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ATTORNEY GENERAL OPINION NO. 87-175

The Honorable Michael L. Johnston
Senate Minority Leader
P.O. Box A
Parsons, Kansas 67357

Re: State Departments; Public Officers and
Employees--State Health Care Benefits
Program--Kansas State Employees Health Care
Commission

Synopsis: The statutes granting authority to the Kansas state
employees health care commission to establish
employee participation charges do not limit the
commission's discretion in establishing such
charges. Further, the distinctions drawn between
higher and lower income employees and smokers and
nonsmokers do not rise to the level of Equal
Protection violations.

Expenditures by the commission are subject to
relevant appropriations acts. Promulgation of
rules and regulations to provide for such
expenditures would be appropriate and desirable.
Alternatively, the legislature could establish
statutory guidelines for the expenditure of this
money. Cited herein: K.S.A. 75-6501; 75-6504;
75-6506; 75-6507; 77-415; U.S. Const., Fourteenth
Amend.

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Dear Senator Johnston:

As Senator for the Fourteenth District, you request our opinion regarding the state's health benefits plan for 1988. Your specific questions are based on your understanding of portions of the plan:

"For the first time, employees will be required to pay a monthly charge for participating in the employee health insurance program. This charge is based on the employee's income level. Employees who consume tobacco must pay an additional \$10 surcharge per month. It is my understanding that the money collected from the participation fee will be used to pay premiums, and the tobacco surcharge will be used to implement wellness programs for employees. What is not spent on wellness programs may be kept in reserve."

Your first question is whether the Kansas state employees health care commission is authorized by K.S.A. 75-6501 et seq. to levy a participation charge based on employee income. To fully answer this question, we must determine (1) whether the commission has the authority to levy a participation charge, and (2) whether this charge may be based on income level.

K.S.A. 75-6501 et seq. authorize the Kansas state employees health care commission (commission) to "develop and provide for the implementation and administration of a state health care benefits program." K.S.A. 75-6501(a). Pursuant to K.S.A. 75-6504(b), and subject to the limitations of appropriations made or available therefor, the commission is authorized "to negotiate and enter into contracts with qualified insurers, health maintenance organizations and other contracting parties for the purpose of establishing the state health care benefits program." K.S.A. 75-6506 provides in part:

"(a) The participation of a person qualified to participate in the state health care benefits program shall be voluntary, and the cost of the state health care benefits program for such

person shall be established by the Kansas state employees health care commission.

"(b) Periodic deductions from state payrolls may be made in accordance with procedures prescribed by the secretary of administration to cover the costs of the state health care benefits program payable by persons who are on the state payroll when authorized by such persons. . . ."
(Emphasis added.)

All moneys received by or for the commission pursuant to the state health care benefits program are to be remitted to the state treasurer for deposit in the state treasury to the credit of the health care benefits program fund. K.S.A. 75-6507.

The above-underscored language in K.S.A. 75-6506 appears to contemplate employee contributions to help pay the cost of the state health care benefits program. While in the past employees have paid only for spouse and dependent coverage, the statutes do not limit the commission to those assessments. Thus, in our opinion K.S.A. 75-6501 et seq. authorize the commission to establish an employee participation charge.

We turn now to the question of whether this charge may be assessed based on employee income level. In a memorandum to members of the legislature dated November 17, 1987, the chairman of the state employees health care commission states that a provision establishing a charge varying by employee income on all employees participating in the health care benefits program was adopted by the commission on September 3, 1987 (p.4). The chairman explains that this monthly charge for all state employees participating in the health care benefits program is to help offset the costs of family coverage (p.6). "The Commission was concerned that the cost of family coverage available to state employees was becoming a barrier to health benefits for the families of state employees on the low end of the wage scale," (p.6). Thus, the commission has determined that higher income employees with employee-only coverage should help subsidize the costs of health care to lower income employees with family coverage.

K.S.A. 75-6501 et seq. do not restrict the commissioner's discretion in establishing employee costs. We must therefore

determine whether the commission exceeded constitutional bounds in establishing a charge based on level of income.

In establishing classifications for differential treatment, the state is bound by the Equal Protection amendment to the United States Constitution. U.S. Const., Fourteenth Amend. In that the provision of health care benefits is not a fundamental right and wealth is not a suspect classification in this instance, the state must show only a rational basis for the differential treatment, and that the means selected have a real and substantial relation to the objective sought. McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); Manhattan Buildings, Inc. v. Hurley, 231 Kan. 20, 30 (1982). The differential treatment in question was apparently based upon the employees' ability to pay. While this theory seems to overlook the fact that the state employee's income is often only a portion of that employee's family's total income, we cannot say conclusively that the differential charges established are completely devoid of any rational basis. Further, according to the information provided by the chairman of the commission, the charges established help achieve the goal of holding down the increase in premiums for family coverage. In all fairness to the commission, it has apparently approached this goal from several directions, thus not placing the total burden on higher income employees. The commission is requesting a supplemental appropriation for fiscal year 1988 to increase the government's contribution (pp. 6, 11), and has negotiated a change in benefits available to further reduce projected costs to the state and its employees (p. 5). Employees with family coverage will also experience an increase in premiums (p. 7).

You next ask whether the commission has the authority to selectively impose a surcharge on one particular group of employees based on their personal habits. You are referring to the tobacco surcharge implemented by the commission.

According to Chairman Flentje's memorandum to members of the legislature dated November 17, 1987, the commission adopted a provision for a non-smoker's "discount" on August 27, 1987. The commission views this "discount" as an incentive for preventive health care (p. 7). The commission's decision to adopt this incentive was reportedly based on the claims experience of the state employees group over the past two years (p. 7), a random-sample survey of state employees and retirees (p. 8), and the U.S. Surgeon General's conclusion

that "[c]igarette smoking is the single most important preventable environmental factor contributing to illness, disability, and death in the United States," (p. 8). Revenues generated from the differential charges between smokers and non-smokers is to be dedicated to preventive health measures such as health-risk appraisals, employee assistance programs, and smoking cessation clinics (p. 8). Though the term "discount" is used by the commission to describe this differential charge between smokers and non-smokers, it is in reality a surcharge on tobacco smokers, not a discount for nonsmokers. See reference to "revenues generated," (p. 8).

K.S.A. 75-6501 authorizes the commission to develop and provide for the implementation of a state health care benefits program. The program may provide any number of health services, and may include such "reasonable provisions as may be established by the commission." K.S.A. 75-6501(b). The statutes do not limit the commission's discretion in establishing employee contributions to the program. Again we must look to constitutional proscriptions on discriminatory state activity.

The basis for the distinction between smokers and non-smokers is the perceived correlation between smoking and increased health care costs (pp. 7, 8). See also Kansagram, Vol. 4, No. 7, p. 4 (October 1987). Again, we cannot say conclusively that this is not a rational basis for the distinction. The two goals sought by implementing this charge are to encourage smokers to stop smoking (as well as discourage non-smokers from taking up smoking) (p. 8), and to generate revenues to support preventive health measures. In other words, the provision is designed to reduce health care costs in the long run by encouraging and assisting employees who are believed to be a cause of the increased costs to change their habits. The means chosen to accomplish this seem reasonably related to the desired result. Thus, we find no legally proscribed discrimination with this provision, or the provision to base premiums on employee income level.

You further inquire as to the limitations, if any, on the spending of money collected from the tobacco surcharge. As mentioned previously, all moneys received by or for the commission pursuant to the health care benefits program are to be remitted to the state treasurer for deposit in the state treasury to the credit of the health care benefits program fund. K.S.A. 75-6507. All expenditures from the health care benefits program fund are to be made in accordance with the provisions of appropriations acts relating thereto. K.S.A.

75-6501(a), 75-6507. Thus, expenditures of the revenues collected from the tobacco surcharge are subject to legislative appropriations acts. Additionally, we believe moneys generated by the smoking surcharge should be used to benefit smokers in some way. The mere incentive to stop smoking may be sufficient benefit, but it is hoped that smoking cessation programs and overall health cost reduction will be targets of these funds. We feel compelled to note that the surveys conducted and used as a basis for the tobacco surcharge indicated that smokers would be charged more for their insurance. There was no indication that smokers might be charged to help fund wellness programs of little or no benefit to smokers.

Your final question is whether the commission must promulgate and file rules and regulations for the expenditure of money pursuant to K.S.A. 77-415 et seq. K.S.A. 77-415 defines "rule and regulation" as "a standard, statement of policy or general order . . . of general application and having the effect of law, issued or adopted by an agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency." The Kansas state employees health care commission meets the definition of "state agency" found at K.S.A. 77-415(1). Since the expenditure of revenues generated by the tobacco surcharge will affect the rights and interests of state employees, and guidance for expenditure is not given in the controlling statutes, it is our opinion that the promulgation of rules and regulations for the expenditure of this money would be appropriate and desirable. Alternatively, the legislature could establish statutory guidelines for the expenditure of this money.

In conclusion, the statutes granting authority to the Kansas state employees health care commission to establish employee participation charges do not limit the commission's discretion in establishing such charges. Further, the distinctions drawn between higher and lower income employees and smokers and nonsmokers do not rise to the level of Equal Protection violations.

Expenditures by the commission are subject to relevant appropriations acts. Promulgation of rules and regulations to provide for such expenditures would be appropriate and

desirable. Alternatively, the legislature could establish statutory guidelines for the expenditure of this money.

Very truly yours,



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