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Opinion Committee

The Honorable Dan Morales  
Attorney General  
State of Texas  
Post Office Box 12548  
Austin, TX 78711

FILE # ML-38902-96

I.D. # 38902

Dear General Morales:

An issue has been brought to my attention regarding the rulemaking authority of certain agencies. An agency created by the Legislature, with a governing board appointed by the governor and subject to advice and consent of the senate, has statutory language which requires it to delegate its rulemaking power to an internal advisory council appointed by its governing board. Is this an constitutional delegation of the Legislature's lawmaking powers proscribed in Article III, Section 1 of the Texas Constitution?

The concern pertains to the Texas Commission on Fire Protection. Articles 5.43-1 et. seq. of the Texas Insurance Code govern the promulgation of rules by the State Fire Marshall. Section 417.004(a) of the Texas Government Code mandates (in pertinent part):

(a) The state fire marshal, *under the supervision of the commission*, shall administer and enforce applicable provisions of the Insurance Code and other law relating to the state fire marshal. *The commission shall perform the supervisory and rule-making functions previously performed by the State Board of Insurance under this subsection.* (emphasis ours)

References to "commission" in Subsection (a) indicate the Texas Commission on Fire Protection. Additionally, Section 417.0041 provides for further clarification in the rulemaking process. This section provides:

**§ 417.0041 Participation of Certain Advisory Councils in Rule Making**

(a) This section applies to rules adopted under Articles 5.43-1 through 5.43-4, Insurance Code, and to the advisory councils established under these articles.

(b) Each council periodically shall review commission rules implementing the article under which the council was established and recommend changes in the



rules to the commission. Notwithstanding Chapter 2001.031, *the commission shall submit all changes and additions to rules that implement the article under which an advisory council was established to that council for development. If the commission does not approve a rule developed by the council, the commission shall indicate to the council the reasons that the commission did not approve the rule and return the rule to the council for further development.* (emphasis ours)

Finally, the aforementioned Section 2001.031, provides:

**§2001.031. Informal Conferences and Advisory Committees**

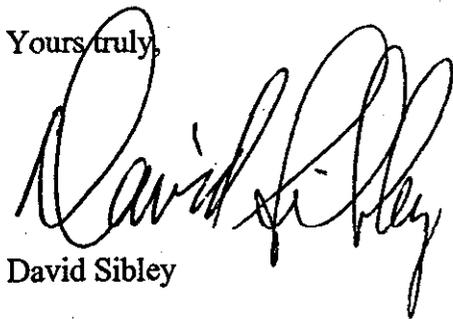
- (a) A state agency may use an informal conference or consultation to obtain the opinions and advice of interested persons about contemplated rulemaking.
- (b) A state agency may appoint committees of experts or interested persons or representatives of the public to advise the agency about contemplated rulemaking.
- (c) *The power of a committee appointed under this section is advisory only.* (emphasis added)

Under the provisions of Section 417.0041, the commission must submit and offer for review any of its rules or rule changes that affect an advisory council. After the council develops said rule, it can only be adopted by the commission or returned to the council for further development.

With these parameters, does an agency then become subject to governance by its advisory council? Is this a proper delegation of legislative authority as per Article III, Section 1 of the Texas Constitution?

Please provide an opinion on this complex question at your convenience.

Yours truly,

A handwritten signature in black ink, appearing to read "David Sibley". The signature is written in a cursive, flowing style with some loops and flourishes.

David Sibley