

1977 S.C. Op. Atty. Gen. 109 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-126, 1977 WL 24468

Office of the Attorney General

State of South Carolina

Opinion No. 77-126

April 29, 1977

*1 The portion of Act No. 674 of the 1976 Acts and Joint Resolutions which provides that the Board of Governors of the South Carolina Patient's Compensation Fund ' . . . may promulgate such rules and regulations as may be necessary to carry out the provisions of this act, such rules and regulations being subject to the approval by the General Assembly,' does not violate Article I, Section 8 of the South Carolina Constitution.

TO: Harold E. Trask, Jr.
Executive Assistant
Office of the Governor

QUESTION PRESENTED:

Does that portion of Act No. 674, 59 Acts and Joint Resolutions 1773 (1976) which provides that the Board of Governors of the South Carolina Patient's Compensation Fund . . . may promulgate such rules and regulations as may be necessary to carry out the provisions of this act, such rules and regulations being subject to approval by the General Assembly

violate Article I, Section 8 of the South Carolina Constitution?

AUTHORITIES CITED:

Constitution of South Carolina, Article I, Section 8; Article III, Section 18.

Act No. 674, 59 Acts and Joint Resolutions 1773 (1976).

Shell Oil Co. v. Illinois Pollution Control Bd., 37 Ill. App.3d 264, 346 N.E.2d 212 (1976).

McKinney v. City of Greenville, 262 S.C. 277, 203 S.E.2d 680 (1974).

Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972).

Shoenburg Farms, Inc. v. People ex rel Schoesher, 166 Colo. 199, 444 P.2d 277 (1968).

Board of Bank Control v. Thomason, 236 S.C. 158, 113 S.E.2d 544 (1960).

Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257 (1938).

Spartanburg Co. v. Miller, 135 S.C. 348, 132 S.E. 673 (1924).

DISCUSSION:

You have requested an opinion of this Office regarding the constitutionality of a portion of Act No. 674, 59 Acts and Joint Resolutions 1773 (1976) which creates a Board of Governors to administer the South Carolina Patient's Compensation Fund, also established by the Act. Your question focuses in particular on the following language of the Act:

'The Board may promulgate such rules and regulations as may be necessary to carry out the provisions of this Act, such rules and regulations being subject to approval by the General Assembly.'

The question presented is whether the language quoted above violates Article I, Section 8 of the South Carolina Constitution which provides for separation of powers of the three branches of State government. Article I, Section 8 of the Constitution of this State provides.

'In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the function of one said department shall assume or discharge the duties of any other.'

It is a fundamental fact that in the General Assembly rests plenary legislative power, limited only by the Constitution, State and Federal. The constitutional limitation of Article I, Section 8 is to the effect that the Legislature having the function of making, repealing, or modifying laws cannot encroach on the function of the executive branch of government which administers the laws, except to the extent that their performance is reasonably incidental to the full and effective exercise of its legislative powers in a supervisory capacity. [Spartanburg Co. v. Miller](#), 135 S.C. 348, 132 S.E. 673 (1924); [Bramlette v. Stringer](#), 186 S.C. 134, 195 S.E. 257 (1938). Resolution of your question necessitates consideration of several factors pertaining to the delegation of duties to an administrative agency and the separation of powers between the executive and legislative branches of government, as this writer found no South Carolina cases on point.

*2 It is a well settled rule of statutory construction in this State that there should be no reasonable doubt that a statute violates some provision of the Constitution before it will be declared unconstitutional. [McKinney v. City of Greenville](#), 262 S.C. 277, 203 S.E.2d 680 (1974). With this principle in mind, and on the basis of other assumptions considered below, it is the opinion of this Office that the quoted provision of Act No. 674 does not violate Article I, Section 8 of the South Carolina Constitution.

It is assumed for the purposes of this opinion that the language of the Act requiring approval by the General Assembly means 'prior approval'; that is, the General Assembly must approve the regulations before they are of any effect. Furthermore, it is assumed that approval will be effected by the traditional legislative scheme of an act or joint resolution passed by the General Assembly pursuant to Article III, Section 18 of the South Carolina Constitution.

In order to determine whether the act violates the separation of powers doctrine, it is necessary to determine whether the rule-making function is an executive power. The Supreme Court of this State has recognized that administrative agencies perform quasi-judicial and quasi-legislative functions. [Board of Bank Control v. Thomason](#), 236 S.C. 158, 113 S.E.2d 544 (1960). Although it has not been decided in this State, other jurisdictions have defined the duty of formulating rules and regulations as a quasi-legislative function. [Shell Oil Co. v. Illinois Pollution Control Bd.](#), 37 Ill. App.3d 264, 346 N.E.2d 212 (1976); [Shoenburg Farms, Inc., v. People ex rel Schoesher](#), 166 Colo. 199, 444 P.2d 277 (1968). On the other side of the coin, however, it has been determined by the Supreme Court of this State that the delegation of rule-making powers to an administrative body is not an invalid delegation of legislative powers so long as there are adequate standards provided in the legislation so that the administrative body is merely 'filling up the details' necessary for the execution and enforcement of the Act. [Terry v. Pratt](#), 258 S.C. 177, 187 S.E.2d 884 (1972). This conforms to the traditional scheme of enacting and enforcing laws as the General Assembly passes an act that simultaneously empowers and sets standards for executive action. In conformity with this traditional scheme, it has been the role of the executive to fill in legislative interstices through the exercise of discretion where the General Assembly has seen fit to leave flexible statutory standards.

It is apparent from the above discussion that labeling rule-making as an executive function or as a quasi-legislative function is not dispositive of the constitutional principle involved. The more precise analysis would be accomplished by examining the impact of this statute on government powers and their distribution in the light of the purposes of the separation of powers doctrine. If the approval required by the Act was to be accomplished by extra-legislative activity, that is outside of the traditional scheme of legislation, it would be necessary to inquire whether the procedure employed allows achievement of results not attainable by standard legislative techniques. This inquiry is unnecessary in this situation because it has been assumed that approval will not be in the form of an extra-legislative activity but instead is to be utilized in compliance with the traditional legislative scheme. The General Assembly in this situation has employed a different 'check' on administrative rule-making in addition to that of compliance with statutory standards.¹ In essence the General Assembly, recognizing the expertise of the members of the Board, is soliciting proposals for legislation. When the General Assembly approves rules and regulations in this manner, it is exercising its traditional function of making laws and is not encroaching on the executive function of administering and executing those laws. Undoubtedly, the General Assembly could have denied the power of rule-making to the Board and provided the rules in the first instance. The Supreme Court of this State has held that, while members of the Legislature were elected for the purpose of making laws and not of administering them, the Legislature may properly engage in the discharge of executive functions to the extent and to the extent only, that their performance is reasonably incidental to the full and effective exercise of its Legislative power. [Spartanburg Co. v. Miller](#), 135 S.C. 348, 132 S.C. 673 (1924). It is apparent in this situation that when the General Assembly approves rules and regulations that this approval is not only incidental to the exercise of its legislative powers, but that it is in fact performing that legislative function. Therefore, it can be stated that there is no usurpation of an executive power and that Article I, Section 8 of the Constitution is not violated.

CONCLUSION:

*3 The portion of Act No. 674 of the 1976 Acts and Joint Resolutions which provides that the Board of Governors of the South Carolina Patient's Compensation Fund ' . . . may promulgate such rules and regulations as may be necessary to carry out the provisions of this act, such rules and regulations being subject to the approval by the General Assembly,' does not violate Article I, Section 8 of the South Carolina Constitution.

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Footnotes

¹ This opinion expresses no opinion as to the existence or adequacy of standards in this act.

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