



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

March 12, 1975

Opinion No. 75- 116

Mr. Charles Rooney, Sr.
Chairman
State Alcoholic Beverage Control
Board of Review
514 Capitol Federal Building
Topeka, Kansas 66603

Dear Chairman Rooney:

You inquire concerning Opinion No. 74-295, issued under date of August 26, 1974, wherein the Attorney General withheld approval of proposed regulation no. 14-19-12, which provided in pertinent part thus:

"Criteria for determining qualification as a bona fide nonprofit organization or association. The criteria for determining whether an application for a class A club license qualifies as a bona fide nonprofit organization or association will be based upon the factors:

* * *

c. Has qualified as an exempt organization under the provisions of K.S.A. 79-32,113 and amendments thereto, or has qualified as an exempt organization under the provisions of Section 501(c) of the Internal Revenue Code of 1954, or in lieu thereof the Director may from competent evidence determine an applicant seeking a class A club license is in truth and in fact a bona fide nonprofit corporation or association."

You suggest that in that opinion, the Attorney General undertook the exercise of some legislative or judicial authority to "strike

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down an enactment or any part of an enactment of the Legislature" I invite your attention to K.S.A. 77-520, which states in pertinent part thus:

"Every regulation or compilation of regulations proposed by any state agency before being adopted or filed shall be submitted to the attorney general for his opinion as to the form and legality of the same, and the attorney general shall promptly furnish his opinion as to the form and legality of the proposed regulation or compilation . . . so submitted. No regulation or compilation of regulations shall be filed with the revisor of statutes unless:

- (a) The same has been approved in writing by the attorney general as to form and legality;
- (b) the attorney general finds that the making of such regulation or compilation of regulations is within the authority conferred by law on the state agency submitting the same"

[Emphasis supplied.]

The proposed regulation purported to denumerate three bases for determining the qualification of an applicant as a bona fide nonprofit organization or association -- first, that the applicant qualify as an exempt organization under K.S.A. 79-32,113; secondly, that the applicant possessed an exempt determination letter issued by the Internal Revenue Service; or thirdly, that in lieu of either of the foregoing, that the applicant be determined by the director to be "in truth and in fact" a bona fide nonprofit association or organization.

K.S.A. 1974 Supp. 41-2634, as amended in 1974, sets forth standards to be incorporated into any regulation prescribing criteria determination of the nonprofit or for-profit status of any applicant, these standards being precisely identical to the definitions of organizations exempt from federal income taxation under 26 U.S.C. § 501(c)(7) and (8).

It is not within the authority of the Secretary under K.S.A. 1974 Supp. 41-2634 to adopt any regulation which permits the determination of the bona fide nonprofit status of any applicant to be based

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upon any standards other than those set out in that section. The last clause of proposed regulation 14-19-12(c), if adopted, would permit the director to determine that, "in lieu of" and without regard to whether the applicant qualified as an exempt organization under K.S.A. 72-32,113 or had been issued or denied an exempt determination under 26 U.S.C. § 501(c)(7) or (8), or qualified for such a determination, that nonetheless the applicant was a bona fide nonprofit organization. Any regulation which would permit the application of standards other than those provided by law is beyond the authority of the Secretary to adopt. Under K.S.A. 77-420, the Attorney General is expressly empowered to make that determination.

Accordingly, we cannot but reaffirm the earlier conclusion set forth in Opinion No. 74-295, that proposed regulation no. 14-19-12 exceeds the authority of the Secretary.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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