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November 19, 1979

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ATTORNEY GENERAL OPINION NO. 79-266

The Honorable Patrick J. Hurley
Secretary of Administration
Department of Administration
Room 263-E, State Capitol
Topeka, Kansas

Re: State Departments; Public Officers, Employees--
Allowances for Official Travel--Rules and Regula-
tions of Secretary of Administration

Synopsis: Rules and regulations adopted by the secretary of administration to implement K.S.A. 1978 Supp. 75-3203a and K.S.A. 75-3207a (as said sections are amended by L. 1979, ch. 286, §§1 and 3, respectively) relating to mileage and subsistence allowances for official travel, are not exempt from the provisions of the rules and regulations filing act (K.S.A. 77-415 et seq.). However, if it is necessary for such rules and regulations to take effect prior to the time that permanent rules and regulations become effective, K.S.A. 77-422 provides sufficient authority to adopt the same as temporary rules and regulations.

* * *

Dear Secretary Hurley:

You have requested our opinion as to certain aspects of the secretary of administration's authority to promulgate rules and regulations fixing mileage and subsistence allowances applicable to travel for official purposes. Specifically, you have asked whether such rules and regulations are definitionally exempt from the basic requirements of Article 4 of Chapter 77 of Kansas Statutes Annotated, governing the adoption of administrative rules and regulations; and you also have inquired as to the frequency such rules and regulations may be adopted.

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The statutory authorizations for the rules and regulations in question are found in K.S.A. 1978 Supp. 75-3203a and K.S.A. 75-3207a (as said sections are amended by L. 1979, ch. 286, §§1 and 3, respectively). The former statute authorizes the secretary of administration to fix and establish the rate of mileage allowance for official travel "by privately owned conveyance," and the latter contains a similar authorization for "the rates of subsistence allowance for in-state and out-of-state travel for official purposes." Both statutes require that the rules and regulations fixing and establishing these allowances be adopted in the manner prescribed by K.S.A. 75-3706, which reads as follows:

"The secretary of administration shall submit to the state finance council proposed rules and regulations with respect to the manner of performance of any power or duty of the department, the execution of any business of the department and its relations to and business with other state agencies, appeals from the final decisions or final actions of the secretary of administration, and such other matters as are provided by law. Before any such proposed rules and regulations are submitted to the state finance council, the same shall have received the approval required by K.S.A. 77-420, the attorney general shall have made the finding required by K.S.A. 77-420, and the secretary of administration shall have held the hearing thereon required by K.S.A. 77-421. The state finance council shall either approve, modify and approve or reject any such proposed rules and regulations. The secretary of administration shall adopt such rules and regulations so approved or so modified and approved."

As you have noted in your letter of request, pursuant to the decision in State, ex rel., v. Bennett, 219 Kan. 285, 294 (1976), the duty imposed on the state finance council under 75-3706 devolves upon the governor.

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With regard to your first question, you suggest the possibility that the rules and regulations adopted by the secretary of administration to implement the provisions of 75-3203a and 75-3207a may be definitionally exempt from the requirements of the rules and regulations filing act (K.S.A. 77-415 et seq.), except for the sections thereof specifically designated in K.S.A. 75-3706, quoted above. In support of this suggestion, you note that by definition not all administrative rules and regulations are subject to the rules and regulations filing act, and you call our attention to the following provisions of K.S.A. 77-415:

"As used in this act, unless the context clearly requires otherwise:

. . . .

"(4) . . . A rule and regulation as herein defined shall not include any rule and regulation which: . . . (j) relates to expenditures by state agencies the purchase of materials, equipment, or supplies by or for state agencies, or the printing or duplicating of materials for state agencies"

In light of these provisions, you have noted that "[r]ules and regulations as defined in 75-3203a and 75-3207a deal with state expenditures for reimbursement of official travel," with the inference that such fact would place these rules and regulations within the parameters of the above-quoted provisions of K.S.A. 77-415(4)(j), thereby exempting them from the requirements of K.S.A. 77-415 et seq.

In our judgment, such inference is not appropriate. While the language of 77-415(4)(j) is somewhat confusing, apparently due to inadvertent omission of language, we believe that subsection (4)(j) is limited in scope to those rules and regulations relating to expenditures by state agencies for "the purchase of materials, equipment, or supplies" or for "the printing or duplicating of materials for state agencies." In our view, therefore, rules and regulations governing expenditures by state agencies for reimbursement of official travel are not encompassed by this exemption.

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Furthermore, we believe that the previously quoted provisions of K.S.A. 75-3706 evince a clear legislative intent that all rules and regulations promulgated by the secretary of administration pursuant to that section be adopted in accordance with the provisions of K.S.A. 77-415 et seq. The only modification to the procedure accomplished by 75-3706 is that, prior to the secretary of administration's adoption of rules and regulations, the governor is required to approve or modify and approve such rules and regulations.

Prior to submission to the governor, however, such rules and regulations must be approved as to organization, style, orthography and grammar (K.S.A. 77-420, as amended by L. 1979, ch. 304, §3), must have been approved as to form and legality by the attorney general (K.S.A. 77-420, as amended) and there shall have been held a public hearing thereon (K.S.A. 1978 Supp. 77-421). The only legislative purpose served by specifying these particular sections of the rules and regulations filing act in 75-3706 is to identify the point in the process where the governor's approval must be rendered. We cannot discern any basis for finding the legislature intended that the secretary of administration comply only with the requirements of these particular sections. Such finding would mean that all rules and regulations of the secretary of administration, not merely the ones adopted to implement 75-3203a and 75-3207a, would be exempt from a substantial portion of K.S.A. 77-415 et seq.; it requires a determination that 75-3706 was intended to establish the complete and exclusive procedure for the secretary of administration to adopt all rules and regulations, thereby amending by implication the provisions of K.S.A. 77-415 et seq.

In our judgment, such determination is unwarranted. Had the legislature intended this result, it could have accomplished its purpose by direct amendment of K.S.A. 77-415 et seq., or at the very least, it could have accomplished the amendment thereof by implication through clear and unequivocal language in 75-3706. For these reasons, then, it is our opinion that all rules and regulations adopted by the secretary of administration pursuant to K.S.A. 75-3706, including those to implement 75-3203a and 75-3207a, are subject to the requirements of K.S.A. 77-415 et seq.

Regarding your inquiry as to the frequency with which rules and regulations may be adopted in compliance with the provisions of 75-3203a and 75-3207a, it is apparent that these statutes contemplate the periodic necessity of changing the rates of allowances established thereby. Both statutes provide

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that such rates are to be fixed and established "at least annually." Certainly, in our judgment, such language recognizes the need for making at least an annual adjustment of such rates within the statutory limitations, and it also provides a clear statement of legislative intent that the secretary of administration has authority to change the rates of allowances more often than on an annual basis, if necessary.

Further, both 75-3203a and 75-3207a require that the rates established under these respective statutes be based upon certain prescribed factors. For example, under 75-3203a, in fixing and establishing the rate of mileage allowance for privately owned conveyances, the secretary of administration is required to consider the "actual costs incurred in using private conveyances, the rates allowed by the internal revenue service, increased costs due to energy crisis and the general inflationary situation, and such other matters as the secretary deems pertinent." Given the present economic conditions, there can be little question that the factors influencing the secretary of administration's determination of appropriate mileage allowances are subject to fluctuation. Similar factors are prescribed for the secretary's consideration in fixing and establishing subsistence allowances under 75-3207a.

Therefore, it is our opinion that, within the limitations established by the legislature, the secretary of administration has the authority to adopt or amend rules and regulations changing the rates of allowances under 75-3203a and 75-3207a, whenever the secretary determines that the statutorily prescribed factors warrant such change. As previously noted, however, any such rules and regulations must be approved by the governor, as required by K.S.A. 75-3206, as well as comply with the procedural requirements of K.S.A. 77-415 et seq.

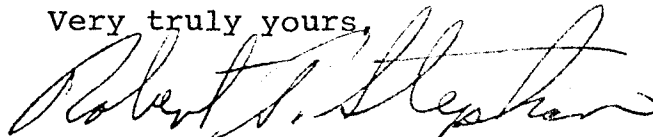
Pursuant to K.S.A. 77-426 (as amended by L. 1979, ch. 305, §1, and further amended by L. 1979, ch. 304, §5) permanent rules and regulations of administrative agencies are to be filed with the revisor of statutes on or before December 31 of the year in which they are adopted, to take effect on May 1 of the following year. However, K.S.A. 77-422 provides for the adoption of temporary rules and regulations which can take effect at the time they are filed with the revisor of statutes, assuming compliance with the necessary procedures.

In order to promulgate temporary rules and regulations, there must be a showing that it is necessary for them to take effect prior to May 1 of the following year. There are two

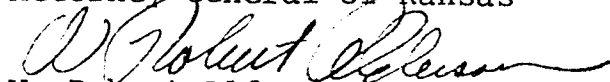
statutorily prescribed bases for justifying such necessity: (1) That the rules and regulations are necessary for the "preservation of the public peace, health, safety or welfare"; or (2) that such rules and regulations are necessary for compliance with the requirements of the statute authorizing their adoption. (K.S.A. 77-422.) In our view, any rules and regulations proposed to be adopted pursuant to 75-3203a or 75-3207a as temporary rules and regulations would be of the latter type. The secretary of administration has a continuing legislatively-imposed obligation to adopt rules and regulations to implement these statutes, and if, in carrying out this duty in compliance with the rules and regulations filing act, it is necessary to implement such rules and regulations prior to the time permanent rules and regulations take effect, it is our opinion that K.S.A. 77-422 provides ample authority to promulgate them as temporary rules and regulations.

In this context, it should be noted that, pursuant to K.S.A. 77-423 (as amended by L. 1979, ch. 304, §4), it is the prerogative of the state rules and regulations board to "determine whether a rule and regulation should be adopted as a temporary rule and regulation." It is our understanding that it has been the policy of this board, in considering proposed rules and regulations which are not of the so-called "emergency" type (i.e., for the preservation of the public peace, health, safety or welfare), to limit its approval to those rules and regulations required by legislation adopted at the immediately preceding legislative session. Such policy would be applicable at this time to proposed temporary rules and regulations implementing 75-3203a or 75-3207a, since both statutes were amended in the 1979 session. However, without questioning the wisdom of such policy, even if said statutes were not amended in 1979, it is apparent that the board's policy can have application only to the rules and regulations of state agencies which are not under a continuing legislative mandate (as in the case of the secretary of administration's rules and regulations adopted under 75-3203a and 75-3207a) to adopt rules and regulations, in effect, as often as changing conditions so require; and in our judgment, the board would have no basis for rejecting proposed temporary rules and regulations promulgated to implement 75-3203a or 75-3207a, unless the statutory procedural prerequisites had not been satisfied.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General