

1983 WL 181979 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 25, 1983

*1 The Honorable J. P. Strom
Chief
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221

Dear Chief Strom:

You have inquired concerning the use of a hearing officer either from this office or another agency, to preside over hearings concerning the suspension or revocation of licenses, regulations, and permits granted by SLED. Examples of these would include licenses granted under the South Carolina Private Detective and Private Security Agency Act, §§ 40-17-10 *et seq.*, [Code of Laws of South Carolina \(1976\)](#).

It is clear from that Act that security businesses and their employees, as well as detective agencies and their employees, must obtain licensing from SLED to operate in South Carolina. In addition, other permits are issued by SLED, including those for carrying concealed weapons and the operation of massage parlors.

The Private Detective and Private Security Agency Act referenced above allows for the suspension or permanent revocation of a license or registration, if a determination has been made that the holder of such license has violated any or all of the subsections of § 40-17-140 of the Code. Similar hearing procedures exist for other types of permits or registrations in the appropriate SLED Rules and Regulations. Any exceptions to the hearing process are stated in the appropriate statutes; e.g., retail pistol dealers may appeal the forfeiture of their licenses to the Circuit Court. § 23-31-150, Code of Laws.

[Section 40-17-140](#) provides that after a hearing, SLED may revoke or suspend a license. It follows that two questions are presented: First, is it a lawful delegation of authority to appoint a hearing officer, and, second, is it lawful for the officer to be from an agency other than SLED?

The case law, together with the statutes and the appropriate SLED regulations, would appear to provide an affirmative answer to both questions.

Generally speaking, in the absence of a statute specifically to the contrary it is a lawful delegation of an agency's authority to appoint a separate hearing officer to conduct the hearings, receive testimony and other evidence, and make a report of his or her observations and conclusions to the agency. The final decision, however, must be made by the appropriate licensing authority but may be based upon that authority's review of the hearing officer's report. No statute prohibiting such delegation appears to exist; moreover, it has been held that appointment of a hearing officer apart from the Agency making the final decision is proper, even when not authorized by the legislature. The hearing must be a full and fair one to satisfy constitutional requirements; and again, the ultimate decision must be made by the appointing agency. In [Pettiford v. South Carolina State Board of Education](#), 218 S.C. 322, 62 S.E.2d 780 (1950), *cert. den.* 341 U.S. 920, 71 Sup.Ct. 742, 95 L.Ed. 1354, the South Carolina Supreme Court, quoting from 42 Am.Jur., Public Administrative Law § 141, stated:

*2 Due process of law does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. A hearing is not inadequate or unlawful merely because the taking of testimony is delegated to less than the whole number, or even to a single member, of the administrative tribunal, or to an examiner, hearer or investigator employed for this purpose, even though such procedure has not been expressly authorized by the legislature. The actual decision must

remain with and be made by the body constituted by the legislature, but it may be made on the report of the examining officer or body. * * * Where a hearing is required as a prerequisite to action by an administrative officer, the one who decides must hear. This rule does not, however, preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. But there must be a hearing in a substantial sense, and to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.

Supra at 342. While the facts in Pettiford did not concern delegation of authority to a hearing officer, but to individual members of the Board, the above quoted language strongly suggests that the Court would reach the same conclusion with respect to a hearing officer. See also, 73 C.J.S., Public Administrative Bodies and Procedures, § 135. And while there is authority recognizing that an administrative agency possesses only such powers and authority granted to it by statute, 73 C.J.S., supra at § 48, Pettiford seems to indicate otherwise in this specific context.

As stated above, there appears to be no statute specifically precluding SLED's appointment of a hearing officer. Cf. Gore v. John, 157 P.2d 552 (Wyo. 1945), where a statute specifically directed that hearings be held before members of the state agency making the ultimate decision. Nor does there appear to be a statute in our Code prohibiting the use of a hearing officer from another agency. The Administrative Procedures Act, §§ 1-23-300 et seq., Code of Laws of South Carolina (1976), as amended, which would be applicable to hearings conducted by SLED, contains no prohibition against such a practice. In fact, it would appear that the APA recognizes that possibility. See, § 1-23-340.

The rules and regulations promulgated by SLED also support this conclusion, but an apparent omission from the Code of Laws should be noted. Subsection (14) of Regulation 73-40 provides as follows:

Chief of SLED, as presiding Officer at suspension or revocation hearing, shall take whatever action necessary to ensure an equitable, orderly hearing.

That subsection appears in the Regulation found in Volume 26 of the Code of Laws. It would appear to require that you personally be present at all hearings conducted under the Private Detective Act. However, there is an exception contained in Subsection (27) of that regulation, which does not appear in the Code of Laws, but does appear in the 1977 Statutes at Large of South Carolina, at page 1115. That Subsection provides as follows:

*3 In the absence of the chief of the division, his designee or the officer in charge of the division shall hold such hearings as are required by this act. (Emphasis added)

It would appear, then, that the Director of SLED has the authority to delegate the responsibility for conducting hearings to a separate hearing officer so long as the final decision on the matter is made by him. The omission of Subsection (27) of Regulation 73-40 from the Code of Laws would not defeat that conclusion. The Legislative Council has been so notified, and that Subsection, along with a couple of others, will be added to the upcoming supplement to Volume 26 of the Code.

Accordingly, we would advise that the Director of SLED could delegate the authority to conduct hearings as described above to a hearing officer from this office or another agency.

Sincerely yours,

James G. Bogle
Assistant Attorney General

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