1972 WL 25205 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 9, 1972

***1** Honorable James Cuttino
Chairman
Military, Public and Municipal Affairs Committee
House of Representatives
Columbia, South Carolina

Dear Mr. Cuttino:
You have requested the opinion of this Office concerning the constitutionality of H–2596, H–2597, and H–2598. These bills provide for the appointment of two additional members to the State Board of Dentistry, the Board of Pharmaceutical Examiners, and the State Board of Medical Examiners, respectively, to be appointed to these boards by the Governor upon recommendation of the Palmetto Dental, Medical, and Pharmaceutical Association. These will be separately considered herein.

Dental Board

Appointments to the Dental Board are made by the Governor upon recommendation of the Board, which recommendation its based upon an election conducted among the licensed dentists residing in the various congressional districts. Nominations in such elections are made by the Board, pursuant to appropriate rules and regulations promulgated by the Board. I do not find that such rules and regulations have been promulgated. Section 56–636.2, Code of Laws of S. C., 1962.

The effect of H–2596 would be to vest in the Palmetto Dental, Medical, and Pharmaceutical Association authority to designate two members of the Dental Board who would not be subject to the election procedures among licensed dentists as is provided for other members. In my opinion, this is an unwarranted preferential treatment of members of the Palmetto Dental, Medical, and Pharmaceutical Association, constituting a denial of the equal protection of the laws to other dentists, thereby rendering the bill invalid.

The one-man, one-vote principle is, in my opinion, not applicable to the boards here involved. This appears conclusive in consideration of the case of Leamond v. Thornton, et al., decided by a three-judge court on February 1, 1971, and involving the composition of the State Highway Commission, but I am convinced that it is a deprivation of equal protection to authorize an association which I am informed, and assume to be correct, consists of a very small portion of dentists, to name two members to a governing body of the profession, whereas a vastly greater number of dentists participate in the election of the remaining members. Additionally, it would seem that the members of the Palmetto Dental, Medical, and Pharmaceutical Association would not only have the right to name two members, but would likewise be eligible to vote in the election to name the remaining six members.

Pharmaceutical Examiners

Members of the Pharmaceutical Board are appointed by the Governor from pharmacists elected by the Pharmaceutical Association of the State of South Carolina, a private organization. H–2597 would require the Governor to appoint two members to the Pharmaceutical Board upon recommendation of the Palmetto Dental, Medical, and Pharmaceutical Association, a private organization.

***2** For the reasons set forth above concerning the Dental Board, it is my opinion that this bill is invalid.

Medical Board

The State Board of Medical Examiners is composed of members appointed by the Governor from rominees selected by the State Medical Association, a private organization, six of whom are selected from the various congressional districts and two of whom are selected from the State at large. An additional member, a doctor of osteopathy, is appointed by the Governor from a nomination submitted to him by the South Carolina Osteopathic Association. The Duties of the latter member is solely related to the examination of applicants fro licenses as doctors of osteopathy and participation in board action concerning osteopaths.

The same conclusions with respect to the Medical Board as are set forth above exist thereto.

I am, therefore, of the opinion that each of these bills is most probably constitutionally defective for the reasons stated.

An additional reason, applicable to each of the bills, apparently exists with respect to the composition of the Palmetto Dental, Medical, and Pharmaceutical Association. I have no information concerning the composition of this Association and find no record thereof in the offices of the Secretary of State or elsewhere. I assume that it is a single organization composed of dentists, physicians, and pharmacists; and if this is correct, it would appear that the effect of the bill would be to vest in each of these classes of members the authority to participate in the selection of members of the governing body of a profession to which they do not belong.

Racial Considerations

Sufficient time has not been allotted in order to determine the racial composition of the various associations referred to in this opinion, nor have I had an opportunity to study the charters, constitutions, or by-laws of these associations. I assume, however, that the Falmetto Dental, Medical, and Pharmaceutical Association is composed solely of black members, and that the Pharmaceutical Association and the Medical Association are composed predominantly of white members and, further, that there are no racial restrictions in the charters, constitutions, or by-laws of the associations. If discriminatory racial practices in the nomination or election process of members exist in any of the associations or in any of the boards, the defect, in my opinion, is in the improper execution of the powers vested in these associations by law and does not reach the statutes themselves.

I am of the opinion that racial quotes is an improper aim of statutory procedures designed to bring about such racial quotes in the composition of the governing bodies such as these three boards and attempted analogy with the racial quota system established in school cases is, in my view, improper. The courts have apparently emphasized strongly that the use of racial quotas in the school cases was conceived to be a starting point in achieving unitary systems rather than a permanent feature of the system. In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 23 L.Ed.2d 554, 94 S. Ct. 1257, the court stressed the limited use of racial quotes in school systems as a remedy and, moreover, stressed the need for flexibility rather than hard and fast standards. See Swann at 28 L.Ed.2d 571–572, 573. It is not likely to be disputed that the members of the black race are a minority among dentists, pharmacists, and physicians, and if the intent or effect of the bills considered is to seat members of the black race on each of the boards, it appears obvious that a ratio is therefore established which does not reflect the proportion of blacks in the professions as a whole. Rather, it creates a substantial disproportion, which represents an inflexible arrangement with all the earmarks of permanence.

***3** I emphasize that if racial discrimination exists in the selection of members to the governing bodies of the various professions involved, the fault lies in the improper execution of the powers vested in the associations which select such members. It is not unforeseeable that, if such circumstances are shown to exist, a court could conceivably order that all members of the boards be named by election by licensed members of the various professions involved or other means. I am not prepared to state that a court is likely to establish racial quotas for membership.

Delegation of Legislative Power

A recent decision of the Supreme Court of South Carolina, Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662, struck down the authority sought to be vested in a Zoological Society to appoint a public official to the governing body of a political subdivision. This does not, in my opinion, invalidate the selection of members of governing bodies of professions by professional associations. It is true that the recommendations made by the various associations or by the election from within the profession of certain individuals leave no room for the exercise of discretion in the Governor. Bradley v. City Council of Greenville, 212 S.C. 389, 397, 46 S.E.2d 291. Blalock v. Johnston, 180 S.C. 40, 18 S.E.2d 51. The difference, however, between the precedure provided by existing statutes, as well as the bills here considered, is that the associations bear a rational relationship to the law sought to be administered. See State v. Taylor, 223 S.C. 526, 77 S.E.2d 195, 97 A.L.R.2d 261, and Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88, in which the court stated:

'The logical and reasonable solution of our problem appears to be to follow a rule that where there is little or no relation between the unofficial persons, body or organization, to whom the power of nomination, appointment or election is attempted to be delegated, and the law administered, the legislative provision so purporting is invalid for such lack of substantial and rational relation between the appointive or elective power and the function of government which appointees or electees are to perform. The rule which we approve goes no further than to invalidate attempted delegation by the Legislature of the appointive or elective power to unofficial persons or bodies where the latter are without rational or substantial relation to the law to be administered by the appointees or electees—or to the public institution to be governed.'

In my opinion, the professional associations which are considered bear a rational relationship to the various professional laws to be administered and the delegation of the appointive or elective power to these associations to name members to the governing bodies of the various professions is, in my opinion, valid.

Very truly yours,

Daniel R. McLeod
Attorney General

ATTACHMENT

February 10, 1972

You have requested that this office render an opinion concerning the following question: Does the Executive Memorandum, dated November 23, 1970, advising each department and agency that a reduction equal to six percent (6%) of its total general fund appropriations for 1970–71 is effected immediately, apply to the State revenues earmarked by statute to the counties?

***4** This opinion requires an initial determination into the validity of the power granted to the Budget and Control Board (the Board) to effect appropriation reductions. The fact that the power was granted could hardly be disputed, as is stated in Part 1, Section 91, General Appropriations Act for 1970–71,

The State Budget and Control Board shall have full power and authority to survey the progress of the collection of revenue and the expenditure of funds by all departments and institutions, and is hereby authorized and directed to make such reductions of appropriations as may be necessary to prevent a deficit; . . . (emphasis added)

This power granted by the Legislature to the Board appears to be a valid exercise of the Legislature's delegatory authority. It is established law that while the power to enact a law is within the exclusive domain of the Legislature, that body can validly confer authority or discretion as to its execution to be exercised under and in pursuance of the law itself. People, ex rel. Thompson v. Barnett, 76 A.L.R. 1044, 344 Ill. 62, 176 N.E. 108; Greenwood County v. Duke Power Company, 81 F.2d 986. No violence is done to the principle of separation of governmental powers when law, complete in itself, declaring legislative policy and establishing primary standards for carrying it out, is delegated to an administrative agency for execution. Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621. There is no question but this law is complete; it sets forth the authorization of the Board and directs the Board to make such reductions of appropriations as may be necessary to prevent a deficit. If a deficit is imminent, the Board

has no discretion but is bound to make appropriation reductions in accordance with the legislative mandate. These powers thus granted are well within constitutional standards, Hodge v. Pollack, 223 S.C. 342, 75 S.E.2d 752, and are necessary to insure the complete operation and enforcement of the law. Heywood v. South Carolina Tax Commission, 240 S.C. 347, 126 S.E.2d 15.

Having concluded that the powers involved are capable of valid delegation, it must be determined if the State Budget and Control Board is the proper agency to administer these powers. This can only be answered in the affirmative, the delegation of such power is valid if there is a rational and substantial relation between the appointive agency and the law to be administered. Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 8. In this instance, the quote from Judge Lide as appears in the case of Floyd, et al. v. Thornton, 220 S.C. 414, 68 S.E.2d 344, seems most appropriate,
We are unable to conceive of a case where there is a more rational and substantial relation to the law to be administered by the appointees than that involved in the statute before us.

This quote is as applicable to the situation at hand as it was when made, for no other agency bears a relation to the control of revenues of the State as does the Budget and Control Board.

***5** It is thus the opinion of this office that the powers delegated by the Legislature pursuant to Section 91, Part 1 of the General Appropriations Act of 1970–71 are valid, and the Budget and Control Board is a proper agency to exercise these powers in the effective administration of the law.

The State Budget and Control Board is empowered and directed to take action of this nature without the benefit of an Executive Memorandum; however, in this instance the action taken did comply with the Memorandum. The Memorandum was directed to each department and agency of the State, and the question is raised as to whether counties are included in either of these two categories. The case law in this State is clear as held in countless instances that counties are but agencies of the State. Chesterfield County v. State Highway Department, 191 S.C. 19, 3 S.E.2d 686; Parker v. Bates, Treasurer, et al. 216 S.C. 52, 56 S.E.2d 723. Any assertion that counties were not included within the term, agency, as used within the Executive Memorandum would be unwarranted and contra to the judicial definition of counties.

The dictate within the Memorandum that 'the reduction shall not affect funds required to meet an existing contractual obligation,' clearly does not apply to counties, for as was stated in the case of Chesterfield County v. State Highway Department (supra.), All of these funds were raised under the authority of the State and were State funds and even if the State appropriated or apportioned some of the funds to the County for administrative purposes and directed some special application of the funds, it was not equivalent to a contract between the State and the County, in the sense that a contract might arise between the State and a private individual, so that the State could not make some different disposition of the funds. Page 46

This effectively precludes the concept of 'contractual relationship' between the State and its counties based upon expected disbursement of funds.

The possible contention that the appropriation reduction administered by the Board does not apply to the counties allocable percentages of revenues as set by permanent statute cannot be justified. Section 91 of the General Appropriations Act for 1970–71 states, 'in making such reductions earmarked revenues shall be considered as a part of the amounts appropriated.' This, it appears clear, indicates that although funds have been earmarked for the counties, they are to be considered as part of the general appropriations for purposes of reducing the same. This conclusion is based upon the principle, that the last expression of the legislative will is the law. Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2D 22. It has also been held that the provisions of the permanent statutes can be suspended by the Annual General Appropriations Act. State, ex rel, McLeod v. Mills, 256 S.C. 21, 180 S.E.2d 638. In the present instance, the Board acting in accordance with the provisions of the General Appropriations Act effected a reduction in appropriations earmarked for the counties, if this in fact conflicts with the permanent statutes, the results would apparently in accordance with State, ex rel, McLeod v. Mille (supra.) be to suspend the provisions of the permanent statutes for the applicable fiscal year.

***6** It is, therefore, the opinion of this office, based upon the foregoing authorities and reasoning, that the action of the State Budget and Control Board in applying the appropriation reduction to the counties, was proper and in accordance with Section 91 of the General Appropriations Act for 1970–71 and the Governor's Executive Memorandum, dated November 23, 1970.

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