



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>June 4, 2008</p>	<p>No. I08-004 (R08-005)</p> <p>Re: Authority of the Arizona Commission for the Deaf and Hard of Hearing to Establish Advisory Committee</p>
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To: Sherri Collins, Executive Director
Arizona Commission for the Deaf and Hard of Hearing

Question Presented

You have asked whether the Arizona Commission for the Deaf and the Hard of Hearing (“the Commission”) has the authority to create an advisory committee made up of Commission members and nonmembers for the purpose of reviewing complaints against interpreters, making recommendations to the Commission, and taking action as deemed appropriate.¹

Summary Answer

The Commission may create the advisory committee, but the committee may not perform the official statutory duties or exercise the official statutory powers that the Legislature has

¹ You have attached to your request a draft of proposed rules as a detailed explanation of the advisory committee’s contemplated role. However, this Opinion will focus on the question directly presented and will leave the analysis of whether the proposed rules comply with this Opinion to the Commission’s attorney and to the Governor’s Regulatory Review Council’s review of the rules.

assigned to the Commission. The committee may act only in an advisory manner, and the Commission must be free to accept, reject, or simply ignore its advice.

Background

Arizona Revised Statutes (“A.R.S.”) section 36-1946 required the Commission to begin licensing interpreters for the deaf and hard of hearing on September 1, 2007. The Commission’s duties and responsibilities relating to interpreter licensing include adopting rules (1) that provide qualified interpreters for civil, criminal, and administrative hearings; (2) that classify interpreters based on their skill levels; (3) that establish standards for the qualifications and procedures for the licensure of each class of interpreter; and (4) that establish standards and procedures by which to certify sign language teachers in American sign language. A.R.S. § 36-1946. The statutes establish the following: (1) who must have a license; (2) what acts are prohibited; (3) the qualifications for licensure; (4) the manner and conditions for issuing and renewing licenses; (5) the bases for denying, revoking, or suspending a license or otherwise disciplining licensees; and (6) the Commission’s authority to investigate complaints, hold hearings, and seek injunctive relief. A.R.S. §§ 36-1971 to -1978. None of the statutes relating to the Commission’s licensing authority give the Commission express authority to establish an advisory committee that reviews complaints, makes recommendations, and takes appropriate action on a complaint. Nevertheless, based on discussion with and other input from stakeholders in the community, the Commission seeks to appoint such an advisory committee to assist it in making decisions related to the complaint and discipline process concerning licensed interpreters.

Analysis

I. The Commission May Appoint an Advisory Committee if It Determines that Doing So Is Reasonably Necessary to Carry Out Its Express Authority.

“[A]gencies are creatures of statute, [and] the degree to which they can exercise any power depends upon the legislature’s grant of authority to the agency.” *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d 765, 767 (2003). An agency that assumes power beyond that which the statutes have given it usurps the constitutional power vested only in the Legislature. *Id.*; see also *Corella v. Superior Court*, 144 Ariz. 418, 420, 698 P.2d 213, 215 (App. 1985). An agency’s powers also include the power to use discretion in carrying out the express authority that Arizona’s Constitution or statutes have given it. *3613 Ltd. v. Dep’t of Liquor Licenses & Control*, 194 Ariz. 178, 183, 978 P.2d 1282, 1287 (App. 1999); see also *Facilitec*, 206 Ariz. at 487, 80 P.3d at 766 (“Because the legislature is often unable to specify detailed rules of conduct . . . it frequently entrusts agencies with the responsibility for developing and implementing regulatory policy for a limited subject matter.”).

In *Arizona Corporation Commission v. State*, 171 Ariz. 286, 830 P.2d 807 (1992), the Arizona Supreme Court considered whether the Arizona Corporation Commission’s constitutional power to regulate ratemaking included the authority to establish rules addressing the reorganization and diversification of public service utilities and their holding companies. The court noted that earlier cases had recognized that the Commission’s express power to set rates extended to the “enactment of the rules and regulations that are reasonably necessary steps in ratemaking.” *Id.* at 294, 830 P.2d at 815. The court concluded that “even assuming we restrict the Commission’s regulatory power to its ratemaking function, we must give deference to the Commission’s determination of what regulation is reasonably necessary for effective ratemaking.” *Id.* In analyzing the extent of deference to give the Commission, the court

considered the range of the Commission's legislative discretion in light of the intent of the Constitution's framers in establishing the Commission "to protect consumers from abuse and overreaching by public service corporations." *Id.* at 295, 830 P.2d at 816. The court held that the Commission had the power to enact the proposed rules because they were reasonably necessary "to fulfill the framers' intent with respect to ratemaking in light of modern corporate practices and regulatory realism." *Id.* at 297, 830 P.2d at 818; *see also City of Bisbee v. Ariz. Water Co.*, 214 Ariz. 368, 372, 153 P.3d 389, 393 (App. 2007) (summarizing the Commission's powers as including reasonably necessary steps in ratemaking). Thus, an agency's implied powers "include those reasonably necessary to carry out [its] express authority." Ariz. Att'y Gen. Op. I87-132.

The Legislature has created or authorized the creation of advisory committees to assist many state agencies by express statutory provisions.² And, in practice, state agencies have created subcommittees by resolution to help carry out their express statutory authority. There are no Arizona cases that directly address whether a state agency has the implied power to appoint an advisory committee by resolution, but some cases from Arizona and other states suggest such authority. The facts in *Washington School District v. Superior Court*, 112 Ariz. 335, 541 P.2d 1137 (1975), suggest that the school board had the authority to appoint a textbook advisory committee without any official statutory mandate because the Arizona Supreme Court upheld the actions that the school board took after considering the committee's recommendations. Another

² *See, e.g.*, A.R.S. §§ 15-203(B)(4) (permitting the State Board of Education to provide for an advisory committee to conduct hearings and screenings to determine whether grounds exist to discipline a certificated person); -918.01 (mandating that the State Board of Education form a state career ladder advisory committee); -1872 (establishing the Family College Savings Program Oversight Committee to assist the Commission for Postsecondary Education); 32-703(B)(10) (permitting the Arizona State Board of Accountancy to appoint committees to advise or assist as necessary); -1307(B)(2) (permitting the State Board of Funeral Directors and Embalmers to appoint citizen advisory committees to make recommendations concerning the Board's enforcement and administration of the governing statutes); -1503(E) (permitting the chairperson of the Naturopathic Physicians Board of Medical Examiners to establish committees from the board membership and to define the committees' duties); -1704(G)(1) (permitting the State Board of Optometry to appoint advisory committees).

state's appellate court has directly addressed the issue of whether a board may appoint an advisor without express authority to make the appointment and has found that such authority may be implied if reasonably necessary. In *Smith v. Department of Professional Regulation*, 202 Ill. App. 3d 279, 289, 559 N.E.2d 884, 891 (Ill. App. 1990), the Illinois Court of Appeals stated that "administrative agencies are to be given wide latitude in determining what actions are 'reasonably necessary' and a court may not overturn an agency policy or action simply because the court considers the policy unwise or inappropriate."

Thus, the Commission may appoint the advisory committee by resolution if it determines that the committee is reasonably necessary to carry out its express authority and if it does not exceed its statutory authority in granting the committee power to act.³

II. Although the Commission May Create an Advisory Committee by Resolution, It May Not Delegate Its Official Statutory Duties or Powers to the Advisory Committee.

State agencies may not delegate their official powers or duties to private citizens because "a delegation of any sovereign power of government to private citizens cannot be sustained nor their assumption of it justified."⁴ *Emmett McLoughlin Realty, Inc. v. Pima County*, 203 Ariz. 557, 559, 58 P.3d 39, 41 (2002) (quoting *People ex rel. Chicago Dryer Co. v. City of Chicago*, 109 N.E.2d 201, 206 (1952)); see also Ariz. Att'y Gen. Op. I95-17 ("Courts have repeatedly held that neither the Legislature nor public agencies may delegate their official powers or duties to private parties."). In *Arizona Department of Economic Security v. Superior Court*, 178 Ariz. 236, 241, 871 P.2d 1172, 1177 (App. 1994), the Arizona Court of Appeals held that the Arizona Department of Economic Security ("DES") could not, in effect, force the juvenile courts to pay

³ Any such advisory committee would be subject to Arizona's Open Meeting Law, which would require that its meetings be open to the public. See A.R.S. §§ 38-431 to -431.09.

⁴ In *Emmett*, the Arizona Supreme Court directly addressed the issue of legislative delegation of authority to private citizens, and Arizona Attorney General Opinion I95-17 noted that courts in several other jurisdictions had also held that public agencies cannot delegate their statutory authority to private citizens.

private attorneys for legal services for children when, by statute, DES was responsible for providing those services with its own attorneys. The court found that DES could not “so delegate its responsibilities regarding dependent children” to private attorneys. *Id.* State agencies may not delegate their official powers or duties within the agency without express statutory authority either. In *Godbey v. Roosevelt School District*, 131 Ariz. 13, 638 P.2d 235 (1981), the Arizona Supreme Court held that without express legislative authorization, the school board could not delegate rule-making power to the superintendent. *Id.* at 19, 638 P.2d at 241; *see also Peck v. Bd. of Educ. of Yuma Union High Sch. Dist.*, 126 Ariz. 113, 115, 612 P.2d 1076, 1078 (App. 1980) (holding that school board could not delegate certain statutory powers to the superintendent). Thus, if the Commission intends to appoint the advisory committee solely through its own resolution and adoption of rules, it may not delegate its official powers and duties to the committee regardless of whether the committee is composed of members, nonmembers, or both.

The principle that the Commission cannot delegate its official powers and duties to the advisory committee means that the Commission cannot be bound by the committee’s actions or recommendations. For example, in *Peters v. Hobby*, 349 U.S. 331, 335 (1955), the Supreme Court held that the Loyalty Review Board exceeded the executive order that had created it as an advisory board to assist an agency by assuming jurisdiction through its own motions to review cases, hold hearings, and reach decisions that bound the agency. As Arizona Attorney General Opinion I90-013 cautioned, a state agency or board simply cannot “be bound by actions of [an] advisory committee” without statutory authority. *Id.*

Applying these principles to the Commission, only the Commission has the power to make decisions and take actions regarding licensees. Arizona Revised Statutes sections 36-1976

and 36-1978 give the Commission broad powers to regulate or discipline a licensee by revoking or suspending a license, placing a licensee on probation, issuing a reprimand, imposing a civil penalty, or asking the Attorney General or the County Attorney to seek an injunction restraining a licensee from engaging in a violation of A.R.S. Title 36, Chapter 17.1. Under the Arizona Administrative Procedures Act, the Commission also has the authority to negotiate with the licensee and to accept an informal settlement of the matter through "stipulation, agreed settlement, consent order or default." A.R.S. § 41-1092.07(F)(5). Thus, the Commission's official duties and powers include making the final decision whether to use a formal hearing proceeding to resolve a complaint or to settle the complaint by an informal settlement agreement that the Commission creates and adopts.⁵ The advisory committee may assist the Commission by recommending how it should proceed in a licensing matter, but the Commission must have the discretion to accept, reject, or simply ignore the committee's advice. *See Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894, 903 (Mo. App. 1997) (stating that even if board adopted licensure committee's findings and recommendation, committee's role was merely advisory where determining what weight to give recommendation and evidence before the board was entirely within board's discretion); *Harrington v. Tate*, 254 A.2d 622, 624-25 (1969) (stating that police review board that mayor had appointed to hold hearings and make recommendations concerning discipline was advisory in nature and did not interfere with or

⁵ For example, the Commission cannot be limited to either accepting the Advisory Committee's recommendation or proceeding with a hearing. It also cannot delegate the power to make settlement agreements or final resolutions of a licensing matter to the Advisory Committee. In addition, the Commission cannot delegate the power to hold a hearing on a licensing matter because the Arizona Administrative Procedures Act provides that all state agencies supported by the general fund must use the Office of Administrative Hearings' services to conduct administrative hearings, unless exempted by statute or unless the agency head, the board, or the commission directly conducts the hearing. A.R.S. § 41-1092.01(E), (F). Moreover, under the "Regulatory Bill of Rights" in the Administrative Procedures Act, a person is entitled to have an administrative hearing heard by an independent administrative law judge. A.R.S. § 41-1001.01(A)(11). The Act defines an administrative law judge as "an individual or an agency head, board or commission that sits as an administrative law judge, that conducts administrative hearings in a contested case or an appealable agency action and that makes decisions regarding the contested case or appealable agency action." A.R.S. § 41-1092(1).

impinge on police department's function where commissioner was free to accept or ignore review board's advice).

Conclusion

The Commission has the authority to appoint an advisory committee made up of members and nonmembers for the purposes of reviewing complaints and making recommendations to the Commission. However, the Commission may permit the committee to act only in an advisory capacity and must retain the authority to make the final decisions with respect to regulating and disciplining licensees.

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