

OFFICIAL OPINION NO. 90-40, Re: Procedure and Jurisdiction of the Commission

October 16, 1990

Chris Anderson, Chair Professional Administrators Practices and Standards Commission
Division of Education - DECA
700 Governors Drive
Pierre, SD 57501-2291

OFFICIAL OPINION NO. 90-40

Re: Procedure and jurisdiction of the Commission

Dear Chair Anderson:

On behalf of the Professional Administrators Practices and Standards Commission (hereinafter the Commission), you have requested my opinion on the following matters:

FACTS:

Pursuant to statute, the Commission has promulgated a Code of Ethics for Administrators. The Code of Ethics for Administrators is now being mailed out to all administrators with each new certificate issued and each certificate renewed. The Commission would like to mail the Code to all persons who are issued an Authority to Act by the State Superintendent of Education.

In addition, the Commission has received formal complaints which it believes could be resolved in the local school district. To date, the Commission has handled these complaints through the formal hearing process.

Based upon the foregoing facts, you have asked the following questions:

QUESTION NO. 1:

Is there a statutory limitation regarding the Authority to Act which would indicate that persons who are issued these temporary authorities are not bound by the Code of Ethics for Administrators?

QUESTION NO. 2:

When a formal complaint alleging one or more violations of the Code of Ethics is received by the Commission, can the Commission table the complaint and send it back to the local district for resolution? Can the Commission set a timeline for resolution and proceed with the complaint process if it is not satisfied with the local resolution?

IN RE QUESTION NO. 1:

The process of applying for an Authority to Act is set out in ARSD 24:02:02:02.02. The rule provides:

An authority to act, valid for one year or less, may be issued at the request of a school administrator to provide temporary certification for a person who has a certificate but is not fully qualified for the assignment. The application shall be made on a form provided by the Division of Education.

An authority to act may not be extended unless the person for whom it was granted has completed the course work agreed upon in the application.

The statutory basis for this rule is identified as SDCL 13-42-3 and 13-42-4. The former statute gives the State Board of Education the authority to prescribe rules and requirements in order for the holder thereof to accept a teaching or administrative position in any school in the State. The latter statute vests the authority to issue teaching certificates in the State Superintendent of Education. In addition, SDCL 13-43-5 provides that an individual may sign a contract to teach only if that person holds a certificate. The statute goes on to imply that the person may sign the contract if the person qualifies the school for accreditation. Regardless of the basis upon which the process of issuing authorities rests, it has been the practice of the State Education Agency for many years that an Authority to Act as either a teacher or an administrator is provided at the request of a school. Your question specifically concerns whether the Code of Ethics promulgated by the Commission applies to individuals who do not hold proper credentials as an administrator but have been issued an Authority to Act.

The Commission was established in 1983, through enactment of SDCL 13-43-38 through 13-43-50, inclusive. The authority of the Commission to adopt a Code of Ethics is found in SDCL 13-43-45. The statute provides:

The professional administrators practices and standards commission may adopt rules in accordance with the provisions of chapter 1-26, to carry out the provisions of 13-43-38 to 13-43-50, inclusive.

The commission shall adopt a code of professional ethics for the administrator's profession in this state.

The commission may make any recommendation to the South Dakota board of education or to school boards which will promote an improvement in the administrator's profession.

[Emphasis added.]

Of critical interest in answering this question is the phrase, "administrator's profession" found in the statute. The phrase again appears in SDCL 13-43-48, which grants authority to the Commission to reprimand or recommend disciplinary action against a member of the "administrative profession" when the member of the profession shall have been determined by the Commission to have violated the Code of Ethics. This statute goes on to provide that the Commission can conduct hearings and that "the certificate holder" shall have available certain powers under South Dakota's Administrative Procedures Act. SDCL 13-43-49 authorizes the Commission to commence a proceeding before the State Superintendent seeking revocation or suspension of "the certificate of an administrator." Finally, SDCL 13-43-50 allows "any member" who has been reprimanded or disciplined by the Commission to appeal to the courts as provided in South Dakota's Administrative Procedures Act.

The critical phrases in the statutes, i.e., "professional administrators" and "members of the profession," are not further defined in the Code. Turning to the rules of the Commission, we find the definition of "administrator" as "any certified educational administrator other than the chief administrator or business manager." The "chief administrator" is defined as the "certified administrator solely accountable to the governing board, whose responsibilities encompass the total educational operation of a school or district." ARSD 24:11:01:01(7) and (8). If the definition of "administrator" were to include "anyone who acts as an administrator," I would have no doubt that the Code of Ethics as promulgated by the Commission could be applied against such an individual. In the absence of this definition, I must conclude that the Code of the Commission does not apply to an individual who is functioning as an administrator under an Authority to Act because that person is not certified as an administrator.

The fact that the individual functioning under an Authority to Act does not technically come under the current definition of administrator for the purpose of application of the Commission's Code does not mean that such individuals are free to act as they like without fear of reprimand or discipline.

First, as noted in the regulations set out above regarding Authorities to Act, the individual seeking an Authority to Act must already have a basic certification as a teacher. Since the Code of Ethics promulgated by the Professional Practices and Standards Commission for teachers found in ARSD ch. 24:08:03 would apply to an individual receiving an Authority to Act as an administrator, the teachers' Code of Ethics in its obligations to students, obligations to the public, and obligations to the profession should be available for discipline of a teacher's certificate holder who is functioning as an administrator. Of course, your Commission may wish to amend its definitions to include these persons within its Code of Professional Conduct as well.

Second, even if it were to be determined that a person functioning as an administrator who is not fully certified in that position was subject to neither the Code of Ethics for teachers nor the Code of Ethics for administrators, such an individual could still be held to answer in a civil or criminal suit, depending upon the nature of the activity in which the person has been engaged. Slander, child abuse and sexual contact with a minor are examples of activities which violate the Code as well as produce criminal liability. Should an individual be called to account in some sort of suit for his or her activities as an administrator or teacher under an Authority to Act, a court would be fully justified in looking to the appropriate code of behavior in order to determine the standard of conduct to which the person should be held. The effect of this would be to determine whether civil or criminal liability could attach to an individual by examining their conduct in light of the expected standards of behavior as set out in the Code of Ethics. Nevertheless, the matter would be far more straightforward if the Commission were to undertake to broaden its definition to include these individuals within its jurisdiction.

In summary then, my answer to your question is that an administrator functioning under an Authority to Act is not directly subject to the Code of Ethics for administrators.

Nevertheless, since the individual may well be held to a similar standard of behavior, it would be completely appropriate for the Commission to provide a copy of the Code of Ethics to any individual who is acting as an administrator.

IN RE QUESTION NO. 2.

As noted above, the statutes establishing the Commission grant fairly broad authority to the Commission regarding reprimands or disciplinary actions against administrators. In order to issue such a reprimand or recommend such disciplinary action, the Commission is required to conduct a contested case proceeding under the provisions of SDCL ch. 1-26. SDCL 13-43-48 provides:

After notice and hearing as a contested case under the provisions of chapter 1-26, the professional administrators practices and standards commission has authority to reprimand or to recommend a disciplinary action which may be implemented by the appropriate governing body against a member of the administrative profession when such member shall have been determined by the commission to have violated the code of ethics established under 13-43-45. The commission shall have the powers conferred by 1-26-19.1 and 1-26-19.2, and the certificate holder and his attorney also shall have available the provisions of those sections.

In addition, the Commission has adopted rules found in ARSD ch. 24:11:04, regarding its complaint procedures. ARSD 24:11:04:01 sets out the procedure for filing a complaint and provides that any person may file a complaint, which will then be provided to the individual who is the subject of the complaint. The Commission is authorized to conduct an informal investigation after giving notice of the investigation to the complainant and the respondent. Based upon that investigation, the Commission shall decide whether a formal hearing will be conducted.

The rules as presently drafted are silent regarding what the Commission might do other than conduct a formal hearing. The rules obviously and necessarily imply that, following an investigation, the Commission may decide not to go forward with a hearing or there would be no purpose for the investigation. Since the Commission has the necessarily implied authority to dismiss a complaint without conducting a hearing, it seems to follow that the Commission would have the authority to dismiss this complaint conditionally, subject to such conditions as the Commission might impose. Accordingly, it would be my view that the Commission could refer a complaint to the local governing body for resolution within a certain time period. If the time line is met and the resolution is satisfactory to the Commission, the matter could then be dismissed. If not, the hearing could go forward. Additional rules in this area would be beneficial.

I caution you concerning the difficulties that may arise when the Commission itself becomes to deeply involved in the process of investigation and local resolution of a complaint. It is clearly possible that the Commission can become "contaminated" and be unable to conduct its hearing should the Commission determine that the facts warrant a hearing being held. In the case of *In re Zar*, 434 N.W.2d 598 (S.D. 1989), the South Dakota Supreme Court addressed a situation where a licensing board had become involved in informal efforts to resolve a complaint against a practicing psychologist. The essence of the case was that the Board's action on Dr. Zar's license was reversed. In that case, the Supreme Court impliedly approved a system whereby one board or commission member could be involved in investigations and attempts at resolution of a complaint. If the matter is resolved following investigation, it is closed. If the matter goes to a formal hearing, the commission member who has been assigned to be involved in that particular investigation does not participate with the Commission, and may actually be involved in the presentation of the case before the Commission. This "investigative commission member" would make the necessary recommendations to the Commission concerning resolution, dismissal, or proceeding to a formal hearing.

Since arrangements of this sort are internal matters within the Commission, I do not see that your rules need to be changed in order to allow this process to occur. You may, however, wish to amend your rules to reflect the procedure you follow in order to provide guidance for future members of the Commission and to provide consistency for complainants and respondents.

In summary, my answer to question no. 2 is that the Commission may determine that the handling of a matter on the local level is an adequate resolution and thus dismiss the complaint. I hasten to add that mere agreement on the local level between the complainant, the respondent, and the employer does not preclude the Commission from continuing to investigate and advancing to a formal hearing if the Commission deems such action necessary. Given the potential for intimidation and other forms of mischief, the Commission, as the watchdog of its profession's ethics, cannot have its hands bound by actions taken by others.

Sincerely yours,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

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