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6 February 1986

Representative Robert M. Forrey  
House of Representatives  
STATEHOUSE MAIL

Re: Real Estate Commission's Rules on Education

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION  
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Forrey:

The question appears to be whether the Real Estate Commission had authority to promulgate the rules they have made in connection with the instruction in real estate that aspiring salesmen and brokers must have before they may take the licensing exam. Please be aware that this analysis was made without any contact with the Real Estate Commission and therefore lacks a factual context which, if available, might have altered some of the conclusions.

There is no clear case authority in Idaho discussing the extent of an agency's exercise of its delegated authority to make rules.

The cases in this area from other states interpret the general rule on delegation of rulemaking, i.e., that rules must be within the statutory authority, by examining the rule and the underlying statute. A rule is invalid if it exceeds the authority conferred by statute; by extending or modifying the statute, conflicting with the statute or having no reasonable relationship to the statutory purpose, Ontario Community Foundation, Inc. v. State Bd. of Equalization, 678 P.2d 378 (Cal. 1984); Halford v. City of Topeka, 677 P.2d 975 (Kan. 1983); Miller v. Employment Division, 620 P.2d 1377 (Oregon 1980); Pacific Northwest Bell Telephone Co. v. Davis, 608 P.2d 547 (Oregon App. 1979); Cohen v. State Dep't of Revenue, 593 P.2d 957 (Colo. 1979); 1 Cooper State Administrative Law, pp. 250-263.

The Real Estate Commission was created and is governed by ch. 20, title 54, Idaho Code. Its administrative rulemaking power is couched in fairly broad terms: "The commission is expressly vested with the power and the authority to make and enforce any

and all reasonable rules and regulations as shall by it be deemed necessary for administering and enforcing the provisions of this act." Idaho Code § 54-2027.

With respect to the prerequisites for a license, Idaho Code § 54-2029 provides that among the qualifications for salesman:

the applicant . . . shall furnish to the commission proof that he has successfully completed a course of study consisting of at least thirty (30) classroom hours, or equivalent correspondence hours, or real estate courses, . . . provided however, the commission may accept other courses in lieu of the above mentioned courses and may designate additional required courses.

A broker applicant must show that he has successfully completed a total of ninety (90) hours of classroom instruction, or equivalent correspondence hours.

Applicants for either license may submit a certification from any university, college or junior college, or from any privately owned school approved by the commission, that the applicant has successfully completed the prescribed courses to meet the training requirement. (Emphasis added.)

The Real Estate Commission's rules in this area are too extensive to cite in detail but may be summarized. The Commission has established a six-member Idaho Real Estate Education Council whose purpose is to establish "real estate education policy and course content quality" for approved courses. Members of this Council are being reimbursed for travel and expenses. Forty-five hours of school are set as the minimum for salesmen. A system for "certification" of schools, courses and teachers is established, in detail. Accredited colleges and universities are the subject of several pages of rules, which include: 1) a requirement that all course prerequisites be met, 2) teachers must be "certified", 3) exams must be monitored, and 4) courses may be audited by Council representatives. Accredited colleges and universities must pay some unspecified fee to the Council for the administration of this rule.

The "certification" requirements for real estate schools, i.e., those not a part of an accredited college or university, are even more involved. Such schools cannot be used by brokerages as a recruiting medium for salesmen. If a school is located in the same building as a brokerage it must have a separate entrance and

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otherwise be distinguished from the agency. There are extensive rules on the financial responsibility and moral uprightness of school sponsors. Fairly rigid requirements are imposed for class attendance, record keeping, examinations, advertising, facilities, and even bonds by the school to protect the students. The school's certification may be cancelled if "just cause" is shown.

The courses offered in these schools must be submitted with all materials to be used including the exams, sixty days in advance, to the Commission. Certification may be refused if courses are not up to the Council's quality standards.

In addition to schools and courses being certified, so must be the instructors. No realtor who has had his license suspended or revoked within two years may instruct. Numerous qualifications are set for instructors, but these qualifications may be waived by the Council if another group of criteria are met. Instructors are also required to pay fees to the Council; and, like the schools, their certification may be withdrawn.

The "decertification" process is outlined briefly in the rules. Notice is given of deficiencies and if not corrected within 30 days, certification is withdrawn. The education director makes the allegation of deficiencies and also determines if compliance has been achieved. This decision may thereafter be appealed to the Council and then to the Commission.

Comparing the rule to the statute, very little is clearly or specifically authorized. The Commission is authorized by law to approve "privately owned schools" offering the courses listed in Idaho Code § 54-2029(C). The statute fails to set forth any guidelines as to the purpose, extent or manner of such "approval." The Commission's rules constitute full-scale regulation rather than simple criteria for approval or disapproval.

The administrative rules purporting to certify, regulate, and impose fees on real estate courses offered by universities, colleges, and junior colleges are not within the statutory authority of the Real estate Commission. There is no language in the statute empowering the Commission to create, appoint, or reimburse a subsidiary council and delegate to such a body responsibility for making education policy. Neither the rule establishing the Council nor the rules relating to colleges relate to the subject matter for which the power to legislate has been delegated.

The rule requiring 45 hours of instruction for a salesman is within the agency's authority, due to the statutory language allowing "at least 30 classroom hours." The board would not be able to increase the classroom requirement for brokers because the statute in that case provides for a maximum of 90 hours.

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That these school rules are beyond their statutory authority is made more apparent by contrasting the "approval" language in § 54-2029 with the schooling requirement for, e.g., barbers and cosmetologists. Idaho Code § 54-506 requires 1500 hours of schooling for an apprentice barber; Idaho Code § 54-805 requires 2000 hours of schooling to be a cosmetologist. Both barber colleges and cosmetology schools are extensively regulated by statutes which authorize clarifying rules, Idaho Code §§ 54-507, 54-521, 54-808, and 54-821. The rulemaking authority to regulate the conduct of these schools is express, and guidance is given in the statutes on the nature and extent of rulemaking authority. The longer period of time which must be spent in school would justify more regulation and the direction for rules in the statutes makes it plain what direction the rules should take.

The authority to approve or disapprove certain schools does not necessarily include the authority to certify teachers and require two extensive lists of qualifications for them to instruct. Nor does it appear "reasonable" to require that the school obtain a bond, or to establish that brokerage agencies may not set up schools and use them to recruit salesmen. The law sets out no guidelines to assist the agency in determining what the basis should be for approving schools, or for disapproving. On a pragmatic basis, these rules do not appear to be either reasonably within the standards prescribed or necessary under the statutory purpose.

There may also be constitutional problems with the rules. Specifically the decertification process for schools and instructors may be vulnerable to claims made on the basis of a deprivation of due process.

Sincerely,

  
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Deputy Attorney General  
Administrative Law and  
Litigation Division

FCG/cjm