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ATTORNEY GENERAL OPINION NO. 87-84

Marshall Crowther, Executive Secretary
Kansas Public Employees Retirement System
Capitol Tower, 2nd Floor
400 W. 8th Street
Topeka, Kansas 66603-3911

Re: State Boards, Commissions and Authorities -- Public
Employees Retirement Systems; Kansas Public
Employees Retirement System -- Management and
Investment of Funds; Investments in "Banking
Institutions"

Constitution of the State of Kansas -- Banks --
Whether "State" includes KPERS; Definition of
"Banking Institution"

Banks and Banking -- Banking Code; Definitions --
Definition of "Banking Institution" Under the
Kansas Constitution, Art. 13, § 2.

Synopsis: KPERS is "the state" for purposes of Article 13,
§ 2 of the Kansas Constitution (1986 Supp.) which
provides that "[t]he state shall not be a
stockholder in any banking institution." Based on
the rules of constitutional construction and
analysis of the intent behind the 1980 revision of
Article 13, it is our opinion that "banking
institution" means banks organized under the
banking laws, chapter nine of the Kansas statutes.
For reasons stated in this opinion, we conclude
that KPERS may hold stock in a savings and loan
association or trust company but is prohibited from
acquiring such an interest in a bank holding

company. Cited herein: K.S.A. 9-514; K.S.A. 1986
Supp. 9-519; 9-520; 9-521; 9-522; 9-525; 9-701;
K.S.A. 9-702; 17-2001; 17-5101; 74-4901; 74-4903;
74-4905; 74-4909; K.S.A. 1986 Supp. 75-4201;
Kan. Const., Art. 13, §§ 1, 2.

* * *

Dear Mr. Crowther:

As Executive Secretary of the Kansas Public Employees Retirement System (KPERS), you ask our opinion whether the prohibition in the Kansas Constitution against the state holding stock in any banking institution applies to KPERS. If our answer is in the affirmative, you also ask our opinion on related questions in order to give the KPERS Board of Trustees guidance in their investment policies.

Article 13, Section 2 of the Kansas Constitution (1986 Supp.) states: "The state shall not be stockholder in any banking institution." The initial question is whether KPERS qualifies as "the state." The statutes concerning KPERS are found at K.S.A. 74-4901 et seq. K.S.A. 74-4903 provides as follows:

"There is hereby created the 'Kansas public employees retirement system' which shall be a body corporate and an instrumentality of the state of Kansas. The system shall be vested with the powers and duties specified in this act and such other powers as may be necessary or proper to enable it, its officers, employees and agents to carry out fully and effectively the purposes and intent of this act."
(Emphasis added).

Members of the board of trustees are appointed by the governor, and the board is responsible for managing and investing state employees' retirement funds. K.S.A. 74-4905; 74-4909. Because it is an "instrumentality of the state," we must conclude that KPERS is included as "the state" for purposes of Article 13, Section 2 of the Kansas Constitution. KPERS, therefore, cannot be a stockholder in any banking institution.

You also inquire as to the definition of "stockholder" and what constitutes a "banking institution." In particular, you

ask whether KPERS may be a stockholder in entities such as savings and loan institutions, trust companies, and bank holding companies.

A "stockholder" is generally defined as follows:

"A stockholder is one who holds membership in a corporation by virtue of holding or owning one or more shares of its stock, one who appears on the books of the corporation as owner of shares and [is] therefore entitled to a voice in the management and burdened with the liabilities incident to that relationship." 18 C.J.S. Corporations § 475a.

A depositor in a bank is a creditor of that institution. The court has said that "[t]he essential difference between a stockholder and a creditor is that a stockholder invests in corporate venture and takes the risk of loss in order to share in the profit; and the creditor does not intend to take such risks, but merely lends his capital to others who do take them." Security Finance & Loan Company v. Koehler, 210 F. Supp. 603, 606 (D.C. Kan. 1962). KPERS would be a stockholder in a banking institution if it goes beyond being a depositor/creditor and acquires an ownership interest in the business.

The determination as to whether KPERS may acquire an ownership interest in certain financial institutions depends on the definition of "banking institution" as used in the Kansas Constitution. "Banking" and "bank" are generally defined as follows:

"Banking is the business of receiving deposits payable on demand, discounting commercial paper, making loans on collateral security, issuing notes payable on demand and intended to circulate as money, collecting notes or drafts, buying and selling bills of exchange, negotiating loans, and dealing in negotiable securities. Exercise of all these functions is not necessary, nor does exercise of certain of them necessarily

render a corporation a bank." 9 C.J.S. Banks and Banking § 1c. (Emphasis added).

"A bank is a moneyed institution, generally incorporated and of a quasi-public character, whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue bank notes." 9 C.J.S. Banks and Banking § 1a.

"By reason of the development and expansion of the banking business, the term 'bank' does not lend itself to an exact definition. Strictly speaking, the term 'bank' implies a place for the deposit of money, and that is the most obvious purpose and a primary function of such an institution. In its more enlarged sense, a bank may be defined as an institution, generally incorporated, authorized to receive deposits of money; to lend money and issue promissory notes, usually known by the name of "banknotes"; or to perform some one or more of these functions." 10 Am. Jur. 2d Banks § 1.

Each state by virtue of its police powers regulates banks under its jurisdiction. The definition of "bank", therefore, depends on the authority and powers conferred upon it by state law. See 1 Michie, Banks and Banking, pp. 3-4 (1986).

The Kansas Supreme Court has applied the following rule when examining the constitution: "In ascertaining the meaning of a constitutional provision, the primary duty of the courts is to look to the intention of the makers and adopters of that provision." Behrmann v. Public Employees Relation Board, 225 Kan. 435, 439 (1979). See, State, ex rel., v. Highwood Service, Inc., 205 Kan. 821, 825-26 (1970). Article 13 of the Kansas Constitution was extensively amended by the voters in the 1980 general election. See L. 1980, ch. 356. In order to determine the meaning of the term "banking institution" in Article 13, § 2, as amended, the meaning of Article 13 as originally adopted by the Wyandotte Convention on July 29, 1859, must first be ascertained.

Article 13 originally contained nine sections, including the following:

"Article 13 -- BANKS AND CURRENCY

§ 1. Banking laws. No bank shall be established otherwise than under a general banking law.

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"§ 5. State not to be stockholder. The state shall not be a stockholder in any banking institution.

"§ 6. Banking offices. All banks shall be required to keep offices and officers for the issue and redemption of their circulation, at a convenient place within the state, to be named on the circulating notes issued by such bank.

"§ 7. Denominations of notes. No banking institution shall issue circulating notes of a less denomination than one dollar.

"§ 8. Referendum on laws. No banking law shall be in force until the same shall have been submitted to a vote of the electors of the state at some general election, and approved by a majority of all the votes cast at such election."

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Kan. Const., Art. 13 (Weeks 1979).
(Emphasis added).

The argument is made that at the time the constitution was drafted institutions such as savings and loans and trust companies were not known. Banks were the only entities that performed services which are today also offered by other businesses. Therefore, it is maintained that the terms "bank" and "banking institution" refer to all entities which perform these functions. KPERS, then, would be prohibited from

becoming a stockholder in savings and loans associations, trust companies, and other such institutions.

Kansas case law, however, reveals that the terms "bank" and "banking institution" as used in original Article 13 had a very narrow meaning. In Pape v. Capitol Bank, 20 Kan. 440 (1878), as a defense in an action for recovery on promissory notes, defendant Pape alleged that plaintiff bank was organized under an unconstitutional banking law as the law had not been submitted to the voters pursuant to Article 13, § 8 of the Constitution. See this opinion, page 5. The Kansas Supreme Court examined the nine constitutional provisions and held that only currency banks, or banks of issue, were intended to be included within the scope of Article 13. The banking law in question was not unconstitutional as it pertained to banks of deposit. Pape v. Capitol Bank, 20 Kan. at 443-44. It is clear that, prior to amendment in 1980, KPERS could hold stock in any bank or financial institution which did not have authority to issue its own currency.

The fact that currency is issued only by the federal government, rendering the provisions of Article 13 moot, led to the comprehensive revision of this article in 1980. See Heineman, "Legislation 1980," 49 J. Kan. B. A. 99, 110 (1980). Seven of the nine sections were eliminated, one of the remaining sections was amended, and the other was renumbered. In addition, the title of the article was changed from "Banks and Currency" to "Banks." See L. 1980, ch. 356. As a result of these changes, Article 13 now reads as follows:

"Article 13 -- Banks.

"§1. Banking laws. No bank shall be established otherwise than under a general banking law, nor be operated otherwise than by a duly organized corporation.

"§2. State not to be stockholder. The state shall not be a stockholder in any banking institution." (Emphasis added.)

The emphasized language in §1 is an amendment effected by the revision. Section two was §5 of the original article, and its language was unchanged.

In Attorney General Opinion No. 81-150 we examined a bill before the 1981 legislature which proposed to establish the Public Bank of Kansas and stated that, because of the 1980 constitutional revision, "there is no longer any basis for interpreting Article 13 as applying only to banks of circulation." The question now before us is, given Article 13, §§ 1 and 2 of the Kansas Constitution as revised by the voters in 1980, what does the term "banking institution" mean?

1980 Senate Concurrent Resolution No. 1655 resulted, in part, from the Report of the Citizens' Committee on Constitutional Revision (Report), which was submitted to the governor and legislature in February, 1969. As to Article 13, the Citizens' Committee made the following recommendation:

"The Committee recommends repeal of this entire article, except section 1, because it is obsolete, and that section 1, with addition of the phrase 'nor be operated other than by a duly organized corporation' be added to Article 12 - Corporations, as new section 3 therein." Report, p. 105.

The Citizens' Committee commented on the proposed change as follows:

"In Pape v. Capitol Bank, 20 Kan. 440 (1878) and in The State v. Dietrich, 117 Kan. 105 (1924), the supreme court of the state of Kansas ruled that the present article of the constitution applied to banks issuing their own currency or having authority to issue their own currency. Since the federal government now regulates all currency, it would appear that all nine sections of Article 13 are now obsolete and could be eliminated from the constitution without impairing its effectiveness. In recognition of the belief that banking business should be carried on by corporations organized under general banking laws, it is proposed that section 1 of the present Article 13 be included as a new section 3 under Article 12 on Corporations, and that the phrase

'nor be operated otherwise than by a duly organized corporation,' be added to the section. It is felt that this would provide the legislature with sufficient latitude in formulating banking laws, yet would provide a prohibition against the formation of private banks." Report, p. 106.

Part of the Citizens' Committee's commentary to proposed changes in Article 12 concerning corporations is pertinent:

"The new material added to section 3 down to the comma, is all that remains of present Article 13 after deletion of the portion thereof that is no longer applicable. Since almost all of the reasons for Article 13 are no longer existent by reason of the federal government's pre-emption of the issuance of currency . . . there remained only the bare statement of public policy that all banks be organized under general banking laws as opposed to special legislation. For this reason, it was thought that the 'remains' of Article 13 should be transferred to the corporations article by reason of commonality of subject matter. The committee further recommends that the last phrase in new section 3 be added so that banks will be operated only as corporations, as opposed to 'private' banks, to insure continuity and stability." Report, p. 103.

Minutes of the legislative committees which considered 1980 SCR 1655 are meager. During its meeting of January 29, 1980, the Senate Committee on Commercial and Financial Institutions noted that the Citizens' Committee had recommended deletion of § 5. The Senate Committee, however, voted to reinsert § 5 (now § 2). No explanation is given for this action.

1980 SCR 1655 was considered by the House Committee on Commercial and Financial Institutions on March 25, 1980. A staff member of the Revisor of Statute's Office commented: "This amendment reflects the [Senate] Committee's desire that the Constitution continue to explicitly prohibit the state

from engaging in banking." The Citizens' Committee commentary on Article 13 (Report, page 106) was made part of the minutes.

The meaning of "banking institution" in Article 13, § 2, must be determined by examining the intent of the 1980 amendment in view of the rule of construction stated by the Kansas Supreme Court:

"In interpreting and construing a constitutional amendment the court must examine the language used and consider it in connection with the general surrounding facts and circumstances that caused the amendment to be submitted." Behrmann v. Public Employees Relations Board, 225 Kan. 435, 439 (1979).

See Higgins v. Cardinal Manufacturing Co., 188 Kan. 11, 19 (1961). The language of constitutional provisions is to be interpreted "to mean what the words imply to men of common understanding." State, ex rel., Frizzell v. Highwood Service, Inc., 205 Kan. 821, Syl. ¶ 4 (1970). Based on these rules of constitutional construction and analysis of legislative intent in amending Article 13, it is our opinion that the term "banking institution" in § 2 means banks organized under chapter nine of the Kansas statutes.

Just as the court in Pape v. Capitol Bank examined and construed together all nine provisions of Article 13, we must analyze both sections of Article 13 as amended to determine intent, and thus the meaning of the term banking institution in § 2. Section one provides that a bank must be established under a general banking law. An advantage to construing constitutional amendments as opposed to the original constitution is that statutes exist at the time amendments are proposed and passed. These statutes can be used to imply what certain words mean "to men of common understanding" at the time the language was adopted.

The "general banking laws" of this state are found in chapter nine of the Kansas statutes. Savings and loan institutions and trust companies are defined and organized under chapter 17, corporations. K.S.A. 17-5101 et seq.; 17-2001, et seq. K.S.A. 1986 Supp. 9-701 contains the following definitions:

"(a) 'Bank' shall mean a state bank incorporated under the laws of Kansas.

"(b) 'Trust company' shall mean a trust company incorporated under the laws of Kansas."

These definitions were in the statute books in 1980. See L. 1947, ch. 102, §1. (Several other statutes define "bank" for purposes of a particular act within chapter nine. See, e.g., K.S.A. 9-514(2) (supervision of business by banks in cases of emergency); K.S.A. 1986 Supp. 9-525 (failed or failing banks); 9-701(a) (definition under the banking code); 75-4201(d) (deposit of state moneys)). The references in chapter nine to the term "trust company" clearly indicate that a trust company is not a bank or banking institution:

"Every bank and every trust company shall keep a full and correct list of the names and addresses of all of its stockholders" K.S.A. 9-805 (emphasis added).

"Any newly organized bank or trust company which shall not begin business within one hundred and twenty days after a certificate has been issued to it by the commissioner shall not engage in the banking business or the business of a trust company without again obtaining a certificate of authority from the commissioner." K.S.A. 9-806 (Emphasis added).

"The acts of any bank or trust company whose charter or articles of incorporation have lapsed or terminated by the expiration of time are hereby legalized and declared to be valid in the same manner and to the same effect as though said banks and trust companies had been duly incorporated at all times" K.S.A. 9-807 (Emphasis added).

The above three statutes also existed in 1980. See L. 1947, ch. 102, §§ 8, 9, 10. See also 9 C.J.S. Banks and Banking, § 2 (trust companies are distinguished from and are

not regarded as banks.) KPERS, therefore, may hold stock in a trust company.

The term "banking" has been defined by Kansas statute since 1947:

"Any individual, firm or corporation, except a national bank, who shall receive money on deposit, whether on certificates or subject to check, or any individual, firm or corporation, except railroad, transoceanic steamship, air transport, telegraph or Morris plan companies, or building and savings and loan associations, or national banks, or express companies engaged in an international financial and travel business or credit unions, which shall receive money for which it issues its check, draft, bill of exchange, or other evidence of indebtedness for which it charges a fee, shall be considered as doing a banking business, and shall be amenable to all the provisions of this act" K.S.A. 9-702 (Emphasis added).
See L. 1947, ch. 102, § 2.

This statute specifically exempts savings and loan associations from the definition of banking. Therefore, a savings and loan institution is not a "banking institution" under Article 13, § 2. See VII Attorney General Opinions, pages 220, 223 (1972) (Kansas law does not recognize savings and loan associations as conducting the business of banking). See also Attorney General Opinion No. 85-148 (The Federal Land Bank does not meet the definition in K.S.A. 9-702 and thus is not a bank.)

Given the definitions of "bank" and "banking" which existed in 1980, if the intent was to prohibit the state from becoming a stockholder in any financial institution, a broader term would have been used when the constitution was amended. Original Article 13 did not apply to all banks, only banks of circulation. This fact was before both legislative committees when SCR 1655 was considered. The legislature adopted the Citizens' Committee's recommendation that the obsolete provisions of Article 13 concerning issuance of currency be deleted from the constitution. Thus, the two remaining provisions of Article 13 apply to all banks. There is no

evidence that the legislature in passing SCR 1655 to amend Article 13 intended to expand the meaning of the term "bank" to include savings and loan associations, trust companies, and other such entities.

The provisions concerning bank holding companies are contained in chapter nine of the Kansas statutes. K.S.A. 9-519 et seq. A "bank holding company" is defined as follows:

"'Bank holding company' means any company:

"(A) Which directly or indirectly owns, controls, or has power to vote 25% or more of any class of the voting shares of a bank and more than 5% of any class of the voting shares of one or more additional banks, or 25% or more of any class of the voting shares of a company which is or becomes a bank holding company by virtue of this act;

"(B) which controls in any manner the election of a majority of the directors of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this act;

"(C) for the benefit of whose shareholders or members 25% or more of any class of the voting shares of a bank and more than 5% of any class of the voting shares of one or more additional banks, or 25% or more of any class of the voting shares of a company which is or becomes a bank holding company by virtue of this act, is held by trustees; or

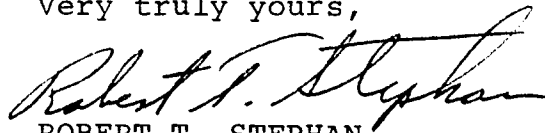
"(D) which, by virtue of acquisition of ownership or control of, or the power to vote the voting shares of, a bank or another company, becomes a bank holding company under this act." K.S.A. 1986 Supp. 9-519(a)(1). (Emphasis added).

A "bank" for purposes of K.S.A. 9-520 through 9-524 means "any bank the deposits of which are insured by the federal deposit insurance corporation, or its successor." K.S.A. 1986 Supp. 9-519(c). A bank holding company is an entity which has an

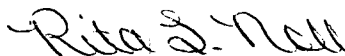
ownership interest in a bank. KPERS cannot be a shareholder/owner of any banking institution. The question is whether KPERS can be a shareholder in a bank holding company, or, whether KPERS may hold an ownership interest in a company which owns a bank. A bank holding company does not itself have authority to function as a bank. See Attorney General Opinion No. 84-84. However, if allowed to be a shareholder in a bank holding company, KPERS would be allowed to do indirectly what it cannot do directly. Therefore, it is our opinion that KPERS may not hold stock in a bank holding company.

In summary, it is our opinion that KPERS is "the state" for purposes of Article 13, § 2 of the Kansas Constitution (1986 Supp.) which provides that "[t]he state shall not be a stockholder in any banking institution." Given the rules of constitutional construction and analysis of the intent behind the 1980 revision of Article 13, it is our opinion that "banking institution" means banks organized under the banking laws, chapter nine of the Kansas statutes. For reasons stated in this opinion, we conclude that KPERS may own stock in a savings and loan association or trust company but is prohibited from acquiring such an ownership interest in a bank holding company.

Very truly yours,



ROBERT T. STEPHAN
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