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June 2, 1982

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ATTORNEY GENERAL OPINION NO. 82-119

The Honorable Ron Hein
State Senator, Twentieth District
6031 S.W. 24th Terr.
Topeka, Kansas 66614

Re: Statutes -- Rules and Regulations -- Scope and
Extent of Filing Act

Synopsis: The terms defined in K.S.A. 1981 Supp. 77-415(4) (as amended by section 1 of 1982 House Bill No. 2712) have the meanings ascribed thereto only when such terms are used in the Rules and Regulations Filing Act (K.S.A. 1981 Supp. 77-415 et seq., and amendments thereto), except where it is clear that the use of such terms in other statutes is intended by the legislature to convey such meanings. Thus, plans, bulletins, policy manuals and other documents issued by state agencies are not rules and regulations under the filing act, unless they meet the definitional criteria of "rule and regulation" in K.S.A. 1981 Supp. 77-415(4) (as amended). However, unless otherwise specifically provided by statute, such plans, bulletins, policy manuals and other documents which satisfy these definitional criteria do not have the force and effect of law, unless they are promulgated as rules and regulations pursuant to the filing act and filed with the Office of the Revisor of Statutes.

Unless altered by legislative enactment, the procedure prescribed in the filing act for legislative oversight and review of rules and regulations may not be extended so as to include plans, bulletins, policy manuals and other documents of state agencies which have not been promulgated in compliance with the filing act. Cited herein: K.S.A. 46-1201, 46-1206, K.S.A. 1981 Supp. 72-961, K.S.A. 1981 Supp. 77-415, 77-416, 77-420 and 77-421 (as

amended by sections 1,2,3 and 4, respectively, of 1982 House Bill No. 2712), K.S.A. 77-425, K.S.A. 1981 Supp. 77-426 (as amended by section 7 of 1982 House Bill No. 2712), 77-436; 1982 House Bill Nos. 2724 and 3151.

* * *

Dear Senator Hein:

You have posed a number of questions relating to Kansas administrative rules and regulations. Several of your questions pertain specifically to the relationship between the Rules and Regulations Filing Act (K.S.A. 1981 Supp. 77-415 et seq. as amended by 1982 House Bill Nos. 2712 and 2724) and the state plan for special education services adopted pursuant to K.S.A. 1981 Supp. 72-961 et seq.; however, it would appear that these questions have been rendered moot by the recent enactment of 1982 House Bill No. 3151. Thus, in this opinion we will address only your remaining inquiries.

Pertinent to your questions is the definition in K.S.A. 1981 Supp. 77-415 (as amended by section 1 of 1982 House Bill No. 2712), which states in part:

"As used in K.S.A. 77-415 to 77-437, inclusive, and amendments thereto, unless the context clearly requires otherwise:

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"(4) 'Rule and regulation,' 'rule,' 'regulation' and words of like effect mean a standard, statement of policy or general order, including amendments or revocations thereof, of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency. Every rule and regulation adopted by a state agency to govern its enforcement or administration of legislation shall be adopted by the state agency and filed as a rule and regulation as provided in this act." (Emphasis added.)

In light of the foregoing definition, you have inquired whether plans, general policy bulletins and policy manuals which are promulgated by state agencies, and administered by these agencies as having the force and effect of law, must

comply with the provisions of K.S.A. 1981 Supp. 77-415 et seq., as amended (hereinafter sometimes referred to as "filing act"). In particular, you ask whether the import of the phrase "words of like effect," in the above definition, would encompass such plans, bulletins and manuals.

Initially, we note that K.S.A. 1981 Supp. 77-415 (as amended) is the first of a series of statutes providing the procedure for the adoption, filing and review of administrative rules and regulations. It contains definitions of terms which are applicable only in this statutory sequence; that is, as can be seen from the above-quoted portion of this statute, the definitions therein have relevance only to terms "used in K.S.A. [1981 Supp.] 77-415 to 77-437 inclusive, and amendments thereto." The words and phrases are not defined for random use elsewhere in the statutes, but are intended for use only in the filing act.

We are not suggesting that use of the term "rule" or "regulation" or "rule and regulation" in a statute which is separate and apart from the filing act can never be regarded as a reference to the terms defined in K.S.A. 1981 Supp. 77-415(4) (as amended). However, that determination depends in each instance on legislative intent, which must be ascertained through established rules of statutory construction.

Similarly, the phrase "words of like effect," as used in the above-quoted provisions of 77-415(4), cannot be regarded as having any significance apart from the sections of the filing act. In effect, it also is a defined term for purposes of this act. Accordingly, as used in the filing act, words and terms having similar effect to "rule" or "regulation" or "rule and regulation" are to have the meaning provided in 77-415(4). However, such definition may not be applied to "words of like effect" used in statutes not included in the filing act, so as to ipso facto bring them within and subject to the requirements of the filing act.

In summary, then, it is our opinion that the definition in K.S.A. 1981 Supp. 77-415(4) (as amended) is applicable only when the defined terms are used in the filing act. Thus, whether "plans," "bulletins" and "policy manuals" are to be regarded as "words of like effect" is a relevant question only within the confines of the filing act. Accordingly, even if these terms are regarded as words of like effect, the mere use of such terms in statutes outside the filing act does not serve to make the filing act applicable. The applicability of the filing act to such plans, bulletins or policy manuals depends on whether they meet the definitional criteria provided in K.S.A. 1981 Supp. 77-415(4).

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Therefore, in order for a particular plan, policy bulletin or policy manual to be regarded as a "regulation," and thereby subject to the filing act, it must be determined if such plan, policy bulletin or policy manual is:

1. a standard, statement of policy or general order;
2. of general application;
3. intended to have the force and effect of law; and
4. issued or adopted by a state agency either to implement or interpret legislation enforced or administered by such state agency or to govern the agency's organization or procedure.

The foregoing enumerates the criteria provided in K.S.A. 1981 Supp. 77-415(4) (as amended) to define "regulation." From a review of these criteria, it is apparent that a determination of whether a particular document of a state agency is to be regarded as a "regulation" is a question of fact; it requires a comparison of such document with these criteria. It also is apparent that the denomination of the document by the agency or the statute authorizing its promulgation is not the significant consideration. Whether the document is styled as a policy manual or as a regulation is not determinative of its status under the filing act. It is to be regarded as a "regulation" under that act only if it satisfies the definitional criteria set forth above.

You also have inquired as to the legal effect of noncompliance with the filing act. By this we assume you are questioning the enforceability of a state agency's regulatory document which meets the definitional criteria of a regulation in K.S.A. 1981 Supp. 77-415(4) (as amended), but which has not been promulgated in accordance with the filing act. Initially, it should be noted that the definition in K.S.A. 1981 Supp. 77-415(4) (as amended) excludes a number of regulatory documents which otherwise satisfy the definitional criteria for a regulation subject to the filing act. These excluded regulatory documents, therefore, are not to be regarded as regulations under the filing act; i.e., even though they may satisfy the definitional criteria outlined above, these specifically enumerated documents have been excluded from the definition of "regulation" and are thereby exempt from the requirements of the filing act.

However, unless a regulatory document which satisfies these definitional criteria is specifically excluded from the definition of "regulation" by the terms of K.S.A. 1981 Supp. 77-415(4) (as amended), or is otherwise exempted from the requirements of the filing act by another statute, such document is of no force or effect unless it has been promulgated in compliance with the filing act. Pertinent to this conclusion is K.S.A. 77-425, which provides, in part, as follows:

"Every rule and regulation . . . which is filed by a state agency in the office of the revisor of statutes as provided in this act shall have the force and effect of law on and after the date prescribed in K.S.A. [1981 Supp.] 77-426 Any rule and regulation not filed and published as required by this act shall be of no force or effect"

Thus, every regulatory document that is a regulation under the filing act must be filed with the Revisor of Statutes in order to be of any force or effect. However, as indicated by the emphasized language in the above-quoted provisions, there are requirements of that act which must be satisfied as conditions precedent to filing with the Revisor of Statutes. K.S.A. 1981 Supp. 77-416 (as amended by section 2 of 1982 House Bill No. 2712) provides that "[e]very state agency shall file with the revisor of statutes every rule and regulation adopted by it" (Emphasis added.) Prior to adoption, an agency must give notice of its intended action and hold a hearing thereon (K.S.A. 1981 Supp. 77-421, as amended by section 4 of 1982 House Bill No. 2712), but prior to such notice and hearing, proposed rules and regulations must be approved in various respects by the Secretary of Administration and the Attorney General (K.S.A. 1981 Supp. 77-420, as amended by section 3 of 1982 House Bill No. 2712). These and other requirements of the filing act must be satisfied before a regulation is eligible for filing with the Revisor of Statutes. Unless there is compliance with these requirements and filing with the Revisor of Statutes is accomplished, a regulation is of no force and effect. In our judgment, it does not have the force and effect of law and, accordingly, is unenforceable.

Your final question concerns the authority of the legislature and the legislature's Joint Committee on Administrative Rules and Regulations to review "plans, bulletins, and policy manuals, whether or not such documents had been filed with the Revisor of Statutes Office pursuant to the provisions of K.S.A. 77-415, et seq." By this, we assume you are inquiring as to the authority of the legislature and the Joint Committee to review regulatory documents which meet the definitional

criteria of a "regulation" in K.S.A. 1981 Supp. 77-415(4) (as amended), but which have not been promulgated or filed with the Revisor of Statutes in compliance with the filing act. We further assume that your question has reference to the review procedure prescribed by K.S.A. 1981 Supp. 77-426 (as amended by section 7 of 1982 House Bill No. 2712), which states, in pertinent part:

"(b) As soon as possible after the filing of any rules and regulations by a state agency, the revisor of statutes shall submit to the joint committee on administrative rules and regulations such number of copies as may be requested by the joint committee on administrative rules and regulations.

"(c) At any time prior to adjournment sine die of the regular session of the legislature, the legislature may adopt a concurrent resolution modifying or rejecting any permanent rule and regulation filed in the office of the revisor of statutes during the preceding year. . . .

"(d) Any rule and regulation included in the Kansas administrative regulations or any supplement thereto and any temporary rule and regulation in effect may be modified or revoked by a concurrent resolution adopted by the legislature." (Emphasis added.)

In conjunction with these provisions, it is appropriate to consider K.S.A. 1981 Supp. 77-436, which establishes the Joint Committee on Administrative Rules and Regulations and prescribes its functions. Subsection (c) thereof states:

"(c) All rules and regulations filed each year in the office of the revisor of statutes shall be submitted to and reviewed by the joint committee on administrative rules and regulations. Each state agency's rules and regulations on file in the office of revisor of statutes shall be reviewed by the joint committee at least once every five years. All forms used by state agencies shall be subject to review by the joint committee. The committee may introduce such legislation as it deems necessary in performing its functions of reviewing administrative rules and regulations and agency forms." (Emphasis added.)

When the foregoing provisions of K.S.A. 1981 Supp. 77-426 (as amended) and 77-436, particularly the emphasized language

thereof, are considered in concert, it is abundantly clear that the procedure prescribed by the legislature for the oversight and review of rules and regulations is limited to rules and regulations which have been promulgated and filed with the Office of the Revisor of Statutes in accordance with the filing act. Of course, the legislature itself through its plenary power may alter this procedure and provide for the formal review of various state agencies' plans, bulletins and policy manuals. In fact, we do not question the authority of the legislature to undertake a review of these documents in the absence of a formalized, statutory procedure. However, to make applicable to these documents the provisions of K.S.A. 1981 Supp. 77-426 (as amended) would require an amendment of that statute or a separate statutory enactment.

With respect to the authority of the Joint Committee on Administrative Rules and Regulations, it is to be noted that legislative committees "have those powers and only those which are lawfully conferred on them by the legislative bodies." 81A C.J.S. States §55. Thus, the Joint Committee is limited to the authority provided by the above-quoted statutory provisions, unless additional authority is conferred by legislative action. However, it is not necessary that such additional authority be conferred pursuant to statutory enactment. For example, subsection (d) of K.S.A. 1981 Supp. 77-436 provides that the provisions of K.S.A. 46-1201 et seq. relating to special committees shall be applicable to the Joint Committee, "to the extent that the same do not conflict with the specific provisions" of the filing act applicable to the Joint Committee.

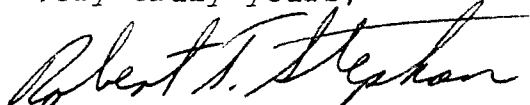
Thus, an interim legislative study may be assigned to the Joint Committee by the Legislative Coordinating Council pursuant to K.S.A. 46-1206(f). Through such a study the Joint Committee might be provided authority to review and make recommendations on plans, bulletins and policy manuals promulgated by state agencies without reference to the filing act. Similar studies might be authorized by the two houses of the legislature. [See K.S.A. 46-1206(b), (c).] However, aside from these studies or authority similarly conferred on the Joint Committee to consider matters outside the scope of the filing act, the authority of the Joint Committee is limited by the above-quoted provisions of K.S.A. 1981 Supp. 77-426 (as amended) and 77-436. [See, also, Attorney General Opinion No. 79-46 regarding the authority of the Joint Committee to introduce legislation.] And we reiterate that the scope of the Joint Committee's authority under the filing act may not be expanded other than by legislative enactment. The provisions of K.S.A. 1981 Supp. 77-426 (as amended) and 77-436 may not be altered so as to include plans, bulletins, policy manuals and other documents issued by state agencies without complying with the filing act, except by amendment of these statutes or other statutory enactment.

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In summary, then, it is our opinion that the terms defined in K.S.A. 1981 Supp. 77-415(4) (as amended) have the meanings ascribed thereto only when such terms are used in the Rules and Regulations Filing Act (K.S.A. 1981 Supp. 77-415 et seq., as amended), except where it is clear that the use of such terms in other statutes is intended by the legislature to convey such meanings. Thus, plans, bulletins, policy manuals and other documents issued by state agencies are not rules and regulations under the filing act, unless they meet the definitional criteria of "rule and regulation" in K.S.A. 1981 Supp. 77-415(4) (as amended). However, unless otherwise specifically provided by statute, such plans, bulletins, policy manuals and other documents which satisfy these definitional criteria do not have the force and effect of law, unless they are promulgated as rules and regulations pursuant to the filing act and filed with the Office of the Revisor of Statutes.

It is our further opinion that, unless altered by legislative enactment, the procedure prescribed in the filing act for legislative oversight and review of rules and regulations may not be extended so as to include plans, bulletins, policy manuals and other documents of state agencies which have not been promulgated in compliance with the filing act.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson
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