

December 3, 2007

The Honorable Mark Sanford
Governor of the State of South Carolina
P. O. Box 12267
Columbia, South Carolina 29211

Dear Governor Sanford:

You have requested an opinion concerning a part of the Charter Schools Act of 1996, as amended. By way of background, you relate the following information:

[u]nder Section 59-40-70, an applicant who wishes to form a charter school must comply with the provisions of sections 59-40-50 and 59-40-60 for a local district board of trustees to approve the application. Section 59-40-50 sets out specific requirements that a charter school must meet including the duty of a charter school to “in its discretion hire noncertified teachers” and “administrative staff to oversee the daily operation of the school” subject to certain conditions. Section 59-40-60 sets out further requirements for an applicant including that it must create a charter school committee which, among other duties, must “employ and contract with teachers and nonteaching employees, contract for services, and develop pay scales, performance criteria, and discharge policies for its employees.”

Before a local school board of trustees gives approval, Section 59-40-70 requires an applicant to submit its application to form a charter school to the Charter School Advisory Committee which must determine whether the application is in compliance with “established standards that reflect the requirements and intent of [Chapter 40, Title 59].” If the advisory committee finds the application is in noncompliance, the applicant may appeal the finding to the State Board of Education. If the advisory committee determines that an applicant is in compliance, it must provide a recommendation to the school board which the school board may accept or reject.

Your questions are thus as follows:

- A. Can a charter school committee enter into an agreement with a private non-profit entity to hire teaching and administrative employees on the

committee's behalf if the contract between the committee and the non-profit gives the committee the specific authority to (1) approve the hiring of all employees; (2) require the non-profit entity to transfer and remove any employee; (3) elect to exercise its power to directly employ and contract with employees; and (4) terminate the contract with the non-profit entity?

- B. What is the general advisory role and responsibilities of the Charter School Advisory Committee and what is the specific role of the advisory committee in determining whether an applicant has complied with "established standards that reflect the requirements and intent of [Chapter 40, Title 59]."

Law / Analysis

South Carolina Charter Schools Act of 1996, As Amended

The South Carolina Charter Schools Act of 1996 is found at South Carolina Code Ann. Section(s) 59-40-10 *et seq.* The General Assembly expressed its intent regarding the enactment in Section 59-40-30. Such Section provides that "[i]n authorizing charter schools, it is the intent of the General Assembly to create a legitimate avenue for parents, teachers and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system." Furthermore, this Section states that

[t]he General Assembly seeks to create an atmosphere in South Carolina's public school systems where research and development in producing different learning opportunities is actively pursued, and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable. As such, the provision of the chapter should be interpreted liberally to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education.

Section 59-40-40 defines a "charter school" as a "public, nonreligious, nonhome-based, nonprofit corporation forming a school that operates within a public school district or the South Carolina Public Charter School District, but is accountable to the local school board of trustees of that district, which grants its charter." A charter school is "considered a public school and part of the South Carolina Public Charter School District or local school district in which it is located for purposes of state law and the state constitution." S.C. Code Ann. § 59-40-40(2). Pursuant to Section 59-40-50(A), "a charter school is exempt from all provisions of law and regulations applicable to a public school, a school board, or a district" However, Subsection (B) requires a charter school to comply with "the same health, safety, civil rights, and disability rights requirements as are applied

to public schools operating in the same school district or, in the case of the South Carolina Public Charter School District, the local school district in which the charter school is located”

Subsection (5) of Section 59-40-50 authorizes a charter school “in its discretion [to] hire noncertified teachers in a ratio of up to twenty-five percent of its entire teacher staff” Pursuant to Subsection (6) of that same Section, the charter school may “hire in its discretion administrative staff to oversee the daily operation of the school.” Section 59-40-60(2) requires that the charter school must “form a charter committee for the charter school which includes one or more teachers” that charter school committee is, by virtue of Section 59-40-60(E)(2) empowered to

- (2) employ and contract with teachers and nonteaching employees, contract for services, and develop pay scales, performance criteria, and discharge policies for its employees.

Your First Question Involving Use of a Non Profit Entity To Perform Certain Functions

With this background in mind, we turn to your first question, which relates to the power of a charter school committee to “enter into an agreement with a nonprofit entity to hire teaching employees on the committee’s behalf” and to authorize such entity to “transfer and remove any employee ...?” Your question assumes that the committee will reserve the power to “approve the hiring of all employees ...” and will further allow the committee to “elect to exercise its power to directly employ and contract with employees” and to “terminate the contract with the nonprofit entity.”

The issue raised by your first question is whether or not such a contract or agreement as outlined in your letter would constitute an unlawful delegation of the discretionary authority bestowed by 59-40-60 upon the charter school committee to a private corporation. In an opinion, dated December 14, 1999, we outlined the general law governing this area as follows:

[a]s a general matter, it is well established that a State or political subdivision may properly maintain supervision and control through the use of a contract. Any employment contract contemplates supervision and control by the employer over the employee. More specifically, a private corporation ‘may be employed to carry a law into effect.’ 16 C.J.S., *Constitutional Law*, § 137. As stated in *Amer. Soc. P.C.A. v. City of N.Y.*, 199 N.Y.S. 728, 738 (1933),

[w]hile it is true that strictly governmental powers cannot be conferred upon a corporation or individual ... still it has been held by a long line of decisions that such corporation may function in a purely administrative capacity or manner.

Although, ‘an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties’ *Krug v. Lincoln Nat. Life Ins. Co.*, 245 F.2d 848 (5th Cir. 1957); see also, 73 C.J.S. *Public Adm. Law and Procedure*, § 53; McQuillin, *Municipal Corporations*, § 29.08, n. 6. This is consistent with the law in South Carolina. See, *Green v. City of Rock Hill*, 149 S.C. 234, 270, 147 S.E. 346 (1929) [contract between a city and private company for the control, management and operation of waterworks plant is valid]; *Op. Atty. Gen.*, No. 85-81 (August 8, 1985) [privately managed prison not necessarily invalid].

Typically, the inquiry does not end there, however. It is well recognized that there must first exist statutory authority for an officer to subdelegate any portion of the authority which has been delegated to that officer by statute. 73 C.J.S., *Public Administrative Law and Procedure*, § 56. However, if it is reasonable to imply the authority to subdelegate, such an implication may legally be made. *State v. Imperatore*, 92 N.J. 347, 223 A.2d 498 (1966); 73 C.J.S., *Public Administrative Law and Procedure*, *supra*.

And, in *Op. S.C. Atty. Gen.*, June 21, 2005, we referenced in particular our earlier opinion, Op. No. 85-81 (August 8, 1985), noting that

there is considerable case law which concludes that the power to “manage” or “control” carries with it the authority to designate another entity to administer or carry out the details of such management *so long as the ultimate supervision is maintained by the original agency or board*.

(emphasis added).

Here, pursuant to Section 59-40-60(E)(3), the charter committee is authorized, in addition to employment of teachers and administrative personnel and other designated matters, to “decide all other matters related to the operation of the charter school, including budgeting, curriculum and operating procedures.” Moreover, pursuant to Section 59-40-60(e)(2), the charter committee is empowered to “contract for services”

Your question assumes generally that the charter committee will maintain the ultimate supervision and control over the hiring and discharge of teachers and administrative employees. We are further advised that the charter committee will retain control over the employment of all teachers and nonteaching employees by maintaining the absolute approval right of all employees and by having the right to require the private entity to remove or transfer any employee. Accordingly, it is our understanding that the committee will retain control over the hiring and firing of all employees. With this understanding, such a contractual arrangement is, in our opinion, not an unlawful

delegation of the statutory authority as referenced above, and is consistent with the governing law in this area as discussed heretofore. As long as the charter committee retains ultimate supervision and control over the hiring and firing of charter school teachers and employees, but allows the private entity to carry out its wishes administratively, no unlawful delegation can be said to have occurred.

Your Second Question Relating to Charter School Advisory Committee

Your second question concerns the powers and duties of the Charter School Advisory Committee. This Committee is established pursuant to Section 59-40-70. Subsection (A) of that provision states in pertinent part as follows:

(A) The Charter School Advisory Committee must be established by the State Board of Education to review charter school applications for compliance with established standards that reflect the requirements and intent of this chapter.

Members of the Advisory Committee (which consists of 11 persons) are appointed by the State Board of Education. Subsection (5) of Section 59-40-70 provides the procedure involving the express role of the Advisory Committee as follows:

(5) An applicant [for a charter school] shall submit the application to the advisory committee and one copy to the school board of trustees of the district from which it is seeking sponsorship. In the case of the South Carolina Public Charter School District the applicant shall provide notice of the application to the local school board of trustees in which the charter school will be located for informational purposes only. The advisory committee shall receive input from the school district in which the applicant is seeking sponsorship and shall request clarifying information from the applicant. An applicant may submit an application to the advisory committee at any time during the fiscal year and the advisory committee, within sixty days, shall determine whether the application is in compliance. An application that is in compliance must be forwarded to the school district from which the applicant is seeking sponsorship with a letter stating the application is in compliance. The letter also shall include a recommendation from the Charter School Advisory Committee to approve or deny the charter. The letter must specify the reasons for its recommendation. This recommendation is nonbinding on the school board of trustees. If the application is in noncompliance, it must be returned to the applicant with deficiencies noted. The applicant may appeal the decision to the State Board of Education.

In your letter, you ask “[w]hat is the general advisory role and responsibilities of the Charter School Advisory Committee and what is the specific role of the advisory committee in determining whether an applicant has complied with ‘established standards that reflect the requirements and intent of [Chapter 40, Title 59].’” In construing Section 59-40-70 of the Act as it relates to the Charter School Advisory Committee, several well-recognized principles of statutory construction guide us. First and foremost, is the cardinal rule of statutory interpretation which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All other rules of statutory construction are subservient to the rule that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute’s intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C. Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984).

Moreover, in construing statutory language, a statute must be read as a whole. Provisions thereof should not be read in isolation. All sections must be construed together with one another and each section given effect. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992).

In a previous opinion, *Op. S.C. Atty. Gen.*, February 1, 2005, we construed Section 59-40-70 as it relates to the duties of the Charter School Advisory Committee. There, we stated that under the statute,

[t]he advisory committee determines only whether the application [of the charter school] is in compliance with the statute. Section 59-40-70(A)(6). It is the duty of the local school board to rule upon the acceptance of the [charter school] application. Section 59-40-70(B). In the event that the local school board denies the application, the charter school applicant may appeal the denial to the Board of Education pursuant to Section 59-40-90.

(emphasis added).

The foregoing interpretation is consistent with the plain language of Section 59-40-70. Subsection (5) clearly provides that the advisory committee “shall determine whether the application is in compliance” with the statute. Moreover, with respect to the “letter” which the Advisory Committee must write “stating the application is in compliance,” it is manifest from the statute that such letter also shall include a “recommendation” from the Advisory Committee as to whether to grant or deny the charter and the reasons for such recommendation. The statute then makes clear that

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“[t]his recommendation is nonbinding on the school board of trustees.” Such “recommendation” is thus merely that, the giving of advice. *See, American Heritage College Dictionary* (3d ed.). Nothing in § 59-40-70(A) is inconsistent therewith as such provision clearly states that the Advisory Committee is to “review charter school applications for compliance with established standards that reflect the requirements and intent of this Chapter.” This provision simply states what is made clear in Subsection 5: the Advisory Committee must determine “whether the application is in compliance.”

Conclusion

It is our opinion that the contractual arrangement which you have described in your letter would not constitute an unlawful delegation of discretionary power by the charter school in question. As long as the charter school committee maintains supervision and control over the hiring and firing of teachers and other employees it may delegate a private nonprofit entity, the administrative and operational details of such decisions.

As to your second question, the Charter School Advisory Committee determines *only* whether the application of the charter school is “in compliance” with the Charter School Act. In addition, the Advisory Committee must make a “recommendation” to the local school board in question (or the South Carolina Public Charter School District) as to whether the charter should be granted. However, such is a nonbinding recommendation only. In the exercise of its recommendatory authority, the Advisory Committee possesses no “veto” power over the issuance of the charter. Such decision remains exclusively within the province of the local school board (or the South Carolina Public Charter School District).

Very truly yours,

Henry McMaster
Attorney General

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