

1973 S.C. Op. Atty. Gen. 251 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3591, 1973 WL 21046

Office of the Attorney General

State of South Carolina

Opinion No. 3591

August 3, 1973

*1 The Honorable Claude McCain
Chairman
South Carolina Insurance Commission
S. C. Department of Insurance
2711 Middleburg Drive
Columbia, South Carolina 29204

Dear Mr. McCain:

You have asked that I advise you with respect to the powers of the Commission of Insurance as contrasted with the powers of the Commissioner of Insurance. Your specific inquiry is principally directed to the question: Does the Commission have the authority to overrule or reverse a determination made by the Commissioner?

The Insurance Department was completely revamped in 1960 and the statutes under which it is governed today differ, in major part, from the extensive modifications of the insurance law made at the session of the General Assembly in 1960. A report compiled by Management Consultants was submitted by the Governor for the consideration of the General Assembly. That report recommended that a single executive be appointed by the Governor to head the Department or that a three-man, part-time Commission should be established which should select a full-time Executive Director. The latter procedure was adopted with some modification. With respect to this choice, the report stated, in pertinent part:

‘Should a three-man, part-time Commission be chosen as the approved method, the members should confine their activities to appointing the Executive Director, considering and adopting policies to guide the Department's operations, final rule-making authority, and the hearing of cases appealed from a decision of the Executive Director. Full responsibility for actual administration should rest with the head chosen, who would be selected by the Commission on the basis of his qualifications, experience and training for discharging his responsibilities. This, it is believed, would provide for effective administration of this function on an independent basis.

The statute which is in existence today incorporates some of these suggestions. It provides for a multi-member Commission, but it does not contain any provision for appeal from decisions by the Commissioner to the Commission. It also provides for the selection of an Insurance Commissioner by the Commission with a term of office not to exceed four years, whereas the recommendation of the report was that the Executive Director (Commissioner) should be appointed for an indefinite term, to remain in office until retirement or removal for cause.

Section 37–56 provides, in part:

The Commission, through the Chief Insurance Commissioner, shall:

(Here follows certain powers vested in the Commission which may be principally summarized as: ‘See that all laws of this State governing insurance companies or relating to the business of insurance are faithfully executed; make rules and regulations to make effective the provisions of the insurance law; to institute and prosecute criminal violations of laws relating to insurance, and to counsel and advise with the Chief Insurance Commissioner.’)

*2 These powers are identical in major respect with former provisions which vested such powers in the Commissioner.

The question is then presented: Does the authority vested in the Commission, through the Commissioner, to see that the laws relating to insurance are faithfully executed carry with it the authority to reverse the Commissioner in any decisions he may make?

It is my opinion that it is extremely doubtful that decisions by the Commissioner are subject to review by the Commission.

Where the statute does not specifically provide for or preclude administrative review, the question whether the determination of a subordinate official should be final and irrevocably binding on the head of his department depends upon the scheme of the statute by which the power is conferred, and upon a full view of all the statutory provisions intended to express the legislative intent. 2 Am.Jur.2d Administrative Law ¶541.

A review of the insurance statutes and other statutes of a similar nature seems to indicate that where the Legislature intended to vest a specific power in the Commission or in the Commissioner, it has clearly designated which of the two it intended to have such power, and where it intended that action by an official with similar powers as the Commissioner is to be subject to review by the authority which appointed him, it has similarly so specifically declared. The entire scheme of the insurance law appears to vest in the Commissioners certain designated specific discretionary authority. He may, for example, undertake the revocation of licenses of brokers and other persons who are licensed in different capacities by him; he is required to undertake the examination of insurance companies at periodic intervals; he has extensive powers with respect to determination of reserves of an insurance company; to determine in the sound exercise of his discretion the eligible investments of insurance companies for designated purposes; to appoint and employ at his will or pleasure actuaries, examiners and other employees; and to perform many other important decision-making functions which are generally characterized by the statute as being vested in 'the Commissioner.' In a few instances, action is authorized to be undertaken by the Commission rather than the Commissioner. For example, certain duties rest upon the 'Commission' with respect to the issuance of certificates to do business in this State by domestic insurers, but in the vast number of instances, the Commissioner, rather than the Commission, is designated in the statute as the authority to undertake action.

There is no statutory provision for a review by the Commission of the determinations made by the Commissioner. On the other hand, the general procedure for appeal from 'any order or decision made, issued or executed by the Commissioner' is directly to the circuit court of the county where such order or decision was issued.

I am aware of only one instance where reversal authority has been given to a body with powers roughly similar to those possessed by the Insurance Commission. Previously, the South Carolina State Highway Commission selected a Chief Highway Commissioner and the enabling statute provided, until 1950, that 'any act of the Chief Highway Commissioner shall be subject to review or reversal by the State Highway Commission—.' This clause was omitted in the amendment of 1951, which event occurred shortly after a controversial issue arose in the State Highway Department and in which the Chief Highway Commissioner was summarily dismissed by the State Highway Commission. It may reasonably be inferred that the reason for omitting from the statute the authorization to reverse the acts of the Chief Highway Commissioner was related to this controversy. In any event, the history of this statute is persuasive of the view that where the Legislature meant for an administrative body to have such power of review, it has so specifically stated. The Real Estate Board, for example, has been specifically given the power of review from decisions made by the Real Estate Commissioner. The absence of such statutory authority from the insurance laws strongly indicates that the Legislature did not intend that it have such power.

*3 The scheme of the insurance statute, as well as other cognate legislation, indicates, in my opinion, that the power of reversal by the Commission is extremely doubtful.

Another reason which is persuasive of the view expressed is that there must be finality of decisions before an appellate body will consider any decision from an administrative tribunal. If the Commissioner's determinations are subject to review by

the Commission, the appeal statutes would be left in a somewhat confused state. 73 C.J.S. Public Administrative Bodies and Procedure ¶ 189.

I advise therefore that, in my opinion, where the statutes provide for action by the Commissioner, action by that official is not subject to review by the Commission. Instead, the Commission establishes guidelines by rule or regulation, counsels and advises with the Insurance Commissioner, and leaves to him the full responsibility for actual administration of the affairs of the Insurance Department, with the exception of those few cases in which decision-making authority is vested in the Commission.

Removal Authority of Insurance Commission

Section 37–58 of the 1962 Code provides that the Commission shall appoint as its chief officer a Chief Insurance Commissioner to serve for a term not to exceed four years. The statute further provides that ‘the right to remove or discharge the Commissioner shall be reserved to the Commission.’

The Supreme Court of South Carolina has held that a statute of this nature uses the words ‘discharge’ and ‘remove’ synonymously. That court has also held that where the term of office is for a fixed term of years, it cannot be terminated except for cause. That court has also held that where removal is sought in such cases, it is necessary that notice of the cause for which removal is sought, with an opportunity for a hearing, must be afforded to the officer sought to be removed. The statutory scheme adopted for the Insurance Commission carries out, to some extent, the recommendations of the report of the Management Consultant Firm which recommended that ‘the head of the department should be appointed for an indefinite term, to remain in office until retirement or removal for cause.’ If summary removal by the Commission is to be obtained, this power must be specifically given by statutory change.

The fact that cause must be given for removal, with notice and hearing, does not mean that the Commission is powerless to carry out the duty reposed in it by statute to see, through the Commissioner, that the laws relating to insurance are faithfully executed. If the Commission determines that the laws are not being properly enforced, it may bring about removal, subject to the procedures as laid down by the Supreme Court of South Carolina.

Personal Liability of Commission Members

As in other areas of governmental administration, there is a growing apprehension among public officials with respect to the risks of personal liability which may be encountered by a public officer in the performance of his duties. As long as the members of the Commission act without malice, illegality, or bad faith, they do not, in my opinion, incur the risk of personal liability for their actions. So long as their judgments do not warrant an inference of such conduct, they will not be subject to personal liability even though such judgments may be incorrect.

Very truly yours,

*4 Daniel R. McLeod
Attorney General

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