partment itself promulgates specific rules and regulations in lieu thereof.

OFFICIAL OPINION NO. 18

April 10, 1964

Hon. Matthew E. Welsh
Governor of Indiana
206 State House
Indianapolis 4, Indiana

Dear Governor Welsh:

This is in response to your letter of March 6, 1964, in which you refer to Acts of 1963, Ch. 432, Sec. 23, and state the following question:

"I should like your opinion as to the validity of appointments so made and the character and status of the office of each person so appointed * * *"

As you know, the act is composed of twenty-four sections and concerns medical assistance for the aged. It was vetoed by you, and for that reason, was not included in the 1963 Supplement to Burns' Indiana Statutes.

Section 22 of the act provides, in part:

"It is the intent and purpose of this act to implement Public Law 86-778 commonly known as the Kerr-Mills Act, dated September 13, 1960, to conform to the provisions thereof and to authorize the state department to adopt such rules and regulations and plans as may be necessary to comply with the provisions of said act and to receive the benefits thereof * * *"

and Section 23, about which you inquire, reads as follows:

"There is hereby created an advisory committee for medical assistance for the aged. Said committee shall consist of eleven (11) members. One member shall be appointed by and represent the Indiana State Medical Association. One member shall be appointed by and represent the Indiana State Osteopathic Association.

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One member shall be appointed by and represent the Indiana Hospital Association. One member shall be appointed by and represent the Indiana State Dental Association. One member shall be appointed by and represent the Indiana State Nurses’ Association. One member shall be appointed by and represent the Indiana Pharmaceutical Association. One member shall be appointed by and represent the Indiana Licensed Nursing Home Association. One member shall be appointed by the Lieutenant Governor as President of the Senate to represent the Senate. One member shall be appointed by the Speaker of the House of Representatives to represent the State House of Representatives. One member shall be appointed by and represent the Indiana Optometric Association and one member shall be appointed by the Governor. The members appointed by the Indiana State Medical Association and the Indiana State Osteopathic Association shall serve for a term of one year. The members appointed by the Indiana Hospital Association, the Indiana Optometric Association, and the Indiana State Dental Association shall serve for terms of two years. The members appointed by the Indiana State Nurses’ Association and the Indiana Pharmaceutical Association shall serve for three years. The House of Representatives and Senate members shall serve for two years. The one member appointed by the Governor shall serve for four years. Thereafter the terms of the members shall be for four years except the members representing the House and the Senate, whose terms shall be two years. Appointments shall terminate on April 1 in the year in which the appointment expires: Provided, however, That members shall serve until their successor has been appointed. Members of said committee shall serve without pay. Said committee shall hold at least four regular meetings each year, one in each quarter of the calendar year and may hold such special meetings as the committee may deem necessary.

“Said committee shall act in an advisory capacity to the state department in the administration of the provisions of this act and in the formulating and adoption
of rules and regulations under the provisions of this act. The committee may make recommendations as to procedures and policies affecting medical aid for the aged and may advise such services, activities, programs, investigations and researches as in its judgment will contribute to said program.”

Before proceeding further, it should be noted that while the section purports to create a committee, it makes no provision for the operation or functioning thereof. There is no provision for a chairman, vice-chairman or secretary. While the committee is required to hold one meeting each quarter of the calendar year and is permitted to hold any number of special meetings, there is no provision as to date or place. There is no statement as to how many members shall constitute a quorum for the transaction of business, and no provision as to how the committee shall determine the advice or recommendations which it is authorized to give. In addition, while the section specifically provides the term to be served by ten committee members in the first instance, there is no such provision as to the representative of the Nursing Home Association.

It should also be noted that the section does not create a commission, a department or any other governmental agency having executive or administrative authority. The body is specifically described as “An advisory committee for medical assistance for the aged.” (Our emphasis) The powers of the committee are advisory only, and there is no provision whatsoever in any section of the act placing a duty upon any governmental department or agency to receive, act upon or be bound by any advice so extended. The purported committee has no governmental power, and in effect is “without portfolio.”

This is not the first instance of an advisory committee in Indiana. Acts of 1959, Ch. 4, created the “Governor’s Youth Council,” together with an advisory committee. Although that act was repealed by Acts of 1963, Ch. 345, as found in Burns’ (1963 Supp.), Section 63-2612 et seq., the latter act created the Indiana Youth Council, and Section 9 thereof, as found in Burns’ (1963 Supp.), Section 63-2620, created the
“Citizens’ Advisory Committee.” The aforesaid section provided that members of the committee should be appointed by the council, that their names should be submitted by the council to the Governor, and that the appointees should be notified by the Governor. The functions of the committee were classified by Burns’ 63-2621, supra, as follows:

“1. Advise, assist and cooperate with the Indiana youth council in the performance of statutory duties and functions; and

“2. Upon request of organized groups of citizens and individuals who voluntarily conduct youth programs[,] observe their operation and upon requests made by them to the observers, report to the council the objectives and needs of these groups.”

It is pointed out that the committee was vested with no administrative power, and that the power to appoint its members was placed in the council. On the other hand, Sections 3 and 4 of the act, as found in Burns’ (1963 Supp.), Sections 63-2614 and 63-2615, place administrative powers in the council and provided for its appointment by the Governor.

Acts of 1959, Ch. 91, as found in Burns’ (1963 Supp.), Section 52-1908 et seq., relates to the Commission for the Handicapped. Section 3 of that act, as found in Burns’ (1963 Supp.), Section 52-1910, names as members to the commission, representatives of some of the bodies named in the Acts of 1963, Ch. 432, Sec. 23, which is the basis for your inquiry. The two acts, however, differ in one basic respect.

While the act creating the Commission for the Handicapped, and particularly Section 8 thereof, as found in Burns’ (1963 Supp.), Section 52-1915, places administrative authority in that commission, no administrative power whatsoever is vested in the advisory committee to which you refer.

There are other instances in which advisory committees have been created, one of which is in conjunction with the Administrative Building Council. Acts of 1945, Ch. 54, as found in Burns’ (1950 Repl.), Section 20-416 et seq., provides for a committee of twelve to be appointed by the Administrative Building Council of Indiana, subject to the approval of the Governor. No administrative power is given to it.
In the field of public welfare, and particularly blind assistance, an advisory committee having no administrative power is created by Acts of 1959, Ch. 337, as found in Burns' (1963 Supp.), Sections 52-1239a and 52-1239b. While that act provides for appointment of committee members by the Governor "in the first instance," there is no provision as to where the power shall lie to make subsequent appointments. Thus it would appear that the statutes creating the several advisory committees are lacking in uniformity with respect to the appointment of members.

In your letter you cite three cases as possibly bearing upon your question, the first of which is Tucker et al. v. State of Indiana (1941), 218 Ind. 614, 35 N. E. (2d) 270. It is the holding of the Tucker case that where the authority is executive, it may be vested in the Governor alone; and further, that while the power to create an office is legislative, the power to appoint to that office is executive. In addition, the case holds that the Legislature has no power to delegate sovereign governmental powers to private agencies outside the departments of constitutional government.

If we were dealing here with a body having administrative function, the Tucker case, supra, might bear great weight, but as pointed out above, the advisory committee with which we are here concerned is not a body having administrative power of any nature whatsoever.

The Tucker case, supra, discusses at length the case of Overshiner v. State (1900), 156 Ind. 187, 59 N. E. 468, which you also cite as possibly bearing upon your question. This is a criminal case, and for these purposes concerns the appointment of members of the State Board of Dental Examiners by the State Dental Association. While these appointments were held valid, and while the Overshiner case has not been reversed, the Tucker case, supra, holds that the Legislature cannot confer upon a private organization the power of appointment to a governmental body.

Finally, you cite the case of Book v. State Office Building Comm. et al. (1958), 238 Ind. 120, 149 N. E. (2d) 273. This case holds, inter alia, that while the Legislature has the authority to make laws, the duties of enforcing them rest within the
executive-administrative department. For the reasons stated above, I do not feel that the Book case, *supra,* is applicable here because we are dealing only with an advisory committee.

Your question is divided into two categories, the first of which is the validity of the appointments here involved. If these were purported appointments to a body having any administrative power, they would clearly be invalid because no power rests in the Legislature to appoint executive or administrative officers. They would be further invalid because there is no legislative power to grant governmental powers to private agencies, and further, because no member of the Legislature may serve in an administrative capacity. In addition, the entire act would likely be unconstitutional because it contains no separability clause.

However, since the act creates no office, but a committee only, having no administrative power, I am of the opinion that the committee is existent for the purposes expressed by this section, and no more.

The second category of your question relates to the status of the office of each person appointed. Since no appointee has been vested with any administrative power, no office exists; hence, no committee member is vested with any status as an officer.

As pointed out above, while the section creates a committee consisting of eleven members, it is incomplete with respect to the original term to be served by the member appointed to represent the Indiana Licensed Nursing Home Association. The time of original service by the other ten members is specifically stated, and the time of committee membership is thereafter stated to be four years, for nine of the members, including the appointee of the Nursing Home Association. Since no limitation has been placed upon this particular time of original service, we must conclude that that appointee, together with the member appointed by the Governor, has been named to serve an initial period of four years.

It is therefore, my opinion that the administrative committee created by Acts of 1963, Ch. 432, Sec. 23 exists; that no member of the committee is invested with any office or administrative power; that neither the committee nor any
OFFICIAL OPINION NO. 19

April 13, 1964

Mr. James C. Courtney, Commissioner
Indiana Department of State Revenue
202 State Office Building
Indianapolis 4, Indiana

Dear Mr. Courtney:

This is in response to your request for my Official Opinion on the following questions:

1. "A taxpayer has entered into a conditional sales contract for the sale of real estate prior to January 1, 1963, and receives resulting payments for each month in the year 1963. Would the taxpayer be subject to Indiana Gross Income Tax on the payments, as received, for the first six months of said year, and subject to Adjusted Gross Income Tax for the year 1963 on a profit or loss basis, as defined by the applicable section of the Federal Code?"

2. "Secondly, assuming that the contract for the sale of real estate was entered into after July 1, 1963, would the provisions of the Federal Code apply?"

3. "Assuming in both of the above cases that the seller was a corporation, would it be required to pay tax by way of the purchase of stamps in the event the Gross Income Tax liability was in excess of that under the Adjusted Gross Income Tax Act?"

For the reason that your inquiry relates to two separate and distinct excise taxes, whenever reference is hereinafter made to the "gross income tax," such term refers to the tax imposed by Section 2 of the "Gross Income Tax Act of 1933," being the Acts of 1933, Ch. 50, Sec. 2, as amended, as found in Burns'