the Legislature was to prohibit State agencies from committing by contract to the expenditure of State funds unless and until those funds have been made available by the Legislature through appropriations.

Considering the second proviso, however, and assuming the accuracy of the Director of the Division of Health and Social Development's statement, as related by you, that the Division has no governing board and is answerable directly to the Governor, a clear reading of the terms of that proviso leads to the conclusion that the Division does not presently qualify

to avail itself of the provisions of Section 1-49.5. Therefore, the Department may not enter into an agreement with the Division of Health and Social Development under the provisions of Section 1-49.5.
CONSIDERING SECTIONS 32-764, ET SEQ., AND SECTION 32-501, OF THE CODE:
A. CAN THE OFFICE OF THE GOVERNOR ASSUME AND CARRY OUT THE PROVISIONS OF THAT LAW?

B. CAN THE BOARD EITHER (1) DELEGATE CONTROL OF THE PROGRAM TO ANOTHER STATE AGENCY, OR (2) ALLOW ANOTHER STATE AGENCY TO PARTICIPATE IN THE PROGRAM?

C. CAN THE BOARD'S RESPONSIBILITIES BE DELEGATED TO ANOTHER STATE AGENCY WITHOUT RETENTION OF SUPERVISION BY THE BOARD?

As to the State Hospital Construction and Franchising Act, which embodies the legal tools for the undertaking of a 'certificate of need' program as required by P.L. 93-641, the language vesting responsibility for that function within South Carolina is clear unequivocal:
***5** § 32-764. Board sole agency for control of program. The Board [Board of Health] is hereby designated to be the sole State agency for control of and participation in the program for construction, repair, location, licensing and franchising of hospitals desiring to construct new, additional, or altered facilities, and other activities necessary to be carried out under this article. [Emphasis added.]

§ 32-765. Division of health facilities.—The Board, through such Division,—[the Division of Health Facilities as created within the Board] shall constitute the sole agency of the State for the purpose of:
(3) —issuing licenses and certificates of need to qualifying applicants—.

Thus, in response to your question as to whether the Office of the Governor can assume and carry out the provisions of that act, the inescapable answer is, 'no.' I refer back to my earlier discussion on the inability of an executive officer to disregard the clear provisions of law.

Neither can the Board delegate control of the program to another State agency. It is an established principle of law that: 'Administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment.' 73 C.J.S. Public Administrative Bodies and Procedure § 57. See also 2 Am. Jur. 2d, Administrative Law, §§ 221-225.

Albeit, Section 32-764 clearly states that the Board is the sole agency of the State for '—participation in' the franchising program, utilization of another State agency in some advisory or ministerial capacity probably does no real violation to the broad mandates of the law.

Referring back to the question of whether the Board's health planning functions can be delegated to another State agency without retention of supervisory control by the Board, the answer is that it may not.

It is the conclusion of this Office therefore that the South Carolina Board of Health and Environmental Control does have the responsibility for comprehensive health planning in South Carolina within the scope of planning as defined in Public Law 89-749 as amended by Public Laws 90-174 and 91-515. Further, to the extent that the planning functions

prescribed in Public Law 93-641 are the same as prescribed in the federal acts adopted by reference, the Board has specific authority to do that planning.

The Division of Health and Social Development of the Office of the Governor has no independent legal authority to assume and carry out State health planning functions and may not enter into an agreement pursuant to Section 1-49.5 of the Code inasmuch as it is not a qualifying 'agency.'

***6** Finally, the South Carolina Board of Health and Environmental Control may not share responsibility for the conduct of a State certificate of need and franchising program for hospitals in South Carolina.

This opinion raises no question as to the power of the Governor to designate a State agency as provided for in P.L. 93-641. However, any designation must be consistent with State statutes.

I feel it appropriate to comment also upon the constitutionality of the creation of State agencies by Executive Order. Agencies created by Executive Order are, in my opinion, merely arms of the Office of the Governor serving in advisory capacities to the Governor, subject to abolition or continuance in his discretion and possessing no authority in law. They have, in some instances, received what appears to be quasi-legal status by receiving appropriation from the General Assembly. However, the Court in State v. Champlin, 2 Bailey's Law, 220 (1831), wherein the question was whether the Governor had created an office, stated as follows:
'Whatever might be the royal prerogative in this respect, it is certain, that in this country, and under our institutions, the creation of an office must be an exercise of legislative authority, and cannot belong to the Executive. Nor do I perceive, that the various resolutions and acts of the Legislature, make any difference in the character of this employment.' Id. at 222.

That same rationale would seem to apply to the legislative actions seemingly approving Executive creation of agencies.

Such agencies are, in my view, creatures of the Governor's Office capable of exercising only those powers which may be given by him. The Governor, however, is empowered only to exercise the duties and powers vested in him as Governor and does not have the power to vest in an agency created by him any other powers.

While the Legislature could pass specific legislation attempting to grant the Governor the specific authority to create State agencies by Executive Order or otherwise, such an enactment may well run afoul of the constitutional doctrine of 'separation of powers.' As our Supreme Court, in Spartanburg County v. Miller, 135 S.C. 348, 132 S.E. 673 (1924), emphasized, quoting from Section 14, Article 1 of the Constitution:
'The legislative, executive and judicial powers of government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of each other.' Id. at 356. See also Little v. Williamson, 103 S.C. 50, 87 S.E. 435 (1915) and 16 Am. Jur. 2d Constitutional Law § 218.

In any case, the Governor clearly does not have the authority to create an agency vested in the sovereign powers in the absence of such legislation. cf. Blalock v. Johnston, 180 S.C. 40

With best wishes,
Very truly yours,

Daniel R. McLeod
Attorney General

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