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January 26, 2010

Opinion No. 10-09

Tennessee Real Estate Commission Education Course Approval

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**QUESTIONS**

1. After the Tennessee Real Estate Commission has approved courses of instruction offered by course providers for a four-year cycle as per Commission Rule 1260-5-.16, does the Commission have the authority to require the reapplication of all approved courses for arbitrary review and reapproval prior to the end of that four-year cycle which currently ends on December 31, 2012? As a point of clarification, the question excludes the normal reapplication required at least 120 days prior to the expiration date.

2. Does the Tennessee Real Estate Commission have authority to approve any course of instruction for a period of time less than the remainder of a four-year cycle as described in Commission Rule 1260-5-.16?

3. Does the Tennessee Real Estate Commission have authority to withdraw authorization of any education course prior to the expiration date except for cause found under Commission Rule 1260-5-.10 (withdrawal of approval)?

4. If the Tennessee Real Estate Commission elected to change the course-authorization period from the current four-year period to a two-year period, do they have the authority to include in the rule a requirement that all courses currently authorized through December 31, 2012, expire arbitrarily on December 31, 2010, thereby retroactively reducing the authorization period of currently authorized courses by two years?

5. If the answer to question number 4 is yes, would the doctrine of estoppel prevent the Tennessee Real Estate Commission from canceling all course authorizations issued set to expire December 31, 2012, and reissuing expiration dates to all courses of December 31, 2010?

6. If during the rulemaking process under the Uniform Administrative Procedures Act, the Tennessee Real Estate Commission failed to satisfy the requirements of the Regulatory Flexibility Act of 2007 or the Governor's Executive Order # 38, would those new rules then be void under Tenn. Code Ann. § 4-5-216 (invalidity of improperly adopted rules)?

## OPINIONS

1. No, the Tennessee Real Estate Commission is bound by its properly promulgated rules, which provide that once approved, a course shall remain effective until the end of the four-year review cycle, absent a specific finding of deficiency by the Commission.
2. No, the Tennessee Real Estate Commission does not have authority to approve education courses for a period of time less than four years as required by the current rules.
3. No, the authority of the Tennessee Real Estate Commission to withdraw its authorization of an education course prior to the approved expiration date is limited by the Commission's own rules to the five specific deficiencies listed in Commission Rule 1260-5-.10.
4. Yes, the Tennessee Real Estate Commission has the rulemaking authority to amend its own rules through the proper procedures, and such authority would allow for the repeal of the current four-year education-course-approval period and the adoption of a new two-year approval period with retroactive application.
5. No, the doctrine of equitable estoppel may not be applied under the circumstances raised in this opinion request.
6. Yes, a violation of Tenn. Code Ann. § 4-5-401 *et seq.*, also known as the Regulatory Flexibility Act of 2007, would render adopted rules void. As the requirements of Executive Order # 38 essentially mirror those of the Act, we need not separately address that Order.

## ANALYSIS

1. Pursuant to Tenn. Code Ann. § 62-13-203, the General Assembly has delegated to the Tennessee Real Estate Commission the “power to do all things necessary and proper for carrying out the provisions of [Chapter 13 of Title 62, which governs Real Estate Brokers] not inconsistent with the laws of this state.” This power includes the express authority to “promulgate and adopt such bylaws, rules and regulations as are reasonably necessary for such purpose.” Tenn. Code Ann. § 62-13-203. Accordingly, the Tennessee Real Estate Commission promulgated rules and regulations governing the real-estate industry in Tennessee, which are found in Chapters 1260-01 through 1260-06 of the Tennessee Comprehensive Rules and Regulations.

Pursuant to statute, a prerequisite to licensure in Tennessee as a real-estate broker or affiliate broker is completion of certain specified education requirements. *See* Tenn. Code Ann. § 62-13-303. The General Assembly further mandated that:

- (a) The real estate commission is authorized and empowered to promulgate rules and regulations relative to the establishment and conducting of any course, courses of study or instruction which are designed to satisfy the educational

requirements of § 62-13-303. The commission shall establish application fees for educational courses submitted for approval, which fees shall be deposited in the recovery fund interest account to be used by the commission for educational purposes.

(b) As a condition to meeting the requirements of § 62-13-303, any such course, course of study or instruction shall be established and conducted in accordance with the rules and regulations of the commission.

Tenn. Code Ann. § 62-13-106(a) and (b). The Tennessee Real Estate Commission fulfilled this statutory obligation by establishing the rules related to the education requirements contained in Chapter 1260-05 of the Tennessee Comprehensive Rules and Regulations.

The primary underlying issue presented in this opinion request involves the Tennessee Real Estate Commission's authority to withdraw approval of previously approved courses and retroactively establish a shorter approval period. Tenn. Comp. R. & Regs. 1260-5-.16 ("Rule 16"), entitled "Course Approval Periods," states:

(1) Effective January 1, 1993, the Commission will approve courses based upon a four (4) year review cycle of all courses. Each cycle will end on December 31st of the fourth year. The first four (4) year period of approval will end December 31, 1996.

(2) **Each course approval shall remain effective until the end of the review cycle** notwithstanding the date upon which it was approved.

(3) All course providers shall be required to resubmit their courses for approval at least one hundred twenty (120) days prior to the applicable expiration date. Failure to meet this deadline may result in the non-approval of a course.

(emphasis added).

The first question posed is whether the Tennessee Real Estate Commission has the authority to "require the reapplication of all approved courses for arbitrary review and re-approval prior to the end of the four (4) year cycle" established in Rule 16. We assume from the context of all of the questions posed that the first question may be rephrased as follows: whether or not the Commission has the authority to summarily withdraw approval of all education courses prior to their expiration at the end of the four-year review cycle established in Rule 16 without changing the existing rule. The answer to this question is no, because the Commission must follow its own rules, its rules provide that approved courses "shall remain effective until the end of the review cycle," and the only mechanism currently provided for the withdrawal of an already granted approval prior to its natural expiration at the end of the review cycle is a specific finding of deficiency pursuant to Rule 1260-5-.10.

Rule 16 is clear and unambiguous – once approved, "[e]ach course approval shall remain effective until the end of the review cycle." Other than the "for cause" findings that permit the

withdrawal of a course's approval on an individual basis outlined in Rule 1260-5-.10, the TREC's rules do not provide for any other course-approval withdrawal, nor do the rules provide for a Commission mandated rereview or reapplication process prior to the outlined reapplication process beginning 120 days prior to the expiration of the four-year approval cycle pursuant to Rule 1260-5-.16(3).

While we have found no reported Tennessee case directly on point, it is a generally accepted principle of law that a state administrative agency is bound by and must follow its own regulations, including procedural regulations, even when the adoption of these same regulations was within the agency's discretionary authority. *See* 2 Am. Jur. 2d *Administrative Law* § 241 (2009). No less than thirty-seven states as well as the District of Columbia have reported cases holding that a state agency is bound by its own rules.<sup>1</sup> Moreover, more than half a century ago the United States Supreme Court held that all federal administrative agencies are required to follow their own rules, a principle universally recognized to date as the "Accardi doctrine." *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). This Office is unaware of any authority to the contrary. In short, it is "axiomatic that an agency is bound by its own regulations." *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979). To allow an administrative agency to violate its own rules and regulations with impunity would in practical effect render the rules meaningless. Accordingly, this Office believes that a Tennessee court would hold that Tennessee boards and commissions are bound by and must follow their own rules and regulations.

Pursuant to Rule 16, the Commission approves courses on a four-year cycle. The applicable rules and regulations state that such approved courses "shall remain effective until the end of the review cycle." Tenn. Comp. R. & Regs. 1260-5-.16(2). Thus, the Tennessee Real Estate Commission does not have the authority to summarily withdraw all approvals or require all approved courses to be subjected to an arbitrary rereview and reapproval process prior to the end of the four-year cycle provided for in the current rules.

2. Under the current rules, the Tennessee Real Estate Commission does not have the authority to approve any course of instruction for a period of time less than four years as expressly stated in Rule 16. For the reasons outlined above, the Commission must follow its own rules and approve educational courses for a full four years.

3. Pursuant to its own rules and regulations, the Tennessee Real Estate Commission has outlined the exclusive process by which it may withdraw authorization of educational courses, described as follows:

**WITHDRAWAL OF APPROVAL.** Approval of any course(s) may be withdrawn by the Commission if:

- (1) (a) the establishment or conduct of a course violates, or fails to meet the

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<sup>1</sup> A list of cases from every jurisdiction holding that administrative agencies must follow their own rules is prohibitively voluminous. However, by way of example, all of Tennessee's fellow Sixth Circuit states have so held. *See, e.g., Hagan v. Farris*, 807 S.W.2d 488 (Ky. 1991); *Lyden Co. v. Tracy*, 666 N.E.2d 556 (Ohio 1996); *Rand v. Civil Service Commission*, 248 N.W.2d 624 (Mich. 1976).

requirements of, the provisions of this chapter or other applicable law[;]

(b) the information contained in the application for approval is materially inaccurate or misleading;

(c) the sponsor, an instructor, or any other school representative disseminates false or misleading information concerning any course;

(d) the sponsor, an instructor, or any other school representative possesses, claims to possess, reveals, or distributes any questions utilized in examinations given by the Commission; or

(e) the performance of the instructor is so deficient as to impair significantly the value of a course; provided, however, that the instructor shall receive adequate notice of the discovered deficiency and opportunity to demonstrate satisfactory correction thereof.

Tenn. Comp. R. & Regs. 1260-5-.10 (“Rule 10”). The five specific deficiencies outlined in the above rule, combined with the conjunction “or,” contemplate an administrative procedure in which the Commission may, upon review and specific finding of any one of the five expressly enumerated deficiencies, withdraw a previously granted authorization of an educational course. Significantly, the finding of a deficiency in the performance of an instructor as outlined in subsection (e) of this rule expressly requires the Commission to provide “adequate notice” and “opportunity” for correction before withdrawing authorization of the course. It is readily apparent from the rule that any withdrawal of course approval must be done pursuant to an administrative proceeding in which the Commission bears the burden of proving that the withdrawal is warranted “for cause,” specifically one of the five causes expressly enumerated in Rule 10.

The protections of procedural due process apply to administrative proceedings. *Martin v. Sizemore*, 78 S.W.3d 249, 263 (Tenn. Ct. App. 2001) (citing *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 455 (Tenn.1995)). Accordingly, the Commission would be required to make specific findings pertaining to one or more of the five enumerated deficiencies in Rule 10 before withdrawing course authorization. The arbitrary withdrawal of all prior course approvals and implementation of a mandatory rereview and reapplication process, absent prior specific review of individual courses and a specific and articulated finding of deficiencies as required by Tenn. Comp. R. & Regs. 1260-5-.10(1) (a) through (e), is not authorized by the Commission’s own rules and would violate the procedural protections of those rules. Thus, the Tennessee Real Estate Commission does not have the authority to withdraw authorization of an education course prior to its approved expiration date except as expressly provided by the Commission’s own rules and regulations outlined in Rule 10.

4. The essence of question four is whether an administrative agency may ever change its rules and regulations regarding the length of time for which an educational course may remain authorized, or, in the alternative, whether a retroactive reduction in the approval

length is per se unlawful. We conclude that an administrative agency may, by following the proper procedures, change its rules and regulations, even if the result is a shorter course-authorization period than that originally granted by the agency.

This Office anticipates that any challenge to a Tennessee Real Estate Commission rule revision resulting in a reduction of a course-approval period would center on claims of infringement upon a property-right interest of providing education courses designed to meet the Tennessee real-estate licensure requirements. Such claims would likely be based on alleged violations of the constitutional principles of due process.<sup>2</sup> For the reasons outlined below, this office is of the opinion that the contemplated rule change would survive constitutional challenge.

The United States Constitution's Fourteenth Amendment Due Process Clause protects "life, liberty and property" from government deprivation without due process. The Tennessee Supreme Court has determined that the "law of the land" provision of article I, section 8, of the Tennessee Constitution is synonymous with the due process clause of the U.S. Constitution. *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994). Procedural due process prevents the state from "arbitrary" or "unreasonable" infringement upon a recognized interest without first being provided procedural safeguards such as notice and opportunity to be heard. *State v. AAA Bonding*, 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998); *Armstrong v. Department of Veterans Affairs*, 959 S.W.2d 595, 598 (Tenn. Ct. App. 1997). Addressing a claim of an unconstitutional denial of procedural due process requires a two-step analysis: first, a determination of whether there is a constitutionally protected interest, and second, if such interest exists, a determination of what process is due and whether a deprivation has occurred. *Rowe v. Bd. of Education*, 938 S.W.2d 351, 354 (Tenn. 1996). The right to engage in a particular profession or common occupation without "unreasonable" government interference is a "property" interest protected by procedural due process. *Rowe*, 938 S.W.2d at 355; *Martin*, 78 S.W.3d at 263. When legal proceedings are conducted pursuant to administrative proceedings, due process requires that affected parties must receive: (1) adequate notice; (2) an opportunity for a hearing at a meaningful time and in a meaningful manner; and (3) an opportunity to obtain judicial review of the board's or agency's decision. *Martin*, 78 S.W.3d at 267.

While the right at issue is not a clearly vested property interest, such as a license to practice a regulated profession, this more ephemeral right nonetheless has value because a provider's course is worth much more if it has been approved for credit by the Commission. Thus, it is possible that a court might find that persons who were granted course authorization by the Tennessee Real Estate Commission to provide real-estate education courses for four years possessed a constitutionally protected property interest, the deprivation of which may only be accomplished through procedures providing due process.<sup>3</sup> However, even when there is a

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<sup>2</sup> While it is possible an equal protection challenge could be brought alleging a disparity between the class of those already issued authorization with an expectation of four years and the class of future applicants who know going into the process that the authorization period will be only two years, such a claim would be weaker than a due process claim and would likewise fail for many of the same reasons outlined below. The right to engage in a particular occupation is not a fundamental right, and to the extent the rule change, applicable to everyone, creates disparate treatment, such treatment is rationally related to a legitimate governmental purpose.

<sup>3</sup> The theory, however tenuous, would be that those persons with an existing four-year course authorization have an interest that is "already acquired." *Rowe v. Bd. of Education*, 938 S.W.2d 351, 354 (Tenn. 1996). Moreover, this

recognized constitutionally protected interest, due process does “not prevent the deprivation of property interests. Rather, procedural due process guards against unfair or mistaken deprivations of property interests.” *Martin*, 78 S.W.3d at 262 (citing *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)).

In the circumstances described in question four – where the course-authorization period is reduced from four years to two years through a change in the rules – those affected parties providing real-estate education courses would nonetheless receive more than adequate procedural due process protection through the administrative rulemaking process outlined in Tenn. Code Ann. § 4-5-201 *et seq.* First, adequate notice is provided pursuant to the notice of hearing requirements in Tenn. Code Ann. § 4-5-203.<sup>4</sup> Second, an opportunity for a hearing at a meaningful time and in a meaningful manner is provided through the rulemaking hearing process and through consideration of public comments as required in Tenn. Code Ann. §§ 4-5-204 and -205.<sup>5</sup> Finally, the Tennessee Uniform Administrative Procedures Act also provides citizens the opportunity to obtain judicial review of the Commission’s decision. If the revised rule is ultimately placed into effect, a party may challenge it through an action for a declaratory order pursuant to Tenn. Code Ann. § 4-5-223, which may be reviewed by a court, or if the agency declines to issue a declaratory order, the party may file a suit for a declaratory judgment pursuant to Tenn. Code Ann. § 4-5-225.

In short, procedural due process protections do not prohibit the government from ever amending its own laws or rules; an entity with the power to create an entitlement or property interest likewise has power to alter or even terminate that interest through later enactments. *See Gattis v. Gravett*, 806 F.2d 778, 780 (8th Cir. 1986). As this office has previously opined in the analogous situation of legislation, “[w]hile the legislative alteration or elimination of a previously conferred property interest may be a ‘deprivation,’ the legislative process itself provides citizens with all of the ‘process’ they are ‘due.’” Op. Tenn. Att’y Gen. 09-91 (May 18, 2009) (quoting Op. Tenn. Att’y Gen. 98-045 (Feb. 17, 1998)). In this situation, the administrative process likewise provides the citizens of Tennessee with all of the “process” they are “due.” For these reasons, the recently adopted rule change would survive a procedural due

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interest was created by “existing rules or understandings” stemming from state law and could be construed as a “legitimate claim of entitlement to a specific benefit” upon which those engaged in instructing rely. *Id.*

<sup>4</sup> Because the Attorney General and Reporter must approve all rules pursuant to Tenn. Code Ann. § 4-5-211, this Office is currently tasked with reviewing the most recent revision of Rule 16, which changes the education-course-authorization period from four years to two years. Notice of this rule change was filed with the Tennessee Department of State on January 30, 2009, and the proposed change was published in the Tennessee Administrative Register in February of 2009. Accordingly, adequate notice to all affected parties was in fact given in this instance.

<sup>5</sup> A rulemaking hearing addressing the rule change at issue was conducted on April 2, 2009, and at this hearing multiple comments (including objections) from the general public pertaining to the proposed change to Rule 16 were presented to the Commission. Pursuant to the requirements of Tenn. Code Ann. § 4-5-222(a)(1)(C), the Commission maintained a written record of its responses to the comments submitted at the public hearing. The Commission states that its intention in reducing the approval period for the education courses is to improve communication with the schools and to gather course information more frequently. The record reflects that the Commission voted to approve the proposed change to Rule 16 after considering the arguments against such a revision presented at the public hearing. As such, the procedural due process requirement of opportunity for a hearing was met.

process challenge. Furthermore, because the Tennessee Real Estate Commission's rule change was undertaken to improve communications with schools and gather course information more frequently, the change was rationally related to a legitimate state interest and therefore would also survive a substantive due process challenge.<sup>6</sup>

5. As stated above, the Tennessee Real Estate Commission has the authority to amend its own rules resulting in the repeal of the current four-year education-course-approval period and the adoption of a new two-year approval period. Furthermore, the doctrine of equitable estoppel may not be applied against the state to prevent the implementation of this proposed revision to Rule 16. The general rule in Tennessee is that the doctrine of estoppel does not apply to the acts of public officials or public agencies. *See Tennessee Bd. of Dispensing Opticians v. Eyear Corp.*, 400 S.W.2d 734, 739 (Tenn. 1966) (holding that "[t]he doctrine of estoppel cannot be invoked against the State"). Furthermore, in light of the reasonable justification for the new rule and the need for state agencies to update their execution of state law, there would be no basis to invoke estoppel in this setting in any event.

6. The failure of the Tennessee Real Estate Commission, or any agency, to satisfy the requirements of the Regulatory Flexibility Act of 2007, or any other requirement of the statutory rulemaking process, would render the adopted rules void and of no effect. Section 4-5-216, Tennessee Code Annotated, states that "[a]ny agency rule not adopted in compliance with the provisions of this chapter shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose." Part four of the same chapter outlines the requirements of the Regulatory Flexibility Act of 2007. *See* Tenn. Code Ann. § 4-5-401 *et seq.* Sections -402 and -403 of this Part require agencies which propose rules to conduct a review of the impact such rules will have on small businesses, employ a regulatory flexibility analysis to minimize adverse effect on small businesses, and prepare an impact statement as part of the rulemaking process.<sup>7</sup> A failure to comply with these requirements would render any adopted rules void and of no effect.

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<sup>6</sup> Government infringement of all rights other than "fundamental" rights will survive a substantive due process challenge as long as the government infringement is "rationally related to a legitimate state interest." *Lawrence v. Texas*, 539 U.S. 558, 593 (2003). There is no fundamental right to employment or to "occupational liberty interests" in Tennessee. *Rowe*, 938 S.W.2d at 353 n.1. Neither the right to conduct real-estate educational courses nor the right to receive authorization for the courses for four years, as opposed to two, is a fundamental right. Given the drastic and sudden changes both the Tennessee and national real-estate market have experienced recently, more frequent evaluation and authorization of courses providing instruction for real-estate brokers is without question rationally related to the legitimate state interest of ensuring the general welfare of the citizens of this state. Because the proposed rule change bears a reasonable relation to a proper government purpose and is neither arbitrary nor discriminatory, the recently adopted rule revision does not violate principles of substantive due process. *See Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003).

<sup>7</sup> Executive Order # 38, signed by Governor Bredesen on May 22, 2006, and entitled "An Executive Order Requiring State Agencies to Assess the Impact of New Regulations on Small Businesses," was a precursor to the Regulatory Flexibility Act of 2007. The requirements of the Executive Order essentially mirror those of the 2007 Act now codified in Tenn. Code Ann. § 4-5-401 *et seq.* Accordingly, we need not separately address Executive Order # 38.

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