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OFFICIAL OPINION NO. 20

May 12, 1960

Hon. C. Wendell Martin
Chairman, Indiana Legislative Advisory Commission
332 State House
Indianapolis 4, Indiana

Dear Senator Martin:

This will acknowledge receipt of your letter of April 13, 1960, wherein you request my Official Opinion on the following questions:

"(1) Can the legislature create a commission and give it certain powers, and at the same time provide that the commission cannot make rules and regulations to carry out its function without having those rules and regulations approved by the legislature?

"(2) Can the legislature delegate to a body which it creates, but which is less than the entire Assembly, by its usual procedure, the power to approve or reject rules and regulations adopted by administrative agencies of the state government?"

In your letter you have stated that, "the problem of the constitutionality of the above procedures was discussed at length."

Your questions on behalf of the Indiana Legislative Advisory Commission are doubtless occasioned by reason of Senate Concurrent Resolution No. 9 of the 91st Regular Session of the General Assembly, approved March 11, 1959, being the Acts of 1959, Ch. 403, which provides as follows:

"A CONCURRENT RESOLUTION concerning the official rules and regulations adopted and promulgated by the agencies of the State of Indiana.

"WHEREAS, Copies of the official rules and regulations of state agencies adopted pursuant to the provisions of Chapter 120 of the Acts of the Indiana General Assembly of 1945 are required to be deposited with the Secretary of State and the Indiana Legislative Bureau; and
WHEREAS, Such rules and regulations have the force and effect of law and can be enforced in the same manner as the law which authorized their adoption is enforced; and

WHEREAS, Many times members of the General Assembly are called upon to explain the adoption of such rules and regulations and are unable to do so because they have no knowledge of their adoption: Therefore

"Be it resolved by the Senate of the General Assembly of the State of Indiana, the House of Representatives concurring:

"SECTION 1. Each agency of the State of Indiana is hereby memorialized to furnish a copy of any rules and regulations adopted by the agency pursuant to the provisions of Chapter 120 of the Acts of the Indiana General Assembly of 1945 to the Chairman of the Indiana Legislative Advisory Commission. The chairman of the commission is thereupon authorized and directed to furnish a copy of such rules and regulations to each member of the commission.

"SEC. 2. The Indiana Legislative Commission is hereby authorized and directed to make a study of the feasibility of amending Chapter 120 of the Acts of the Indiana General Assembly of 1945 to require the approval of all rules and regulations by the commission as a necessary part of the process of promulgation. In the event the commission is of the opinion that such an amendment is feasible and necessary, the commission shall make such recommendation, in the form of a bill, to the members of the Ninety-second Indiana General Assembly for their consideration." (Our emphasis)

The enactment of legislation granting rule-making authority to designated administrative agencies is not new in Indiana. For example, in Burns' Indiana Statutes, General Index, L-Z, pp. 1566 to 1569, inclusive, we find three and one-half pages of index of specific statutory enactments relative to rules and regulations with a range as diversified as the number of agencies listed in state government.
While statutory authority for agency rule-making has been in effect for many years, the Indiana General Assembly in 1943, by means of the Acts of 1943, Ch. 213, first established the requirement, as a condition precedent to placing any such rules or regulations in effect, that they must be submitted “to the Attorney General for approval as to legality.” This initial act was repealed and superseded by the Acts of 1945, Ch. 120, which is the present statute and contains detailed procedural requirements.

The Acts of 1945, Ch. 120, Sections 1, 4, 5, or parts thereof, as found in Burns’ (1951 Repl.), Sections 60-1501, 60-1504, and 60-1505, are particularly appropriate in a consideration of your questions. These sections read, in whole or in part, as follows:

60-1501. “It is the intent to establish a uniform method of making, promulgating, filing and publishing rules by all agencies of this state, to permit public participation therein and provide a method of making rules readily accessible to the public. * * *” (Our emphasis)

60-1504. “Before any rule is adopted by any agency it shall cause a notice to be published in a newspaper of general circulation printed and published in Marion County, Indiana, at least ten [10] days prior to the date set for a hearing: Said notice shall include a statement of the time and place of said hearing, a reference to the subject-matter of the proposed rule or rules and refer to the fact that a copy of said proposed rule or rules is on file at the office of said agency where it may be examined: Provided, however, That no rule shall be invalid because the reference to the subject-matter thereof in said notice may be inadequate or insufficient. At least five [5] copies of said proposed rule or rules shall be on file at the office of said agency from the date of the publication of said notice continuously until the said hearing and any interested person shall be given an adequate opportunity to examine a copy of said proposed rule or rules.
"On the date set for hearing any interested party in person or by attorney shall be afforded an adequate opportunity to participate in the formulation of the proposed rule or rules through the presentation of facts or argument or the submission of written data [data] or views. All relevant matter presented shall be given full consideration by the agency.

"Any agency may adopt procedures in addition to those required by this act including the holding of conferences and inviting and permitting the submission of suggestions, facts, argument and views of interested persons in advance of the drafting of the proposed rule or rules." (Our emphasis)

60-1505. "It shall be the duty of every agency which may have been or hereafter may be clothed with or given any power or authority to make, adopt, promulgate or enforce rules to submit the same to the attorney-general for approval as to legality and when so approved to submit the same to the governor for approval. When approved by the governor such agency shall file the original approved copy and one [1] duplicate thereof with the secretary of state who shall note the date and hour of such filing thereon and said agency shall also file a duplicate approved copy with the legislative bureau. No such rule shall be effective until after compliance with the provisions of this act and until they have been so approved and filed and shall be effective as of the date and time filed with the secretary of state * * *.*" (Our emphasis)

The above act indicates an earnest attempt on the part of the Legislature in 1945, as shown in Sections 4 and 5 of said Act, namely, Burns' 60-1504, supra, and 60-1505, supra, to provide requirements, checks and limitations to protect the public interest wherever there has been a delegation of rule-making authority. This is evidenced by the requirement of a 10 day notice of hearing, which notice shall include time and place of hearing, subject matter of proposed rule or rules and reference to the fact that copies of such rule or rules are on
file at the agency and can be there examined by any interested party. This section further provides that on the date set for the hearing any interested party, in person or by attorney, shall be afforded an adequate opportunity of expression and the right to present facts or argument in support of his views. As an additional safeguard, the above act requires that in the event that any agency does adopt a rule or regulation, then Burns’ 60-1505, supra, requires that such rule, before becoming effective, must be submitted to two elective state officials, namely, the Attorney General for approval as to legality, and to the Governor for approval. Without the approval of both the Attorney General and the Governor, no such rule shall be effective. Any so-called rule or regulation adopted under the guise of rule-making by a method which fails to follow the prescribed procedure is null and void. Included within the required procedure is the further necessity of filing the original approved copy and one duplicate thereof with the Secretary of State and also the filing of a duplicate approved copy with the Legislative Bureau as above provided. The 1945 statute provides explicitly that in order to be effective all rules must comply with the provisions of that Act, including both the approval and filing above stated. See also the Acts of 1959, Ch. 403, supra, which provides for a copy of any rules and regulations adopted pursuant to the Acts of 1945, Ch. 120, supra, to be furnished to the Chairman of the Indiana Legislative Advisory Commission.

It should be emphasized that the 1945 Act is a statute establishing only the procedural requisites for the adoption of rules and regulations and is not to be considered as itself providing authority for the adoption of such rules. Such authority must always be found in a legislative act specifically granting such authority and prescribing the standards and limitations to be followed by the state agency in the adoption and promulgation of such rules and regulations as may therein be authorized.

In view of the far-reaching effect that proposed legislation contemplated by your questions may have on administrative rule-making in Indiana, I will set forth certain basic principles applicable to such power and limitations thereof, as preliminary to a consideration of your specific questions.

The rule-making power of state agencies is not inherent in any such agency but is derived solely by specific delegation
from the Legislature itself. No state agency may adopt a rule or regulation which may have the force and effect of law and which may therefore be imposed upon those to whom it applies with the exaction of penalties for the violation thereof, unless such a rule or regulation is grounded upon the stability of a specific legislative act authorizing such rule. These truths are well stated in summary form in Indiana Law Encyclopedia, Vol. 1, Administrative Law and Procedure, §§ 27, 28, and 29, as follows:

§ 27, pp. 168, 169, reads, in part, as follows:

“Rule-making is the part of the administrative process that resembles the Legislature’s enactment of a statute, in that the rules so made establish a pattern of conduct thereafter to be followed.

* * *

“A rule or regulation of a public administrative body or officer should be definite and certain. To be valid, the rule or regulation must be within the authority delegated to such body or officer, and the rule or regulation must not be arbitrary.” (Our emphasis)

§ 28, pp. 169 and 170, reads, in part, as follows:

“* * * The power to make or adopt administrative rules and regulations does not include the authority to enact laws, or to make rules affecting or creating substantive rights.

“In exercising its power, an administrative body may adopt or make only such rules and regulations as are reasonable.”

§ 29, pp. 170 and 171, reads, in part, as follows:

“Statutory provisions control with respect to what rules and regulations may be promulgated by an administrative body, and the administrative body may not use the rule-making power to enlarge its powers beyond the scope intended by the Legislature.

“* * * It may not, however, make rules and regulations which are inconsistent with the provisions of a
statute, particularly the statute which it is administering or which created it, and it may not, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment.” (Our emphasis)

See also: Sutherland, Statutory Construction, 3rd Ed., Vol. 1, Sec. 313 et seq., p. 74.

An examination of the questions you have presented does not indicate any intention to abolish rule-making authority delegated to state agencies but rather indicates a desire to consider the right of the Legislature to alter or amend such delegated power by a redesignation of those who shall possess approval authority, without which no such rule or regulation may become effective.

In your question No. 1, the point at issue is whether the new or additional approving authority for changes in rules or regulations could be delegated to the Legislature as a body, while in question No. 2, the point is whether such new or additional approving authority could be delegated to a body which it would create but which would be less than the entire Assembly. The result of such legislation, in either case, would be merely to add another reviewing authority to those presently so empowered, namely, the Attorney General and the Governor, or substitute the Legislature, as a whole, or a legislative body for the present reviewing authorities.

My answers will be confined to the scope of the questions asked. Inasmuch as no reference has been made to what effect changes, such as those under consideration, would have on the working efficiency and effectiveness of agency rule-making, I do not feel it proper to comment thereon in this Opinion. The Legislature is the sole judge of the means that are necessary and proper to accomplish the object it seeks to attain.

The State ex rel. City of Terre Haute v. Kolsem et al. (1891), 130 Ind. 434, 442, 29 N. E. 595, 598.

The Indiana Constitution, Art. 4, Sec. 1, provides, in part, as follows:

“The Legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. * * *”
The Supreme Court of Indiana in the case of Hanley v. State Department of Conservation et al. (1955), 234 Ind. 326, 332, 333, 123 N. E. (2d) 452, said:

"In Indiana, all legislative authority is vested in the General Assembly, Ind. Const. Art. 4, Sec. 1. The right to legislate is limited only by the restrictions expressly or impliedly imposed by the state constitution, the federal constitution and the laws and treaties made pursuant thereto." (Here follows a list of authorities)

An aid in a determination of the answers to your questions is found in Indiana Law Encyclopedia, Vol. 1, Administrative Law and Procedure, § 9, p. 157, which reads as follows:

"In determining whether a delegation of power to an administrative body is an unconstitutional grant of legislative power or a proper grant of administrative power, the distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be and is void, and a delegation of authority or discretion as to the execution of the law, to which delegation no objection can be made."

See also: State ex rel. Standard Oil Co. v. Review Board of the Indiana Employment Security Div. et al. (1951), 230 Ind. 1, 8, 101 N. E. (2d) 60;

Hollingsworth v. State Board of Barber Examiners (1940), 217 Ind. 373, 378, 28 N. E. (2d) 64.

The law is well settled that the Legislature may delegate its nonlegislative functions and confer rule-making authority upon governmental agencies, but it is equally well settled that it may not delegate purely legislative powers in the absence of constitutional authorization. In 16 C. J. S. Constitutional Law, § 133, p. 558, it is stated:

"While the legislature may not delegate the exercise of its discretion as to what the law shall be, it may confer discretion in the administration of the law, and the constitution has never been regarded as denying to the legislature the necessary resources of flexibility
and practicality which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply, and the legislature may make a law to delegate a power to determine some fact or state of things on which the law makes or intends to make its own action depend.

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law; and while the first cannot be done, to the latter no valid objection can be made. In order to hold a statute invalid as an unlawful delegation of legislative power, it must be clear that without the exercise of legislative power by the person or body to whom the delegation has been made, the statute remains incomplete so that the legislative will has not been fully made known, but it is only necessary that the statute establish a sufficient basic standard, a definite and certain policy and rule of action for the guidance of the instrumentality that is to administer the law, and the fact that a future contingency controls the operation of a statute does not affect its validity with respect to the delegation of power. * * *

(Our emphasis)

Sutherland, Statutory Construction, 3rd Ed., Vol. 1, Sec. 313, p. 74, contains the following statement on the rule-making power which is in point in a consideration of your questions:

"Many general statements appear in the cases to the effect that the legislative function cannot be delegated. The necessities of governmental practice and the constant increase of social and economic regulation has left this generalization inaccurate. Indeed the rule might have been stated originally that the delegation of the legislative function without the retention of legislative control is unconstitutional. Legislative control of delegated legislative functions may be exercised in sev-
eral ways. First, by the repeal of statutory authority creating the administrative agency. Second, by a revocation of or amendment of the delegated power. Third, by the original establishment of rules, principles, and standards to guide the exercise of the legislative function by the delegee.” (Our emphasis)

Because the Legislature unquestionably has the power to prescribe the limits within which a rule must be confined in order to be susceptible of approval by the Attorney General as now provided by law, there is no substantial difference between the right to exercise the power to prescribe such limits as a prerequisite to approval, and the right of the Legislature itself or an agent designated by it to pass upon and approve or disapprove rules and regulations, the authority for whose adoption derives solely from legislative enactment.

Since it may be inferred from your questions that the Indiana Legislative Advisory Committee is considering the advisability of the Legislature assuming the direct supervision of the exercise of the rule-making power, it may be noted that one effective means to curb the possible abuses of that power is for all statutes to be as complete and detailed as reasonably possible. The more precise the provisions of any legislation, the less the need for the adoption of rules to administer such law. Consequently, if it were possible that all legislation achieved the goal of perfection, it would be unnecessary for there to be any rules for administration. Just as in theory, it would be possible for legislative enactments to be so clear and complete as to be self-interpretive and thereby capable of administration by designated agencies without administrative rules, it is equally true that the law-making body could control the interpretation of its own enactments by reserving the approval of administrative rules either to itself or to one of its own committees.

Rule-making, as authorized for state agencies, involves the exercise of a quasi-legislative function and the delegation of such power must be accompanied by a retention of legislative control. I find no constitutional restriction that would prohibit the power sought in either of the two cases presented.

Therefore, in my opinion, the answer to each of your questions is in the affirmative and it is within the scope of legis-
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lative authority to enact such legislation as would place either of said plans in effect as a part of legislative control of rule-making by state agencies.

Inasmuch as the questions presented concern possible proposed legislation, I wish to emphasize that the answers contained herein are directed solely to the specific legal questions presented and are not to be construed, in any manner, as evidencing either the approval or disapproval by the Attorney General of the wisdom of such legislation.

OFFICIAL OPINION NO. 21

May 24, 1960

Mr. F. J. Brown

Secretary, Indiana War Memorials Commission

Indiana War Memorial Plaza

431 North Meridian Street

Indianapolis, Indiana

Dear Mr. Brown:

This is in answer to your request of April 28, 1960, for my Opinion concerning disposition and use of interest accrued on a sum of money used to purchase property for war memorial purposes. Your letter quite adequately supplies the facts for a full consideration of your request and therefore is set out as follows:

"The State of Indiana, through the War Memorials Commission and Marion County Indiana through its Commissioners, purchased the First Baptist Church property located at Vermont and Meridian Streets, City of Indianapolis, Marion County, Indiana. The Deed was dated May 23rd, 1957.

"The purchase price paid was $615,000.00. One half or $307,500.00 was paid at that time and the balance of $307,500 was placed in Escrow with the American Fletcher National Bank. They were instructed to buy Government Bonds with the money.

"Under our agreement with the Church Trustees, they were to vacate the premises in thirty (30) months