



**OFFICE OF  
THE ATTORNEY GENERAL  
AUSTIN, TEXAS**

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August 16, 1947

FAGAN DICKSON  
FIRST ASSISTANT

Honorable Bert Ford  
Administrator  
Texas Liquor Control Board  
Austin, Texas

Opinion No. V-350

Re: The authority of the  
Liquor Control Board  
or Administrator, un-  
der the provisions of  
the Texas Liquor Con-  
trol Act, to appoint  
an "Assistant Admin-  
istrator" and related  
questions.

Dear Mr. Ford:

Your letter of June 25, 1947, requesting the opinion of this Department concerning the authority of the Liquor Control Board or Administrator to appoint an Assistant Administrator and other related questions reads in part as follows:

"The Texas Liquor Control Board and Administrator find that it would be convenient and necessary in order to properly administer and carry out the provisions of the Texas Liquor Control Act to appoint an Assistant Administrator with the same duties, powers and authority to act in the absence of the Administrator as possessed by the Administrator. The Departmental Appropriation Bill for the Biennium beginning September 1, 1947, sets up a salary for an Assistant Administrator.

"Section 5 of Article I of the Texas Liquor Control Act provides as follows:

"The Board or Administrator shall appoint all necessary clerks, stenographers, inspectors, and chemists and other employees to properly enforce the provisions of this Act."

"The Board or Administrator shall fix the duties, salaries, and wages

of all employees authorized by this Act.'

"Paragraph (d), Section 6, Article I of the Texas Liquor Control Act in enumerating the powers of the Board, reads as follows:

"To exercise all other powers, duties, and functions conferred by this Act and all powers incidental, convenient or necessary to enable it to administer or carry out any of the provisions of this Act and to publish all necessary rules and regulations.'

"Section 12 (a), (3) of Article I of the Texas Liquor Control Act reads as follows:

"The Board or Administrator may designate any of its members or representatives to conduct any hearing authorized by this Act, making a record thereof and the Board or Administrator may upon such record render its decision as though the hearing had been held before all members of the Board or Administrator. The Board may prescribe its own rules of procedure and evidence.'

"In view of the foregoing provisions, we would appreciate your opinion upon the following questions:

"1. Does the Board or Administrator have authority under the Texas Liquor Control Act to appoint an Assistant Administrator?

"2. Can the Board or Administrator delegate to the Assistant Administrator, in the absence of the Administrator, the same powers, authority and duties delegated to the Administrator?

"3. If not, in what respect would the authority of such Assistant Administrator be limited?

"4. In the absence of the Administrator, can the Assistant Administrator conduct hearings and pass upon same by proper delegation from the Board or Administrator?

"5. What procedure would be necessary to properly and legally confer upon the Assistant Administrator these duties and powers?

"6. Should the Assistant Administrator possess the same qualifications and give bond in the same amount as required by law of the Administrator?"

In order to satisfactorily answer your questions, it will be necessary to construe various provisions of the Texas Liquor Control Act which you correctly set out in your letter.

Under the provisions of Section 5 of Article I of the Texas Liquor Control Act, it is difficult to place a construction other than that the Board or Administrator has the authority to designate one of its employees as "Assistant Administrator" in carrying out the provisions of the Act. While the Act does not specifically provide for the appointment by name of an "Assistant Administrator", the language used in this Section is sufficiently broad to allow such appointment. Also, under the provisions of Senate Bill 391 as passed by the Fiftieth Legislature, 1947, the salary for an "Assistant Administrator" is provided for in the appropriation to the Texas Liquor Control Board at \$5,004.00 per annum. Therefore, your first question should be answered "Yes".

The answer to your question numbered 2 depends upon whether the Board or Administrator can delegate duties involving administrative discretion. By specific statutory provision, the Board has the authority to appoint an Administrator, who shall administer the provisions of the Act and to delegate some of its powers and duties to him. In answering your first question, supra, we have indicated that it is not necessary for the Act to specifically provide for the appointment of each individual

employee. However, before the Board or Administrator would have the authority to delegate its administrative discretionary duties, there would have to be statutory authority to do so. There are specific instances provided whereby the Board is authorized to delegate its duties to the Administrator but we cannot infer the authority to delegate matters involving discretion to any other employee or for the Administrator to sub-delegate his official duties. Nowhere in the Act do we find any specific provision allowing the Board or Administrator this power. We are, therefore, of the opinion that such delegation of duties involving discretion to an Assistant Administrator would be invalid. Railroad Commission of Texas et al vs. Red Arrow Freight Lines, Inc., et al, 96 S. W. (2d) 735; Railroad Commission of Texas et al vs. Southwestern Greyhound Lines, Inc., 92 S. W. (2d) 296; Commercial Standard Insurance Company vs. Board of Insurance Commissioners of Texas, 34 S. W. (2d) 343; State, et al vs. Robison, Land Commissioner, et al, 119 Tex. 302, 30 S. W. (2d) 292; Naill vs. State, 129 S. W. 630; Gano et al vs. Palo Pinto County, 71 Tex. 99, 8 S. W. 634; Horne Zoological Arena Company v. City of Dallas, et al, 45 S. W. (2d) 714.

We are of the opinion that the intention of the Legislature in delegating certain powers to the Board and allowing delegation to the Administrator, was that either the Board or the Administrator must do such prescribed duties, and that no other person would be authorized to act for them on discretionary matters. This conclusion is drawn from a portion of Section 5, Article I, Texas Liquor Control Act, which provides that "The Administrator shall devote his entire time to said office", and from Section 12a, Paragraph (3) of Article I of said Act, providing that a representative may be designated to make a record at a hearing upon which the Board or Administrator may render its decision. In other words, in such matters as cancellation of permits, where the Board or Administrator has discretionary powers, such powers cannot be delegated without specific statutory authorization.

In support of the above proposition, your attention is called to Volume I, Section 312, Sutherland on Statutory Construction, which is quoted in part below:

" . . . Nevertheless, in many statutes it is customary to grant power directly to the

executive head or the board or commission. If the statute expressly authorizes the re-delegation to a subordinate official, the subdelegation is valid. . . . . It is equally obvious that ministerial or administrative functions may be subdelegated for the ordinary board or commission could not personally perform the multitude of clerical, physical and nondiscretionary acts required of the usual administrative agency. . . . " (Emphasis added)

The rule is stated in Texas Jurisprudence (34 Tex. Jur. 459, Sec. 79) in the following language:

"It is a general rule that public duties must be performed and governmental powers exercised by the officer or body designated by law - that they cannot be delegated to others. This is particularly true of duties which are judicial in their nature, or which call for the exercise of reason or discretion, and which are regarded as a part of the public trust assumed. . . . ."

"But a board may delegate ministerial or administrative functions not calling for the exercise of reason or discretion by appointing agents to perform duties of that character. . . . ." (Emphasis added)

Also, in Texas Jurisprudence (39 Tex. Jur. p. 68, Sec. 33) is found a statement in this connection as quoted below:

"A delegation of power, when permitted, must be expressed by clear and express terms or by clear implication. An administrative agency has only such authority especially with respect to the regulation and control of private rights and properties, as is clearly delegated or necessarily implied from that expressly delegated. And when a statute delegating a power directs the manner of its exercise that method is exclusive of all others."

In Horne Zoological Arena Company vs. City of

Dallas, supra, Judge Alexander, the present Chief Justice of our Supreme Court, while he was serving on the Waco Court of Civil Appeals, said:

"The general rule is that, where the law creates a board to have charge of the affairs of a municipality or a particular part thereof, such board may appoint agents to discharge ministerial duties not calling for the exercise of reason or discretion, but it cannot go beyond this and delegate to others the discharge of duties which call for reason or discretion, and which are regarded as a part of the public trust assumed by the members of such board. The power to exercise discretion in matters intrusted to such boards cannot be delegated, surrendered, or bartered away. . . ." (Emphasis added)

From the above discussion, your second question should be answered in the negative.

Your third question can be answered by stating that the Board or Administrator shall fix the duties of all employees and thus can authorize the Assistant Administrator to do any act, except discretionary acts, delegated to the Board or Administrator. Any ministerial duty as distinguished from a discretionary one could be placed with such employee.

The distinction between a ministerial and a discretionary act is set out in the following excerpt from Texas Jurisprudence (34 Tex. Jur. p. 452, Sec. 73):

"The following distinction between ministerial, judicial and other acts is apparent in the decisions: where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial. An executive officer acts in quasi judicial capacity when, in the exercise of his functions, he is required to pass upon facts and determine his action by the facts found. As to whether an act is quasi

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judicial or merely ministerial depends upon the statute which empowers the officer."

As we have set out above, the Board or Administrator may designate one of its members or representatives to conduct hearings. However, the rendering of a decision based upon such hearing is a discretionary power specifically granted to the Board or Administrator, and it cannot be delegated to any other person in the absence of statutory authority to do so. Therefore, your fourth question is answered "No".

In order to legally confer all of the authority inquired about upon an "Assistant Administrator", a statutory provision should be passed by the Legislature providing that such Assistant shall have the same powers and duties as the Administrator and authorizing the Assistant to act in the Administrator's absence. The qualifications and amount of bond of an Assistant Administrator would be the same as may be required by the Board for other representatives and employees. The provisions of House Bill 727, passed by the Fiftieth Legislature, 1947, but which was vetoed by Governor Jester, would have satisfactorily covered both the authority to subdelegate the power and duties and the qualifications of an "Assistant Administrator". The action of the Legislature in passing such House Bill 727 lends some weight to the conclusion that such was needed in order to confer the power inquired about on the Board or Administrator.

#### SUMMARY

The Liquor Control Board or Administrator has the authority to name an employee as "Assistant Administrator" and to prescribe his duties, but they cannot legally delegate discretionary powers to such Assistant without specific statutory authority. Art. 666-5, V.A.P.C.; Art. 666-12a, Par. (3), V.A.P.C.; 34 Tex. Jur. 459.

Yours very truly

APPROVED:

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WSL:rt

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