

1979 WL 43092 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 27, 1979

\*1 Mr. George L. Schroeder  
Director  
Legislative Audit Council  
500 Bankers Trust Tower  
Columbia, South Carolina 29201

Dear Mr. Schroeder:

In [Gold v. South Carolina Board of Chiropractic Examiners](#), 271 S.C. 74, 245 S.E.2d 117 (1978), the Supreme Court of South Carolina invalidated a statute which limited the Governor's authority to appoint members to the South Carolina Board of Chiropractics Examiners to only those persons who were members of the South Carolina Chiropractors' Association. See, [CODE OF LAWS OF SOUTH CAROLINA § 40-9-30 \(1976\)](#). The Court observed: Article III Section I prohibits the delegation of the appointive power to a private person or organization. [Gould v. Barton](#), 256 S.C. 175, 181 S.E.2d 662 (1971).

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The Governor's authority to appoint the members of the Board is restricted by [Section 40-9-30](#) to those persons who are members of the Association, a private organization. Thus, membership in the Association is a prerequisite to membership on the Board. Since the Association's ability as a private organization to control its membership is absolute, the Association possesses the unbridled authority to determine who is eligible for appointment to the Board.

This authority is tantamount to an express grant of the appointive power which, when placed in the hands of a private organization, violates Article III Section I. [Gould v. Barton](#), *supra*.

. . . On its face [Section 40-9-30](#) violates Article III Section I by unconstitutionally delegating the appointive power to a private organization. 245 S.E.2d at 119-120.

As a consequence of the Court's decision in the [Gold](#) case, questions have arisen regarding the constitutional validity of a number of other South Carolina statutes that provide for the selection of members to boards which regulate various professions and occupations in this State. Those statutes are: [CODE OF LAWS OF SOUTH CAROLINA §§ 40-33-210](#) (Nursing Board); 40-45-30 (Physical Therapists Board); 40-69-30 (Veterinary Board); 40-13-30 (Cosmetology Board); 40-19-30 (Funeral Services Board); 40-15-20 (Dentistry Board); 40-37-40 (Optometry and Opticianry Board); and 40-55-30 (Psychology Board). You seek our opinion as to their constitutionality.

#### State Board of Nursing

The State Board of Nursing is composed of seven persons. [Section 40-33-210](#) directs that three members of the Board be members of the South Carolina Nurses Association, one member be a member of the South Carolina Hospital Association as well as the South Carolina Nurses Association, and two members be members of the South Carolina

Federation of Licensed Practical Nurses, Inc. Only one member of the Board need not belong to any particular organization.

Obviously, [Section 40-33-210](#) is most probably unconstitutional because it restricts the Governor's power to appoint six of the Board's seven members to only those persons who are members of certain private organizations, *i.e.*, the Nurses Association, the Hospital Association and the Practical Nurses Federation. Those three organizations possess 'the unbridled authority' to determine who is eligible for appointment to a prescribed number of the seats on the Nursing Board. [Gold v. South Carolina Board of Chiropractic Examiners](#), *supra*. The fact that Board members are to be selected from the membership of more than one private organization does not, in our opinion, validate the statute. It, like the one challenged in [Gold](#), we feel, violates [Article III, Section I of the State Constitution](#) to the extent that it limits the Governor's power of appointment simply to those who are members of designated organizations.

#### State Board of Examination and Registration of Physical Therapists

\*2 [Section 40-45-30 of the Code of Laws of South Carolina](#) creates the State Board of Examination and Registration of physical therapists. That statute authorizes the Board to have between three and five members who are appointed by the Governor; however, members must be 'nominated' by the South Carolina Physical Therapy Association, Inc., for appointment.

In [Floyd v. Thornton](#), 220 S.C. 414, 68 S.E.2d 334 (1951), the Supreme Court upheld a statute which provided that three of the six members of the State Board of Bank Control were to be appointed by the Governor upon the recommendation of the State Bankers Association and that two of the six members were to be appointed by the Governor upon the recommendation of the State Savings and Loan League.

Because we can discern no real distinction between the statute involved in the [Floyd](#) case and the one questioned here, it is our opinion that the latter is most probably constitutional. *Cf.*, [Gould v. Barton](#), 256 S.C. 175, 181 S.E.2d 662 (1971).

#### State Board of Veterinary Medical Examiners

The State Board of Veterinary Medical Examiners is composed of five members who are selected from five separate districts. [Section 40-69-30 of the Code](#) allows the South Carolina Veterinary Medical Association to recommend to the Governor for appointment to the Board two nominees from each of the five districts.

[Section 40-69-30](#), in our view, is also most probably constitutional because it, like the one which relates to the Physical Therapists Board, is similar to the statute attacked in [Floyd v. Thornton](#), *supra*.

#### State Board of Cosmetic Art Examiners

The State Board of Cosmetic Art Examiners is composed of members appointed 'by the Governor from a list of six persons recommended to him, two of whom . . . by the Board, two of whom . . . by the South Carolina Registered Cosmetologists Association and two of whom . . . by the South Carolina State Cosmetologists Association.' See, [CODE OF LAWS OF SOUTH CAROLINA § 40-13-30 \(1976\)](#).

The statute which prescribes the method of selection of the members of the Cosmetology Board is most probably constitutional. It is similar to the statute questioned in the [Floyd](#) case.

#### State Board of Funderal Service

Section 40-19-30 authorizes the South Carolina Funeral Directors Association and the South Carolina Morticians Association to recommend, respectively, six and three members of the nine-member State Board of Funeral Services.

Since the statute is similar to that which was challenged in the Floyd case, it too is most probably constitutional.

#### State Board of Dentistry

The members of the State Board of Dentistry are appointed by the Governor upon recommendations that are secured in elections conducted among the licensed dentists of South Carolina. See, [CODE OF LAWS OF SOUTH CAROLINA § 40-15-20 \(1976\)](#).

We discern no constitutional invalidity as to the statute which provides for the method of selection of the members of the Dentistry Board. The holding in Floyd v. Thornton, supra, in our view, would support its validity.

#### Board of Examiners in Optometry<sup>1</sup>

\*3 Five of the seven members of the Board of Examiners in Optometry are appointed by the Governor 'upon nomination by all the licensed optometrists in this State at meetings called by the President of the South Carolina Optometric Association.' [CODE OF LAWS OF SOUTH CAROLINA § 40-37-40](#) (Cum.Supp., 1978).

[Section 40-37-40](#) is most probably constitutional under the authority of Floyd v. Thornton, supra.

#### Board of Examiners in Opticianry

[Section 40-37-41 of the Code](#) provides for the creation of a seven-member Board of Examiners in Opticianry. Five of its members are appointed by the Governor 'upon nomination by all the licensed opticians in this State at meetings called by the President of the South Carolina Association of Opticians.'

That statute, which is almost identical to the one which relates to the Optometry Board, is also most probably constitutional. Floyd v. Thornton, supra.

#### State Board of Examiners in Psychology

Members of the State Board of Examiners in Psychology, Section 40-55-30 prescribes, are 'appointed by the Governor from a list of qualified candidates . . . submitted by the executive committee of the South Carolina Psychological Association.'

Once again, we see no constitutional defect and feel that Floyd v. Thornton, supra, rather than Gold controls.

In summary, any statute which provides that only members of a particular organization can qualify for appointment to a state board will most probably be held unconstitutional. Gold v. South Carolina Board of Chiropractic Examiners, supra; Gould v. Barton, supra; however, a statute which merely permits a private organization to make recommendations for nomination to a state board will most probably be upheld. Floyd v. Thornton, supra; cf., Schneider v. Sweetland (Fla.), 214 So.2d 338 (1968); contra, Westlake v. Merritt (Fla.), 95 So. 662 (1923).

Best wishes,

C. Tolbert Goolsby, Jr.  
Deputy Attorney General

Footnotes

- 1 [Section 40-37-40](#) was amended last year. The effect of the amendment was to abolish the Board of Examiners in Optometry and Opticianry. Two new boards were created, the Board of Examiners in Optometry [[CODE OF LAWS OF SOUTH CAROLINA § 40-37-40](#) (Cum.Supp., 1978)] and the Board of Examiners in Opticianry [Id. [§ 40-37-41](#)].

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