



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81- 83

The Honorable Paul Hess, Chairman
Senate Committee on Ways and Means
State Capitol, Room 123-S
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees --
Leases of Real Property by State Agencies --
Powers of Legislature

Synopsis: If enacted, the proposal under consideration by the Senate Committee on Ways and Means that would statutorily require a legislative committee to approve certain leases of real property by state agencies would constitute a significant interference with the operations of the executive department in an area that is essentially executive in character, thereby violating the separation of powers doctrine. However, the legislature may exert control over the lease of office space by state agencies through appropriations, and the conditions, limitations and qualifications imposed on them, and through the enactment of substantive laws prescribing such restrictions on state agencies' powers in this regard as the legislature deems necessary and appropriate. Cited herein: K.S.A. 75-3025, K.S.A. 1980 Supp. 75-3739, 75-3765, 75-3766, 75-5411.

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Dear Senator Hess:

As chairman of the Senate Committee on Ways and Means you have requested, on its behalf, our opinion as to action contemplated by the committee. You advise that the committee "is considering introduction of a bill which would prescribe that any state agency contract for the lease of office space, buildings, or land for a term of more than ten years or for

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a term which is renewable for more than ten years or which involves an option for purchase shall first be approved by the Joint Committee on State Building Construction, but that this approval remain subject to legislative appropriations."

You further indicate that the constitutionality of the foregoing proposal has been questioned, and you have requested our opinion in this regard.

It would appear that the constitutional principle involved in your inquiry is that of separation of powers, which is an issue that has been considered quite extensively by our Supreme Court on several occasions in recent years. In State, ex rel. v. Bennett, 219 Kan. 285 (1976), the Court discussed the history and purpose of the doctrine, as follows:

"Like the Constitution of the United States, the Constitution of Kansas contains no express provision requiring the separation of powers, but all decisions of this court have taken for granted the constitutional doctrine of separation of powers between the three departments of the state government -- legislative, executive and judicial. The separation of powers doctrine was designed to avoid a dangerous concentration of power and to allow the respective powers to be assigned to the department most fitted to exercise them. (Van Sickle v. Shanahan, 212 Kan. 426, 446, 511 P.2d 223.)"
Id. at 287.

Subsequently, the Court expressed its opinion that strict application of the doctrine is impossible:

"In our judgment a strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power including legislative, executive, and judicial powers often blended together in the same administrative agency. The courts today have come to recognize that the political philosophers who developed the theory of separation of powers did not have any concept of the complexities of government as it exists today. Under our system of government the absolute independence of the departments and the complete separation of powers is impracticable. We must maintain in our political system sufficient flexibility to experiment and to seek new

methods of improving governmental efficiency. At the same time we must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent." Id. at 288, 289.

In this case, the Court summarized the general principles of law necessary to a consideration of the separation of powers doctrine where the executive and legislative branches of state government are involved. However, we find the following statement of these principles by Justice Holmes in State v. Greenlee, 228 Kan. 712 (1980), to be more appropriate, since it also includes the principles developed in State, ex rel., v. Bennett, supra:

"There have been a number of cases in Kansas dealing with the separation of powers and in them the following general principles are established:

"(1) A statute is presumed to be constitutional. All doubts must be resolved in favor of its validity, and before a statute may be stricken down, it must clearly appear the statute violates the constitution. Leek v. Theis, 217 Kan. 784.

"(2) When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented. Leek v. Theis, 217 Kan. at 785; State, ex rel., v. Fadely, 180 Kan. 652, 308 P.2d 537 (1957).

"(3) A usurpation of powers exists when there is a significant interference by one department with operations of another department. State, ex rel., v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976).

"(4) In determining whether or not a usurpation of powers exists a court should consider (a) the essential nature of the power being exercised; (b) the degree of control by one department over another;

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(c) the objective sought to be attained by the legislature; and (d) the practical result of the blending of powers as shown by actual experience over a period of time. State, ex rel., v. Bennett, 219 Kan. 285." 228 Kan. at 716.

It is clear, therefore, that the validity of the proposal before your committee depends on whether it constitutes a usurpation of the powers of the executive department. That is, it must be determined whether the involvement of the legislature's Joint Committee on State Building Construction in the long-term leasing of office space by agencies of the executive department constitutes "a significant interference" with the operations of that department. Such determination can be achieved by measuring the contemplated action against the considerations stated in State, ex rel., v. Bennett, supra, as the same are summarized above in paragraph (4) of the excerpt from State v. Greenlee, supra.

The first factor to be considered "is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two?" State, ex rel., v. Bennett, supra at 290. Here, the power in question is the acquisition of office space by state agencies. In our judgment, this is a purely executive or administrative power that has traditionally been exercised by the executive department.

Persuasive to our conclusion is State, ex rel., v. State Office Building Commission, 185 Kan. 563 (1959), where the Court had under consideration a seven-member commission whose membership was composed entirely of legislators appointed by the governor. The powers of this commission were discussed by the Court as follows:

"The powers of the defendant commission are set out in the act as amended and are to be found in the General Statutes and the Supplement thereto following section 75-3601. Plaintiff's brief has summarized these powers as follows:

"1. To construct and equip a state office building on the tract now occupied by that structure. 2. To sue and be sued and to make all contracts necessary and convenient for the accomplishment of its authorized purposes and for the carrying on of its business. 3. To accept gifts and grants and to contract with the federal agencies in connection therewith.

4. To borrow money and issue evidences of indebtedness in the name of the state of Kansas, and to secure payment thereof or of any or all obligations of the Commission by pledging all or any of its revenues. 5. To select and determine the number of its employees and their compensation and duties. 6. To permit the use of the office building by any state agency selected by the Commission; and to fix and charge such rentals therefor as it may determine to be necessary to pay the expenses of the Commission, the construction and equipment of the building and payment of the principal and interest on its obligations allocable to such building. 7. To rent unoccupied space in said building to others on month to month leases. 8. To acquire a parking lot and improving the same from the state office building fund, raze buildings on said property, regulate parking on said lot, fix and collect charges therefor, and to make rules for the removal and impoundment of vehicles unlawfully parked thereon. 9. To take title to and hold the parking lot real estate and to take title to and hold under and as against the state the interest of the state to the office building site.'" (Emphasis added.) Id. at 565, 566.

In concluding that the commission's powers were executive in nature, the Court relied upon a well-accepted encyclopedic statement as to the distinction between legislative and executive powers:

"A standard and often used definition of legislative power is found in 16 C.J.S. 545, §130:

"'As a general rule, under constitutional principles with respect to the division of powers, legislative power as distinguished from executive power is the authority to make laws, but not to enforce them.'" Id. at 566.

Thus, it is clear that the legislative branch of government has the power to make laws, while the executive branch has the responsibility to enforce or execute the laws so enacted. In our view, the provision of office space for state agencies established by laws duly enacted by the legislature is a power necessary to the implementation of such laws, and a review of existing statutory provisions reflects that this power has traditionally been exercised by the executive branch.

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For example, subsection (8) of K.S.A. 1980 Supp. 75-3739 provides that, "[e]xcept as otherwise specifically provided by law, no state agency shall enter into any lease of real property without the prior approval of the secretary of administration." This section also grants to the secretary of administration the power to "approve, modify and approve or reject" any state agency's proposed lease. Further, pursuant to K.S.A. 1980 Supp. 75-3765, the secretary of administration is authorized to "assign space and facilities in all state owned or operated property or buildings" in Shawnee County, with certain exceptions, and is authorized to "determine, fix and establish a system of rental charges" for such space and facilities. Also of note are the provisions of K.S.A. 1980 Supp. 75-3766, which state:

"Any state agency assigned office space in the state office building by the secretary of administration is hereby authorized to enter into agreements with the secretary of administration for the use and occupancy of such space, such rental to be paid by such state agency from any available funds or moneys authorized to be spent by such state agency."

When these statutory provisions are considered in conjunction with the general contractual authority conferred on most state agencies and, in some cases, the specific power given particular state agencies to lease property, it is apparent that the executive rather than legislative nature of the power to lease office space for state agencies has been recognized by legislative enactments. Based on the foregoing, it is our opinion that the leasing of office space by state agencies is a governmental function that is essentially executive in nature.

Having established the executive character of this governmental function, it is necessary to consider the additional factors prescribed by the Court in State, ex rel., v. Bennett, supra, in order to determine whether the committee's proposal would effect a "significant interference" by the legislature with the executive department.

"A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture?" State, ex rel., v. Bennett, supra at 290. As you have described the proposed legislation, it does not appear to us that the legislature is intended to be a mere cooperative participant in the process of entering into long-term leases for office space by state agencies. Rather, the proposed legislation would vest absolute control over this process in the legislature. By requiring approval of all such leases by the Joint Com-

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mittee on State Building Construction, it is our opinion that the legislative branch would exert "a coercive influence" over the executive department's exercise of its rightful authority.

A third consideration

"is the nature of the objective sought to be attained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature?" Id.

Applying these considerations to the subject of your inquiry we must conclude that the obvious purpose of the proposal is to establish the legislature's superiority over the executive department in an area we have previously found to be "essentially executive in nature." While we have no doubt as to the particular expertise of the Joint Committee on State Building Construction, or of its individual members, regarding the acquisition of space and facilities for the various state agencies, the manner in which such expertise would be brought to bear upon this matter extends far beyond an effort to cooperate with the executive department. The practical effect of the proposal being considered by your committee would, in fact, usurp the executive department's prerogatives.

It should be noted that the proposal under consideration is quite distinct from other existing statutory procedures providing for legislative involvement in the acquisition of space and facilities for state agencies. For example, K.S.A. 1980 Supp. 75-5411 provides in part:

"(a) The secretary of administration shall issue monthly reports of progress and advise, consult with and cooperate with the joint committee on state building construction.

. . . .

"(c) No change order or change in plans involving costs of twenty-five thousand dollars (\$25,000) or more, and no change in the proposed use of any new or remodeled building shall be authorized or approved by the secretary of administration without having first advised and consulted with the joint committee

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on state building construction." (Emphasis added.)

In our view, the procedure outlined in this statute represents a cooperative venture between the legislative and executive departments in the accomplishment of an apparent executive department function. It provides for the furnishing of the joint committee's special expertise without encroaching upon the executive department's prerogatives, and it is quite distinguishable from the proposal to vest in the joint committee the ultimate control over long-term leases of office space for state agencies. By withholding approval of any such lease, the joint committee can negate the exercise of the executive department's legitimate powers regarding the execution of such leases.

The fourth and final factor suggested in State, ex rel., v. Bennett, supra, for evaluating a legislative enactment's adherence to the separation of powers doctrine does not appear to be applicable to the situation you have described. The Court suggests that consideration should be given to "the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available." Id. at 290, 291. Obviously, evidence of actual experience is not available in this instance.

Therefore, in light of the relevant factors suggested by the Court for determining conformity to the separation of powers doctrine, it is our opinion that the proposal under consideration by the Senate Ways and Means Committee violates this doctrine. If enacted, the requirement of this proposal that there be obtained the Joint Committee on State Building Construction's prior approval of any lease of office space, a building or land for a term of more than ten years or for a term renewable for more than ten years, or which contains an option to purchase, would, in our judgment, constitute a "significant interference" with the operations of the executive department in an area that is essentially executive in nature.

Before concluding, it should be noted that the legislature is not without recourse to maintain fiscal control over long-term contractual commitments by state agencies. In this connection, we note K.S.A. 75-3025, which provides, in part:

"Any officer or agent of the state who shall be empowered to expend any public moneys, or to direct such expenditures, is hereby prohibited from making any contract for the erection or repair of any building, or for any

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other purpose, whereby the expenditure of any greater sum of money shall be contemplated, agreed to, or required, than is expressly authorized by law" (Emphasis added.)

The foregoing provisions are in practical effect the state's equivalent of the cash basis law, which is applicable to local units of government. By its terms, contracts requiring the payment of money in excess of appropriations made for such purpose are prohibited. Thus, any lease agreement providing office space to a state agency that contemplates a term longer than the period in which appropriated moneys have been made available for such purpose would be prohibited by 75-3025, unless such agreement is made contingent upon the appropriation of moneys necessary to carry out the agreement. This is standard procedure in all state contracts.

The Department of Administration requires its form DA-146a, Contractual Provisions Attachment, to be incorporated in and made a part of state contracts, either expressly or by reference. Paragraph 3 of that form provides a procedure whereby the contract in which such form has been incorporated is terminated if the legislature fails to appropriate sufficient moneys "to continue the function performed in the agreement." Not only does this provision achieve compliance with K.S.A. 75-3025, but it also recognizes the fundamental power of the legislature to control expenditure of public funds, which was addressed in State, ex rel., v. Bennett, 222 Kan. 12 (1977), as follows:

"As pointed out in State, ex rel., (Anderson) v. Fadely, supra, except as is restricted by the constitution, the legislature has the exclusive power to direct how, when and for what purpose the public funds shall be applied in carrying out the objects of the state government." Id. at 18, 19.

Therefore, since the duration of any such lease agreement is contingent upon the extent of appropriations made for such purpose, it is clear that the legislature has effective control over such leases through the appropriation process. In addition to controlling the amount of funds available, the legislature may impose conditions, limitations or qualifications upon the expenditure of moneys appropriated to a state agency, so as to ensure that public funds will not be expended in contradiction of the will and purpose of the legislature. Finally, even though it is stating the obvious, the legislature may enact substantive laws restricting the authority of state agencies to lease real property.

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Accordingly, although the proposal before your Committee would be a direct intrusion on the executive department's operations, the legislature may exert control over the lease of office space by state agencies through appropriations, and the conditions, limitations and qualifications imposed on them, and through the enactment of substantive laws prescribing such restrictions on state agencies' powers in this regard as the legislature deems necessary and appropriate.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

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