

FILE

Subject

*Schools - Bd of Regents
Funds - Use of*



STATE OF KANSAS

Copy to

Office of the Attorney General

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VERN MILLER
Attorney General

January 11, 1974

Opinion No. 74- 11

James R. Cobler, Director
Division of Accounts and Reports
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Topeka, Kansas 66612

Dear Mr. Cobler:

You have presented for review several vouchers received by your office from Wichita State University purporting to pay doctoral scholarships from, depending upon the voucher, moneys appropriated by the legislature from the State General Fund as defined by K.S.A. 75-3036 to Wichita State University for "other operating expenses" or moneys appropriated and authorized for expenditure from the University's "general fees" as authorized and collected under the authority of K.S.A. 1973 Supp. 76-719. It has been confirmed by University officials that these payments are scholarships, as opposed to stipends or fellowships, since students receiving such scholarships are not obligated to, nor do they, perform any services for the University as a condition of the receipt of such funds. The question is whether the expenditure of these funds has been lawfully authorized.

State ex rel. Hopkins, Attorney General v. Turner, 111 Kan. 302 (1922) involved a situation where the legislature by statute authorized the state auditor to sell land comprising an old navigable stream bed when the land between the old bank is abandoned by the water and a new channel is established. The state owned the original stream bed. Additionally, the statute ostensibly authorized the auditor to pay part of the proceeds of the sale of the abandoned bed to the private property owners whose land was taken by the stream as a new channel.

The Kansas Supreme Court concluded as follows:

"Before the change of channel occurred, the state owned the bed of the stream. The petition does not tell how the change of channel occurred, whether by

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gradual and imperceptible relinquishment of one and acquisition of the other, or by sudden and violent irruption of the water, whereby the new channel was cut and the old one deserted. If the change was accomplished by the first method, the state no longer owns the old channel, and has nothing to sell. If the change was accomplished by the second method, the state does not own the new channel, and would get nothing for its money. Assuming the change was caused by flood, the state has full jurisdiction over the river in its present location, for preservation and protection of its public highway character, but the proprietors whose lands were invaded and degraded by the avulsion still own the bed and banks of the stream.

" * * * The attorney-general offers no suggestion of public purpose to be promoted by using money which has been regarded as belonging to the school fund, or for that matter, by using any other public money, in buying river beds; . . .

"The legislature may not make a gift of public money, any more than it may make a gift of public property, for the private benefit of an individual, and that would be the result of selecting a few flood sufferers of a special class and reimbursing them for their losses." [Citations omitted.]

Also supporting this principle is Hicks v. Davis, State Auditor, 97 Kan. 312 (1916), wherein the Kansas Supreme Court stated as follows:

" * * * Of course, no officer, great or small, may lawfully obligate the state to pay any sum whatsoever unless there is a statute therefor . . ."

By substituting the word "students" for the words "flood sufferers" in the case first quoted, the answer in my opinion is provided to the situation you present. In fact, arguments supporting scholarship payments from state funds have even less lawful support than the situations presented in the referenced cases since no general or special (appropriation) statute may be found authorizing such payments. In other words, a situation is not present here whereby a duly enacted law authorizing the expenditure of public money may be put to the test whether, by its terms, it authorizes the expenditure of public funds for a declared public purpose or is merely a gift or gratuity for the special benefit of certain private individuals. Given a clear law on the subject, the legal presumption might favor the expenditure as proper (see Hicks v. Davis, supra). However, absent a law, there not only exists

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no legal presumption but there is no basis of authority for an expenditure which standing alone without a declaration of public purpose, is no more than a gift of public funds.

It has been suggested that these payments by the University have been authorized by the Board of Regents. This claimed authorization takes the form of requests by Wichita State University and the Regents in 1969 and 1970 to the Director of the Budget, in accordance with K.S.A. 1973 Supp. 75-3717 et seq., to receive funds for this activity. Part of those documents are attached. It is noteworthy that even these claimed supportive documents speak of fellowships as opposed to the gratuitous scholarship payments which the vouchers in question represent. To this argument it should first and clearly be noted that although the Board of Regents is a constitutional board, its effective powers to act are to be derived from the legislature. See State ex rel. Miller, Attorney General v. Board of Education, 212 Kan. 483, 487 (1973). Certainly then the Board of Regents does not have power greater than the legislature, that is, to declare on its own initiative scholarship payments to be for a public purpose and allocate funds to satisfy the declared purpose when the subject matter of the expenditure itself is solely an object to be tested against the constitutional law making power of the legislature. Notwithstanding, it is impossible to find the public purpose, much less to measure it, from the documents presented. Additionally, no standards can be found to guide the disposition of any funds claimed available to recipients, or to determine upon which basis one individual should receive a scholarship and another not. Is the award based on past scholarship, future potential, or like non-state funded athletics, on muscle, speed and quickness, or as in the spoils system, acquaintanceship? Thus, even raising the Wichita State University and Regents' budget request to the dignity of statutory enactment, which it does not have, standards for administration and equal protection of the law do not exist since there is no standard of operation or opportunity for which all students in one or more classes or situations might apply. The legislature has in the past deemed it within its province in the first instance to establish classes of individual for the application of fees and/or tuition, e.g., K.S.A. 73-1217 -P.O.W.'s and M.I.A.'s; K.S.A. 1973 Supp. 76-729 et seq. - residency distinctions.

It is unfortunate that questions of the authority of state agencies arise so often after programs have been in operation because individuals, whether state employees, students, or third parties, have relied on the agency assertion of authority and acted accordingly. Often erroneous or excessive assertions of authority seem to be predicated upon matters involving the budget

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process of this state, for it appears obvious that many incorrectly confer upon the budget documents, requests, et al, the status of law, and thus the nexus of authority for proceeding. This is a most dangerous reliance since budgetary documents as they are presently prepared and processed never in actuality became the law, but, at most, and rarely, only may be some evidence of what the legislature intended when bills survive the constitutional legislative process and questions arise as to the proper interpretation and application of those laws.

In the instance at hand, from discussions with Board and agency officials, this continuing erroneous assumption as to the effect of the budget is most clear and historically complete. As stated, the subject matter of the expenditure here is one which only the legislature can authorize. An authorizing law declaring the public purpose, complete with standards or the basis for standards of eligibility for payment, must exist somewhere before the authority to spend funds appropriated to the agency may be considered for this purpose. Concededly, no general statute appearing in the Kansas Statutes Annotated specifically confers authority on Wichita State University or the Board of Regents stating that it is a declared public purpose to award public moneys for scholarships nor can an argument be sufficiently made to include such awards under the general organic statutes of the University or Board as necessary and incidental to and encompassed within statutes authorizing the operation of a university. In other words, "beating the sidewalks" for students is not generally considered a proper university mission, save perhaps as is required by civil rights laws, and certainly paying students to attend compounds this questionable activity in the first place. A self-initiated Parkinson's law is not a part of a university's authority.

Absent then a general law authorizing an act to be done, what authority may an agency claim from special legislative acts (laws) appropriating money to the agency?

Fundamentally, appropriation acts are merely special and/or supplemental laws giving the means to accomplish the objects set forth in the agency's organic law. In and of themselves, they rarely create additional independent powers in an agency such that no reference need be made to the general law when questions arise as to whether an activity or an expenditure in furtherance of an activity is lawfully authorized. Since the legislature has the sole power to appropriate state funds, it may in its discretion also withhold funds for a previously authorized purpose or dictate the form, manner, and conditions upon which money appropriated may be withdrawn within certain constitutional limitations and restrictions. In this sense they are complete and independent laws. Generally, restrictions on expenditures for purposes already declared lawful take the form of line items.

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For instance, although a university could lawfully receive a single appropriation in lump sum which could be applied to any lawful purpose of the university reasonably necessary or necessarily incidental to the operation of a higher educational institution, the legislature generally appropriates funds to the use of a university through various categories of line items. Such line item appropriations as, for example, "salaries and wages," or "operating expenses," by their mere delineation and expression, restrict the funds that may be used for each stated purpose. The expression of the amount of funds appropriated for the one category is simultaneously a limitation on, and a grant of authority for, the use of the moneys appropriated from a state fund for the purpose stated.

On the other hand, the legislature often uses line items and must use line items where the organic law requires specific legislative approval to accomplish a purpose. An example of this would be statutes like K.S.A. 1973 Supp. 75-4609 relating to the purchase of passenger motor vehicles which requires authorization to purchase be made specifically by appropriation act. Again, the line item is both an authority and, by the amount, a limitation.

Line item appropriations are also required in some instances in order to identify the statutory fund from which the funds are to be drawn. This is required by virtue of K.S.A. 75-3036 since not to name the fund would require the legal presumption that the money appropriated was to be derived from the state general fund as there defined.

Additionally, the fact that the legislature may line item an appropriation in a duly enacted law will lend great weight to the existence of a power in an agency which perhaps has been weakly enunciated in the organic law when a question exists as to whether the purpose stated by the terms of the line item was originally intended by the legislature to be within the scope of the agency's authority.

Finally, a line item appropriation might suffice as a grant of authority to the agency in and of itself in some instances if sufficient standards for its expenditure otherwise exist by reference to other existing laws and no laws exist which declare such expenditures generally prohibited or otherwise improper. This specie of line items may, in certain circumstances, be subject to constitutional attack. An example of this would be a line item appropriation for the scholarships in question here since the awards so border on gifts, a subject even prohibited to the legislature, that the mere expression of funds for such a purpose by the legislature would probably not suffice without statutory declaration of the public purpose and legislative

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standards or guidelines by which to administer it. In other words, it is such a delegation of power that the line item ceases to be supplementary authority to existing law, but, in fact, rises to the status of new authority, in which case its independent promulgation may be required by Article 2, §16 of the Kansas Constitution. As stated by the Supreme Court in Cashin v. State Highway Commission, 137 Kan. 744 (1933) at page 747:

"While section 16 of article 2 of the constitution requiring the single subject of an act to be clearly expressed in its title is not so frequently invoked as formerly, it is still as binding as ever . . . The congressional practice of putting riders on appropriations bills is not permitted under our constitution." [Emphasis supplied.]

Again in Philpin v. McCarty, 24 Kan. 393, at page 402, the court stated:

"It [section 16 of article 2] was introduced to prevent a certain abuse, and it should be construed so as to guard against that abuse, and not to embarrass or obstruct needed legislation. That abuse was this: Oftentimes a matter of merit and commanding general confidence was yoked to something unworthy, and by this union the latter was carried through in the strength of the former. This provision was designed to prevent this, to make every measure stand upon its own merits, and to cut off omnibus legislation. Of course, where all of the bill is clearly expressed in the title, there is no danger of surreptitious legislation for all are advised by the title of what legislation is proposed. But two measures entirely foreign to each other cannot (be) allowed to be joined in one act. . . ." [Emphasis supplied.]

The use of a line item appropriation to delegate power not arguably previously held by an agency is an incautious approach to legislation from a legal point of view because of the potential constitutional objections that could evolve either by the application of Article 2, §16, and/or the absence of standards upon or by which to measure the public purpose or perform its command resulting in an unlawful delegation of the constitutional lawmaking power of the legislature. Nevertheless, legislative pronouncements in whatever form are infinitely more commanding of legal certification than are budget reports. Budget documents are particularly unsuited as an aid to the interpretation of general statutes. They would be of some value in questioning whether a certain expenditure fell within the contemplation of all concerned

as an "operating expense," a "capital improvement," or "salaries and wages," but such a question would involve a question of availability of funds for the purpose, not a question as here of the raw legal power of an agency to act in a certain matter; that is, the question would involve the means by which to avail oneself of existing power, as distinguished from the power to act in the first instance. An initial budget document is a declaration of an agency's intended use of funds for which they request appropriation. Nevertheless, budget documents accordingly, from the time of initiation to the time they are presented to the legislature in the form of the Governor's budget report, as required by K.S.A. 75-3721, never materialize, except through cognizable legislative action, beyond recommendations. To give weight to budget documents as any concrete or authoritative basis in the interpretation of law, is to reverse the constitutional scheme of executive recommendation and legislative authorization to one of executive recommendation and legislative negation. Such a scheme, however, might be appropo in considering gubernatorial executive reorganization orders under Article 1, § 6 of the Kansas Constitution. In other words, a theory that the budget documents constitute strong evidence of legislative intent in terms of an agency's power to act presumes that, in absence of expression to the contrary, the legislature, when appropriating funds, has, in fact, ratified the expressions of intended expenditure by the agencies and raised them to the status of law. Even as to questions of the availability of the means to act, violating or deviating from expressions of expenditure in the budget document, unless correspondingly specifically appropriated by law, is not enforceable against an agency and would not constitute a misappropriation of funds if questions later arose.

In the instance here at hand it is Wichita State University's and the Regents' claim that the intended expenditure of funds for scholarships was specifically noted in budget documents in 1969 and 1970 and later "ratified" by the legislature and further, once noted, these expenditures and activities have become an immutable part of their base budget and thus, when they receive an appropriation they may conclude that funds may be spent for scholarship purposes. Besides reflecting a disturbing expression of legislative concern, or more clearly, lack of it, for how tax dollars are being spent, such an approach simply misses the point. If an activity is necessarily incidental to the exercise of the agency's powers, is otherwise in accordance with law, and the legislature has not unduly restricted the funds made available to the agency by an appropriation act through the use of a line item or proviso form of appropriation, then the agency may in its discretion, spend funds for such purpose regardless of whether it is expressed

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and announced in the budget documents. Consequently, the most an agency could expect from deviation would be legislative action in the future to limit by line item or proviso funds available for such purpose or risk the displeasure of a governor who did not wish an executive agency under his control to implement such a program. But doing so would violate no law, and would but merely be a question of priority within the agency or the executive to whom the agency is responsible.

For the foregoing reasons, we conclude that the expenditure of the funds here in question by a university for the purpose of awarding gratuitous scholarships of the kind involved here requires specific legislative authorization. Any observations regarding the validity of such legislation would be premature until specific legislative proposals or enactments are presented.

Yours very truly,


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