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ATTORNEY GENERAL OPINION NO. 79-243

The Honorable E. Dean Shelor
State Representative, 115th District
R.F.D.
Minneola, Kansas 67865

Re: State Boards, Commissions and Authorities--State
Board of Agriculture--Constitutionality of Board
Selection Process

Synopsis: The selection process for membership on the Kansas
State Board of Agriculture as provided by K.S.A.
74-502 and K.S.A. 74-503 does not contravene the
mandates of the equal protection clause of the
Fourteenth Amendment to the U. S. Constitution.

* * *

Dear Representative Shelor:

You request the opinion of this office regarding the constitutionality of K.S.A. 74-502 and K.S.A. 74-503 which sections provide for the selection of the Kansas State Board of Agriculture. You question whether the selection process for membership on the Board meets the constitutional mandates of the judicial doctrine of "one person, one vote" derived from the equal protection clause of the Fourteenth Amendment to the United States Constitution. For reasons discussed below, we must conclude that the method of electing Board members is not violative of our federal constitution. Simply stated, under current judicial interpretation, the equal protection of Kansas residents is not denied by the membership selection process of an administrative body having the limited powers of the Kansas State Agricultural Board.

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The method of selecting officers and members of the Kansas State Board of Agriculture is set forth in K.S.A. 74-502 and K.S.A. 74-503. K.S.A. 74-502 states, in pertinent part, that certain specified agricultural organizations

"shall be entitled to send one delegate to the annual meeting of the state board of agriculture, such delegate to be duly elected, and authorized in writing, by the members of the organization the delegate represents, said authority to be certified to the secretary of the state board of agriculture on or before the first Friday following the second Tuesday of December each year"

K.S.A. 74-503, in pertinent part, provides for division of the state into six agricultural districts and requires that two persons be elected to the board from each district. Persons authorized as electors are the state board officers, members, and the authorized delegates whose selection is provided for in K.S.A. 74-502. All such electors are entitled to one vote. K.S.A. 74-503 further provides that those persons elected to the Board shall elect from among themselves a president, vice-president and treasurer whose terms will be for one year, and a secretary whose term will be for two years.

It is important to note that neither the Kansas Board of Agriculture nor its members or officers are provided for by the state constitution. The Kansas Constitution does state, however:

"All officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."
Kan. Const., Art. 15, §1.

The Kansas Constitution restricts and does not grant power; thus, the legislature, except where restricted by the Constitution, is free to act. Jansky v. Baldwin, 120 Kan. 332 (1926). In Marks v. Frantz, 179 Kan. 638 (1956), the appointive process established by the legislature for the appointment of persons to the Kansas Board of Examiners in Optometry was questioned. After noting the statutory (not constitutional) nature of the Board and the presumptions favoring the constitutionality of legislative enactments, the Court held:

"There is no constitutional limitation on who may be appointed, nor any constitutional restriction on the legislature exercising its power as it shall see fit. As a matter of fact the legislature has provided a restricted power of appointment in many instances. Examples of restrictive appointments to specified boards may be found in the following: state board of agriculture, by G.S. 1949, 74-501, and G.S. 1955 Supp. 74-502 and 503" Id. at 649. (Emphasis added.)

In Marks the Court held the statutory appointment scheme to be constitutional. However, in State ex rel. v. Doane, 98 Kan. 435 (1916), a question arose as to the constitutionality of restricting those voters eligible to vote for a county superintendent to only those electors living outside first and second class cities. In holding such requirement unconstitutional, the Court pointed out:

"A considerable number of county offices are created by statutes and not by the constitution and it is clearly within the power of the legislature to provide for the election or appointment of all mere statutory officers in any reasonable manner; but it is also clear that where the constitution itself creates the office and provides that the holder of such office shall be elected, the electors defined by the constitution are the voters for such officer and their right of suffrage for that office can not be abridged by the legislature." Id. at 438.

Thus, the one person, one vote doctrine has been applied in Kansas to the election process for constitutional offices such as the state legislature. See Long v. Avery, 251 F.Supp. 541 (D. Kan. 1966); In re Senate Bill No. 220, 225 Kan. 628 (1979); Harris v. Anderson, 194 Kan. 302 (1965) cert. denied 382 U.S. 894, 86 S.Ct. 185, 15 L.Ed.2d 150 (1965); and Harris v. Shanahan, 192 Kan. 183 (1963). However, consistent with Marks and Doane, we know of no Kansas decisions applying this equal protection doctrine to statutorily created administrative bodies, similar to the Kansas State Board of Agriculture.

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Our consideration of the one person, one vote doctrine does not conclude with the distinction between offices created by the constitution and those created by statute. Courts of other jurisdictions have had occasion to address the subject with regard to administrative or legislative bodies akin to the Board herein, and such federal and state courts have consistently considered the nature of the powers of the body in question, rather than the source of its powers, as the determinative factor in applying or refusing to apply the suffrage mandates of the equal protection clause.

Circuit Judge Wilkey's concurring opinion in Ripon Society, Inc. v. National Republican Party 525 F.2d 567 (D.C. Cir. 1975) cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976), noted that:

"The Supreme Court has repeatedly emphasized, in one reapportionment case after another, that the principle of 'one man, one vote' applies only to units of government which are representative in nature and exercise general governmental powers. If the government unit has a very limited function and its members are not accountable to particular constituencies for their decisions, the 'malapportionment' of the members does no offense to the Constitution." Id. at 612. (Footnotes omitted.)

Ripon Society, Inc., involved a suit brought for declaratory and injunctive relief on the ground that the formula fixed by the Republican Party for allocation of delegates to the national convention denied equal protection of the laws.

The Court, in Ripon Society, Inc., recognized the validity of the "one man, one vote" concept, but indicated that there are exceptions to that rule. Citing Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973), the Court noted that the one person, one vote rule does not apply to certain special purpose assemblies whose decisions disproportionately affect different groups. The Salyer court permitted directors of a water storage district to be elected by agricultural landowners only, whose votes were

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weighed according to the valuation of their lands. The Court in Salyer based its holding on evidence that the water district did not exercise what might be thought of as normal governmental authority.

The Court, in Ripon Society, Inc., in light of the Salyer case said:

"[T]he principle of one person, one vote is not an absolute, to be unthinkingly invoked every time two or more persons are selected to make decisions on other people's behalf, even if the making of those decisions is very plainly 'state action.' The constitutional command is not one person, one vote but equal protection of the laws, and what it requires by way of representation in a given assembly must depend on the purposes for which the assembly is convened and the nature of the decisions it makes. The Supreme Court's inquiry into these matters has led it to the conclusion that where the assembly exercises formal governmental powers one person, one vote is ordinarily required. A similar inquiry in other contexts may well reveal that the public and private interests in making decisions through some other scheme of representation outweigh the interests served by numerically equal apportionment."
525 F.2d at 580.

General governmental power is usually attributable to constitutionally created officers and organizations. Bodies found to have such powers include, for example, state legislatures, county commissioners [Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968)], and school districts [Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970)].

In Avery v. Midland County, *supra*, the Court found that the county commissioners performed legislative, executive, administrative and judicial functions such as: 1) Setting tax rates; 2) equalizing assessments; 3) issuing bonds; 4) preparing and adopting a budget for allocating the county's funds; 5) choosing subjects on which to spend; 6) maintaining buildings; 7) administering welfare services; 8) determining school districts; and 9) making various decisions affecting all citizens of the county.

The Court determined that such powers were pervasive enough to be considered general governmental powers. In Hadley, *supra*, the junior college district trustees were found to have the power, among other things, to: levy and collect taxes; issue bonds; hire and fire employees; make contracts; collect fees; pass on petitions to annex school districts; and acquire property by condemnation. The Court noted that these powers are not as broad as those of the Midland County Commissioners, but felt that the trustees' powers were such that the trustees exercised general governmental powers.

In contrast, the Kansas Board of Agriculture is a mere agent for the state legislature in the area of state agricultural matters. Although vested with some typical governmental powers such as the ability of the secretary of the Board to appoint directors of its various administrative divisions, one of its most important powers, namely the adoption of rules and regulations, is subject to the approval of the Kansas Legislature. K.S.A. 77-426. [See also State, ex rel., v. Columbia Pictures Corporation, 197 Kan. 448 (1966), where the Kansas Supreme Court said the power to adopt rules and regulations is administrative in nature, not legislative.] Indeed, the Board does not have the power to tax or issue bonds, or provide general public services such as schools, housing, transportation, utilities or roads.

Unlike members of a legislature, a board of county commissioners or a school board which are separate bodies politic, the Board of Agriculture is merely a creation of a body politic (the state legislature) and derives its powers only from this source. See Kan. Const. Art. 2, Sec. 1. The method of selection of the Board does not change its nature, from merely an agent of the legislature, into an independent governmental entity.

We note in passing that the lack of taxing authority, standing alone, is not determinative of this issue and the courts will look to the totality of the powers exercised by the agency or governing body in question. In Baker v. Regional High School District No. 5, 520 F.2d 799 (2d Cir. 1975), a school district was found to exercise general governmental powers even though it did not have the power to levy taxes. The Court decided the powers of the district were sufficient, absent the power to tax, to constitute general governmental powers. The district's powers included, for example, the power to: 1) authorize bond anticipation notes; 2) borrow money; 3) purchase land and buildings; and 4) receive gifts of real and personal property.

In view of the vast differences between the nature and powers of the Board and those of entities found to have general governmental powers, it is doubtful that the Kansas State Board of Agriculture should or would be deemed to have general governmental powers, especially when the duties and powers of the Board are compared to those of the county commissioners in Avery.

Finally, we refer to the case of Benner v. Oswald, 592 F.2d 174 (3rd Cir. 1979) (U.S. Appeal pending). We find the facts of this case to be analogous and the Court's conclusions illustrative and determinative of the scope of the application of "one person, one vote" doctrine to government agencies. In Benner, undergraduate students brought suit under the Civil Rights Act of 1871 alleging denial of equal protection in the process used by Pennsylvania State University for selecting trustees. In its analysis of the pertinent law, the Court noted the standard of judicial scrutiny in equal protection cases depends upon the subject matter of the classification. The classification may be deemed suspect, or the individual right affected may be deemed fundamental. Where the case involves a suspect classification or a fundamental right,

"the state activity will be subject to strict judicial scrutiny and will prevail only if the state shows that such action is justified by a 'compelling state interest.'" Id. at 181. (citations omitted.)

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The Court further stated that rights not deemed fundamental or classifications not suspect are subject to a lesser standard of judicial scrutiny and need have only some rational relationship to a legitimate state purpose. The Court, quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978), said:

"The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographic or political subdivision of the state' . . . Rather, the Equal Protection Clause is offended only if the statute's classification 'rests on grounds wholly irrelevant to the achievement of the State's objective.' . . ." 592 F.2d at 181.

In Benner, the students argued that: 1) the selection process denied them a fundamental right to vote, and the selection process should therefore have been scrutinized under the compelling state interest test (the students cited Kramer v. Union School District, 395 U.S. 621, 89 S.Ct. 1886, 22 L.Ed.2d 58 (1969) in that regard); and 2) even under the less stringent rational basis test the process was constitutionally defective.

After discussing the standard of judicial scrutiny to be applied and the history of judicial review of legislative classification schemes for determining the voting franchise for members of various agencies and governing bodies, the Court then turned its attention to the students' allegations that the selection process denied them equal protection. The Court refused to conclude that the University selection process was a denial of a right to vote in general public elections, or that University trustees exercised general governmental powers. The Court pointed out:

"The University's board of trustees controls no viable political subdivision and has less power than a local school district. It cannot acquire property by condemnation, levy or collect taxes, or pass on petitions to annex school districts. It simply does not possess the minimum governmental powers associated with municipal, school district, county, state, or federal offices. At most, the board has the authority to approve a budget and set a level of tuition. And even in the setting of tuition, they do not have a free hand." 592 F.2d at 183.

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Again referring to Holt Civic Club v. Tuscaloosa, supra, the Court concluded that

"the duties of the trustees are not commensurate with the duties of elected public officials; that these duties do not involve the responsibilities going to 'the essence of a democratic society,' and do not implicate decisions that are 'preservative of all rights.' Because the trustees' duties do not approach the quantum of responsibilities of officials selected in a political democracy, we conclude that any individual interests affected by the selection process classifications are not fundamental rights so as to require recourse to the strict judicial scrutiny standard." 592 F.2d at 183.

The Benner Court, then discussed whether any rational basis existed to support the distinction used to limit participation in the trustee selection process. The Court agreed with the determination of the district court which stated that it could not

"say as a matter of law that the distinction made between agricultural and industrial societies and other interested groups . . . , is wholly unrelated to the achievement of Penn State's underlying objective which is the governance of the affairs of the University. Therefore the charter provisions which give local agricultural and industrial societies a voice in selecting members of Penn State's board of trustees but which deny it to undergraduate students do not violate the equal protection clause." 592 F.2d at 183, 184.

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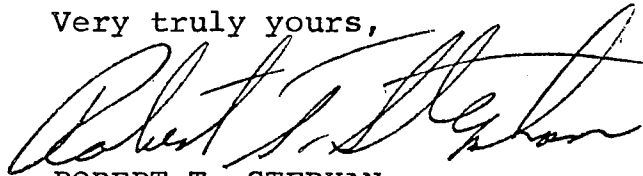
The Court concluded stating:

"Applying the rational basis test, we cannot conclude that the trustee selection process which limits participation to alumni and agricultural and industrial groups is irrational. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)." 592 F.2d at 184.

The similarities between Benner and the issue regarding the Board of Agriculture are obvious and significant. The Benner analysis is to be followed in the present situation where, in our judgment, the Kansas Board of Agriculture does not possess, as the University trustees in the Benner decision did not possess, general governmental powers.

Therefore, it is our opinion that the selection process for membership on the Kansas State Board of Agriculture as provided by K.S.A. 74-502 and K.S.A. 74-503 does not contravene the mandates of the equal protection clause of the Fourteenth Amendment to the U. S. Constitution.

Very truly yours,



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RTS:BJS:gk