

1974 WL 27613 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 28, 1974

**\*1 RE: Continuing Education Requirements**

John S. Herin, C.P.A.  
South Carolina Board of Accountancy  
P. O. Box 11376  
Columbia, S. C. 29211

Dear Dean Herin:

By letter dated December 21, 1973, you have inquired whether the following proposed change to the South Carolina laws governing accountancy would be legally sound:

Section 56-40. Continuing Education Requirements.

The Board shall from time to time adopt standards of continuing education which must be met by certified public accountants, public accountants and accounting practitioners, and such standards need not be identical for each class. The Board shall require compliance with such standards as a prerequisite to the issuance of a current license to practice as a certified public accountant, public accountant, or accounting practitioner.

For reasons hereinafter stated, in the opinion of this office this proposed law, if adopted, would be legally defective in that it constitutes an unlawful delegation of legislative power to an administrative arm of the executive branch of government.

Integral to the tripartite system of government which exists in South Carolina is the concept that the legislative branch of government passes the laws, the executive branch of the government executes these laws, and the judicial branch of the government interprets these laws when necessary. This concept, under which the three branches of government are to be and remain separate and apart, is not founded upon considerations of governmental efficiency. Rather the concept rests upon the recognized need for public protection from misuse of governmental power which is afforded by the limitations and checks and balances of separate governmental departments, each supreme as to matters within its own sphere. And in order to insure that these necessary checks and balances shall not be compromised, the State constitution has for over one-hundred years contained the following provision, now found in Article 1, Section 8, Constitution of South Carolina: 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 functions of one of said departments shall assume or discharge the duties of any other.

The above cited rule of law, though perfectly clear on its face, has over the years proved difficult to apply. It still remains a legal certainty that no discretion at all may be delegated by the legislative branch of State government to another branch in matters which are exclusively of a 'legislative' nature. Nevertheless, it is impossible for the legislature to deal directly with the host of details which must be individually considered in the complex matters which the legislature seeks to regulate. And it is this fact that has given rise to the necessity that the legislature create within the executive branch of government administrative officers (such as the Board of Accountancy) and that it vest in such officers a sufficient degree of discretionary power to enable them to handle the details associated with implementation of various laws. The

judicial branch of the government, recognizing the requirement for such administrative discretion, has held that where this discretion is properly limited it does not constitute the exercise of 'legislative' power.

\*2 Defining the lawful bounds between legislative and administrative spheres of responsibility is difficult. Reality fixes a point beyond which it is unreasonable and impracticable for the legislature to prescribe detailed rules simply to maintain a hypertechnical compliance with the separation of powers doctrine. At that point it becomes constitutionally sufficient if the legislature clearly delineates the general policy, the public agency which is to apply it, and then sets some standards or guides to indicate the extent and to prescribe the limits of the discretion which is to be afforded an administrative officer in the implementation of the law. The following South Carolina cases serve to illustrate the point.

In [S. C. State Highway Dept. v. Harbin](#), 227 S.C. 585, 86 S.E.2d 465 (1955), the South Carolina Legislature had by statute granted to the State Highway Department the power to refuse a driver's license 'to any person for any cause satisfactory to said Department.' Additionally the Department was empowered 'to promulgate rules and regulations for the administration and enforcement of this Act'. On this authority the Department, by regulation, adopted a system whereby individual traffic violations were assigned 'points' and drivers' licenses were subjected to revocation or suspension upon accruing a certain number of points. Harbin's license was subsequently suspended under this system. He appealed, charging that the law which permitted the Department to suspend his license 'for any cause satisfactory to said Department' left the right to revoke or suspend within the Department's uncontrolled and unrestricted discretion and therefore was void as an unconstitutional delegation of legislative power. The State Supreme Court agreed. (Shortly thereafter the State Legislature itself enacted the point system which has been law ever since. [See S. C. Code Section 46-195, et. seq.](#)).

A second case illustrative of the point is that of [State v. Watkins](#), 259 S.C. 185, 191 S.E.2d 135 (1972). This case involved a criminal action against the Defendant under State obscenity laws, for allegedly showing lewd motion pictures. The Defendant attacked the validity of the obscenity statutes including Section 16-414.9, S. C. Code of Laws, as amended, which provides:

The provisions of [the State's obscenity laws] shall not apply to motion pictures that carry the Motion Picture Association of America's Code Seal of approval.

As to this section the Defendant maintained that the legislature may not confer upon the MPAA complete and standardless power to decide what pictures shall be the subject of criminal prosecution. The State Supreme Court agreed, reaffirming its position that it is necessary for the legislature, in delegating its authority, to declare a legislative policy, and then to establish primary standards for carrying it out or at a minimum to lay down a guideline to which an administrative officer or board must conform.

However, there are cases in this State which appear to allow certain administrative bodies a great deal of flexibility. In [Atlantic Coast Line Railroad Co. v. S. C. Public Service Commission](#), 245 S.C. 229, 139 S.E.2d 911 (1965) the State Supreme Court upheld the authority of the Public Service Commission to issue transport certificates based on a determination of 'when public convenience and necessity are not already being reasonably served.' The Court recognized the unconstitutionality of uncontrolled administrative discretion, but also recognized the need for maintaining administrative flexibility, and held that the Public Service Commission's discretionary authority was constitutional.

\*3 Based on these cases it is apparent that the proposed change to the accountancy laws is defective in that it gives the Board of Accountancy unbridled discretionary authority to establish whatever continuing education requirements it sees fit, and to refuse to renew an accountant's license should these requirements not be met. Presumptively the Board would establish reasonable requirements. However that would not cure the constitutional defect.

Certain other states have granted to medical boards the authority to provide for continuing education. For example, in 1972 Maryland gave to its Board of Medical Examiners the following authority:

. . . The Board may establish mandatory continuing education requirements for physicians licensed in this State as a condition to their being preregistered in accordance with this section. In establishing such requirements, the Board shall recognize and give weight to existing educational methods, procedures, devices and programs in use among the various medical specialties and other recognized medical groups. The Board shall not establish or enforce such requirements if they will reduce the availability of physicians in a community to an extent that adequate medical care is jeopardized. Maryland Code Ann. Art. 43 Section 124 (1972).

This Maryland statute does provide some limitations on Board authority, but whether or not a similar statute would be viewed as constitutional under South Carolina law is an open question. Atlantic Coast Line Railway Co. v. S. C. Public Service Commission, *supra*, while seemingly favorable can be readily distinguished due to the fact that the Public Service Commission is regularly confronted with a great many more contingencies in its sphere of responsibility than is a board such as the Board of Accountancy. A more sound approach would appear to be to have the legislation be reasonably specific in its scope and, for example, specify requirements such as the maximum number of credit hours which could be required by a board to be devoted to continuing education by any one person within a given period of time. The increase in personal workload is going to be a primary source of complaint against this type of law, and consequently such a legislative determination would not only give a board concrete guidelines as to what minimum professional educational requirements are necessary to assure the public's welfare, but would also greatly lessen the board's burden in defending its continuing education requirements against legal attack.

In summary, in the opinion of this office the continuing education requirement as now proposed could not survive a constitutional attack. The Board of Accountancy should seek to draft into such a law as much specificity as possible, while retaining the flexibility it requires. At a very minimum, such a law must contain guidance similar to that contained in the Maryland medical statute, *supra*. However, that law has not been tested in court and the Board of Accountancy would do well to seek to have the State Legislature enact by statute as many of the controversial features of such continuing education requirements as is practical.

Very truly yours,

\*4 John B. Grimball  
Assistant Attorney General

#### 238. PORTS AUTHORITY, STATE

appointments—interim—effective date of interim appointment of an appointee to the Ports Authority 10.12176.76 see 85

Appointment, interim—Making an interim appointment to the ports authority 10.25.76 see 85

Governor—Making an interim appointment to the ports authority see 85

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