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May 14, 1981

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Mr. Jim Anderson
Chairman
Student Advisory Council
Kansas Board of Regents
Student Government Office
Memorial Union, FHSU
Hays, Kansas 67601

ATTORNEY GENERAL OPINION NO. 81-115

Re: State Institutions -- State Educational Institutions; Management, Operation -- Fixing of Tuition, Fees and Charges

Synopsis: The disregard of the Policy and Procedures Manual of the Kansas Board of Regents does not require the invalidation of otherwise lawful actions of the Board in fixing tuition, fees and charges as authorized by K.S.A. 76-719. In addition, the fixing of tuition, fees and charges at state educational institutions need not be accomplished by rules and regulations complying with K.S.A. 1980 Supp. 77-415 et seq. Cited herein: K.S.A. 76-712, 76-719, K.S.A. 1980 Supp. 77-415, 77-416, Kan. Const., Art. VI, §6.

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Dear Mr. Anderson:

As chairperson for the Student Advisory Committee for the Kansas Board of Regents, you inquire as to the legality of recent actions of the Kansas Board of Regents in raising student tuition at the various Regent institutions. Specifically, the Advisory Committee desires to know if the Board of Regents (hereinafter "Board") is required "to follow their [sic] policy manual." Further, you wish to know "if the Board of Regents is bound by K.S.A. [1980 Supp.] 77-416."

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Although you do not specify those sections of the Board's Policy and Procedures Manual (hereinafter "Manual") which you believe were not followed, we presume you are interested in the section concerning the establishment and alteration of fees, which states:

"Board approval must be secured prior to the establishment or alteration of student fees and room and board charges. These fees must be published in the 'Comprehensive Fee Schedule.' All proposed fee changes shall first be submitted to the Budget and Finance Committee of the Board and shall be accompanied by a statement of the financial impact of such proposed change. The proposed fee change and the financial impact statement shall be provided to all persons receiving the agenda of the Board of Regents meeting. Final action on such proposed fee change by the Committee shall not be taken until the next regularly scheduled meeting of the Committee." Manual at 58.

Hence, we shall consider whether this provision must be adhered to by the Board as a matter of law.

The Kansas Constitution provides authority for the collection of tuition, fees and charges as follows: "The legislature may authorize the state board of regents to establish tuition, fees and charges at institutions under its supervision." Kan. Const., Art. VI, §6(b). The Kansas Legislature has authorized the collection of such tuition, fees and charges. K.S.A. 76-719 states in pertinent part: "The board of regents shall fix tuition, fees and charges to be collected by each state educational institution."

The legislature has placed no legal restrictions on the exercise of this power to set student tuition, fees and charges. Indeed, the Board is granted even greater powers over the management and control of state institutions under its supervision. K.S.A. 76-712 states:

"The state educational institutions are state agencies and state institutions and shall be controlled by, and operated and managed under the supervision of the board of regents. For such control, operation, management or supervision, the board of regents may make contracts and adopt orders, policies or rules and regulations and do or perform such other acts as are authorized by law or are appropriate for such purposes."

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Moreover, the provision of interest in the policy and procedures manual promulgated by the Board was not adopted as an official rule or regulation pursuant to K.S.A. 1980 Supp. 77-415 et seq. Obviously, the provisions of the Manual and this provision in particular, were intended as guidelines for the orderly functioning of the Board's decision-making process and the collecting of information for the benefit of the Board. We discern no intent to bestow legal rights upon any citizen to participate in the agency's deliberations.

There are hundreds of court cases, particularly from the federal courts, distinguishing between those instances in which agency rules are to be followed by the agency itself and when avoidance of those rules does not invalidate agency action. Probably the most important case in this area is American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970). This case arose out of a claim by certain motor carriers against the Interstate Commerce Commission. Plaintiffs alleged that the regulatory agency failed to strictly adhere to its own rules which required certain information to be set forth in statements filed in support of applications by motor carriers for temporary operating authority. The analogy between this procedural requirement and the requirement of the Manual for presentation of a financial impact statement for tuition and fee increase proposals, is obvious. In American Farm Lines, supra, the United States Supreme Court observed:

"The Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems. It is argued that the rules were adopted to confer important procedural benefits upon individuals; in opposition it is said the rules were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications for temporary authority.

"We agree with the Commission that the rules were promulgated for the purpose of providing the 'necessary information' for the Commission 'to reach an informed and equitable decision' on temporary authority applications. . . . The Commission stated that requests for temporary authority would be turned down 'if the applications do not adequately comply with [the] . . . rules.' . . . The rules were not

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intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in Vitarelli v. Seaton, 359 US 535, 3 L Ed2d 1012, 79 S Ct 968; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. . . . Thus there is no reason to exempt this case from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.'" (Citations omitted.) 397 U.S. at 538, 539.

American Farm Lines has been followed frequently. See, e.g., Barnes Freight Line, Inc., v. I.C.C., 569 F.2d 912, 921 (1978) and Lyman v. United States, 500 F.2d 1394, 1396, 1397 (1974). For cases distinguished due to substantial prejudice to private parties, see, e.g., Alamo Express, Inc., v. United States, 613 F.2d 96, 98 (1980).

Hence, although we believe the guidelines contained in the Board's Policy and Procedures Manual are not official rules and regulations entitled to legal significance and enforcement, even if these guidelines were given legal status, disregard of procedural rules designed to aid the agency itself and not bestowing legal rights on private parties, is not grounds for invalidating otherwise legal action of a governmental entity. See American Farm Lines, supra.

Your second inquiry concerns whether the requirements of K.S.A. 1980 Supp. 77-415 et seq., are applicable to the setting of tuition and fees by the Kansas Board of Regents. As previously noted, the fixing of tuition, fees and charges is delegated by statute to the Board. K.S.A. 76-719. The general grant of rule-making authority is contained in a separate statute, K.S.A. 76-712, supra, which law, by its terms, distinguishes rules and regulations from orders, policies and contracts. No statute specifically requires the Kansas Board of Regents to adopt tuition or fees as rules and regulations as those terms are used in K.S.A. 1980 Supp. 77-415(4). Indeed, the Board has not adopted such fees by rule or regulation in the past.

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Where the legislature has intended the fixing of fees and charges to be determined in the form of rules and regulations, it has done so quite explicitly. See K.S.A. 1980 Supp. 32-164b authorizing the Kansas Fish and Game Commission to fix fees by the adopting or amending of rules and regulations. See also, for example, K.S.A. 55-141a requiring the Kansas Corporation Commission to comply with K.S.A. 1980 Supp. 77-415 et seq., "with respect to any such rule or regulation which levies, assesses, taxes or otherwise fixes or determines any fee, tax, charge or other payment of money to the commission or to the State of Kansas" This office reached a similar conclusion with respect to the state plan adopted by the State Board of Education pursuant to the Special Education for Exceptional Children Act, K.S.A. 1980 Supp. 72-961 et seq. See Kansas Attorney General Opinion No. 80-234, wherein this office opined that the statute requiring the adoption of the state plan distinguished such plan from rules and regulations.

Thus, it is our opinion that the fixing of student tuition and fees at educational institutions under the supervision of the Kansas Board of Regents need not be accomplished under the rule-making procedures of Article 4 of Chapter 7 of the Kansas Statutes Annotated. Such a result is neither expressed nor implied by enactments of the Kansas Legislature.

Therefore, it is our opinion that the disregard of the Policy and Procedures Manual of the Kansas Board of Regents does not require the invalidation of otherwise lawful actions of the Board in fixing tuition, fees and charges as authorized by K.S.A. 76-719. In addition, the fixing of tuition, fees and charges at state educational institutions need not be accomplished by rules and regulations complying with K.S.A. 1980 Supp. 77-415 et seq.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Bradley J. Smoot
Deputy Attorney General

RTS:BJS:hle