



STATE OF KANSAS

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October 3, 1980

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ATTORNEY GENERAL OPINION NO. 80-219

Mr. Jerry W. Cole
Chairperson, Behavioral Sciences Regulatory Board
2700 West Sixth
Topeka, Kansas 66606

Re: State Boards, Commissions and Authorities--
Behavioral Sciences Regulatory Board--Committees

Synopsis: The behavioral sciences regulatory board may establish committees or subcommittees to assist it in the performance of certain of its administrative functions, but the board may not delegate its authority to such committees or subcommittees to determine the examination to be used for applicants for licensure or certification or to determine which applicants will be permitted to sit for said examinations.

The board's application of K.S.A. 74-5310 to candidates for certification as psychologists is a matter left to the sound discretion of the board, or as may be determined pursuant to board rules and regulations establishing procedures or guidelines by which such board determinations may be made, according to the plain and ordinary definitions of the words used in the statute. Cited herein: K.S.A. 1979 Supp. 65-2828, 65-2830, K.S.A. 74-5310, 75-3223, 75-5346 to 75-5361, inclusive, as amended by L. 1980, ch. 242, 77-201, Second, L. 1980, ch. 242.

* * *

Dear Mr. Cole:

You have asked several questions relating to the powers and duties of the Behavioral Sciences Regulatory Board as prescribed by the

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1980 act of the legislature establishing said board, 1980 House Bill No. 3210, hereinafter referred to as the act or L. 1980, ch. 242.

First, you inquire whether there is any language in the act in question requiring or permitting a "separation of powers" on the board, i.e., language requiring or permitting a delegation of the board's administrative powers and functions to committees of the board representing the respective professions regulated under the act, psychology and social work. You advise that the board has established separate committees known as the social work and psychology examining committees. Each committee is composed of one public member of the board and two members representing the respective professions. You further advise that some board members have expressed concern that the two committees will be used to perpetuate "business as usual" for the licensure of social workers and certification of psychologists, while others argue that each profession should be responsible for determining the examination to be used and the candidates or applicants who will be permitted to take the examination prescribed for applicants for licensure or certification. You have noted that the healing arts act contains a so-called "separation of powers" provision, and you ask whether there is any similar provision in the act in question.

K.S.A. 1979 Supp. 65-2830, the provision of the healing arts act to which you refer, provides as follows:

"The examination under this act shall be given and graded by members of the board who hold a license in the branch of the healing arts in which the applicant seeks to be licensed."

We think it important to note, however, that K.S.A. 1979 Supp. 65-2828 provides that "[t]he board [of healing arts] shall prepare rules regulating examinations and grading of examination papers." (Emphasis added.)

We can find no provision in the act in question similar to K.S.A. 1979 Supp. 65-2830. The powers and duties of the behavioral sciences regulatory board are prescribed in section 2 and section 7 of L. 1980, ch. 242. Subsection (b) of section 2 of the act provides that all of the powers, duties and functions of the former board of examiners of psychologists and board of social work examiners, and those formerly vested in the secretary of social and rehabilitation services under K.S.A. 75-5346 to 75-5361, inclusive, as amended, are transferred to and conferred upon the behavioral sciences regulatory board. Subsection (c) of section 2 of the act states that the new board "shall be the

successor in every way" to the powers, duties and functions of the former boards and the SRS secretary, as described above. Section 7 of the act enumerates additional powers, duties and functions of the new board, including the power to:

"(c) prescribe the form and contents of examinations required under the provisions of the act . . . ;

. . . .

"(i) adopt rules and regulations establishing procedures for examinations of candidates for certification . . . and licensure . . . and for issuance of . . . certificates and . . . licenses;

. . . .

"(j) adopt such other rules and regulations as may be necessary for the administration of this act, the certification of psychologists act . . . and the provisions of K.S.A. 75-7346 to 75-5361, inclusive, and amendments thereto, and to carry out the purposes thereof."

We find no provision in the act expressly authorizing the board to establish committees or subcommittees. However, it appears from the language of subsection (e) of section 1 of the act [L. 1980, ch. 242, §1(e)] that the legislature anticipated that the board would establish committees or subcommittees to assist the board fulfill its administrative responsibilities because it provided for compensation, subsistence allowances, mileage and other expenses as provided in K.S.A. 75-3223 to be paid for members' attendance at subcommittee meetings authorized by the board. Importantly, however, we do not conclude that discretionary powers vested in the board may be delegated to committees established by the board, or that the board may abdicate its responsibilities in favor of its committees.

What administrative responsibilities may the board assign or delegate to its committees or subcommittees? In 73 C.J.S. Public Administrative Bodies and Procedure, §57, the following is stated as a general principle:

"In general administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, and they cannot legally confer on their employees or others

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authority and functions which under the law may be exercised only by them. Although mere ministerial functions may be delegated, in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment; and subordinate officials have no power with respect to such duties." (Emphasis added.)

In 2 Am.Jur.2d Administrative Law, §222, the rule is stated thus:

"It is a general principle of law, expressed in the maxim 'delegatus non potest delegare,' that a delegated power may not be further delegated by the person to whom such power is delegated, and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied. Accordingly, apart from the statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may depute others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or, on the other, discretionary or quasi-judicial. Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. An administrative board cannot legally confer upon its employees authority that under the law may be exercised only by the board A commission, charged by law with power to promulgate rules, cannot, in turn, delegate that power to another." (Notes omitted.)

Applying the foregoing rules, the Supreme Court of Iowa concluded that member-school boards in a state high school athletic association had unlawfully re-delegated their rulemaking powers to the association in the adoption of a "good conduct" rule relating to students' eligibility to participate in interscholastic athletics. Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555, 53 A.L.R.3d, 1110 (1972). The court said that although rules adopted by the association are initially adopted by a majority of the schools

constituting the association's membership, the rules are essentially association rules, and the authority for adoption of such rules is delegated to the association by virtue of the several school boards' membership therein. 53 A.L.R.3d at 1116-1118. Since a school board's rulemaking power necessarily involves the exercise of judgment and discretion, consistent with the foregoing rules, the court said that a school board may not delegate its rulemaking authority governing the conduct of students under its jurisdiction to another agency. The court cited an earlier Iowa case, Kinney v. Howard, 110 N.W. 282, 286 (1907), for the proposition that "[w]hile it is a general rule that power conferred upon a public board or body cannot be delegated, yet a public corporation . . . or instrumentality may . . . do its ministerial work by agents or committees . . . [W]here the act to be done involves judgment or discretion, it cannot be delegated to an agent or committee." 53 A.L.R.3d at 1116. (Emphasis added.)

Further, the court said that "[c]ases are legion involving application of the principle to various agencies and governmental units," citing cases from some nine jurisdictions and noting encyclopedic authority for application of the rule to school districts, municipal corporations, and public bodies and agencies generally. See 78 C.J.S., Schools and School Districts, §122; 56 Am.Jur.2d, Municipal Corporations §§196-198. We note that in 62 C.J.S., Municipal Corporations, §154b, it is said: "Delegata potestas non est delegari is a general maxim applicable with peculiar force to any form of sovereign power." (Emphasis added.)

The reason for the rule is perhaps most eloquently expressed by the Minnesota Supreme Court in Muehring v. School District No. 31 of Stearns County, 28 N.W.2d, 655, 658 (1947):

"It is elementary that a public corporation, agency, or officer to whom governmental power has been delegated by statute cannot redelegate such delegated power. Delegation of governmental power is a manifestation of legislative intention that only the public authority to which the delegation is made, and not some agency or person of its choosing, shall exercise such power. The power of choice is in the legislature, which it has exercised by the very act of delegation."

Guided by the foregoing general principles and authority, it is our opinion that while the behavioral sciences regulatory board may establish committees or subcommittees to assist it in the performance of certain of its administrative functions, the board may not delegate its authority for the regulation of the psychology and social work professions in this state when the exercise of that authority must necessarily involve the judgment and discretion of the board. With

respect to the matters of determining the examination to be used in testing the ability of applicants for licensure or certification, and for determining which applicants or candidates will be permitted to sit for examinations, we find clearly manifested in the above-quoted sections of the act establishing the board (L. 1980, ch. 242) that those responsibilities are vested in the board, and that such determinations shall be made in accordance with the procedures adopted by the board, as prescribed by board rules and regulations. Clearly, these are matters involving the exercise of the judgment and discretion of the board which, for the reasons noted above, may not be delegated to committees or subcommittees of the board.

The foregoing conclusion should not be construed to suggest that the board's professional subcommittees may not give advice or make recommendations for the establishment of procedures for examination and licensure or certification of applicants, and for the various forms and examinations to be used therefor. We think that committee study and recommendations on such matters are most certainly appropriate and desirable. We emphasize, however, that the ultimate responsibility and decision-making authority in these matters is vested solely in the board.

Finally, you inquire: what must the board be cognizant of in interpreting and applying the language of K.S.A. 74-5310, particularly those words underscored in the following quotation:

"The board shall issue a certificate as psychologist to any person who pays a fee prescribed by the board not in excess of one hundred dollars (\$100), which shall not be refunded, who either satisfied the board as to his training and experience after a thorough review of his credentials or who passes a satisfactory examination in psychology: Provided, That any person so paying said fee must also submit evidence verified by oath and satisfactory to the board that he: . . . (c) has received the doctor's degree based on a program of studies in content primarily psychological from an educational institution having a graduate program with standards consistent with those of the state universities of Kansas; or the substantial equivalent of such program in both subject matter and extent of training. . . ." (Emphasis added.)

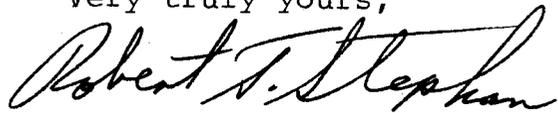
We have found no cases or previous Attorney General opinions construing the above-quoted section, and we find nothing in that section, or in the 1980 act, establishing any standards or criteria

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by which board determinations as to what doctoral programs of studies are primarily psychological in content, what standards and graduate programs in foreign states are consistent with Kansas university standards and programs, or what the substantial equivalent of such programs is, may be guided. But, as K.S.A. 77-201, Second enjoins, "[w]ords and phrases shall be construed according to the context and the approved usage of the language." (Emphasis added.) Or, more simply stated, "words [of a statute] are to be understood in their plain and ordinary sense." Lakeview Gardens, Inc. v. State, ex rel., Schneider, 221 Kan. 211, 214 (1976). The board's application of the statute in question to particular candidates for certification is a matter left appropriately to the sound discretion of the board, or as may be determined pursuant to rules and regulations establishing procedures or guidelines by which such board determinations may be made, according to the plain and ordinary definitions of the words used in the statute.

In summary, we conclude that the behavioral sciences regulatory board may establish committees or subcommittees to assist it in the performance of certain of its administrative functions, but the board may not delegate its authority to such committees or subcommittees to determine the examination to be used for applicants for licensure or certification or to determine which applicants will be permitted to sit for said examinations. Secondly, the board's application of K.S.A. 74-5310 to candidates for certification as psychologists is a matter left to the sound discretion of the board, or as may be determined pursuant to board rules and regulations establishing procedures or guidelines by which such board determinations may be made, according to the plain and ordinary definitions of words used in the statute.

Very truly yours,



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Steven Carr
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