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March 11, 1988

ATTORNEY GENERAL OPINION NO. 88-34

The Honorable Joan Wagnon
State Representative, Fifty-Fifth District
State Capitol, Room 278-W
Topeka, Kansas 66612

Re: Public Health--Emergency Medical Services; Regulation of Ambulance Service--Legislative Members of Newly Created Board

Constitution of the State of Kansas--Legislative--Ability to Sit on Executive Boards

Synopsis While there is no express provision in the Kansas Constitution that prohibits the legislature from appointing its members to administrative boards or commissions, the separation of powers doctrine prohibits the legislature from usurping the powers of another governmental branch. In view of the case law history of this doctrine and the facts with which we have been presented, we cannot conclusively say that legislative membership on the emergency medical services board is unconstitutional under the separation of powers doctrine. Cited herein: K.S.A. 65-4316; 74-2127; Kan. Const., Art. 2, §14; 1988 House Bill No. 2639.

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Dear Representative Wagnon:

As State Representative for the Fifty-Fifth District, you inquire whether legislative membership on an executive board

is constitutional. Specifically, you ask whether the appointment of four legislators to the emergency medical services board is constitutional in light of the board's rule-making authority and other executive functions.

You indicate that the House Local Government Committee held hearings on 1988 House Bill No. 2639, a bill which would abolish the Bureau of Emergency Medical Services, K.S.A. 74-2127, and the Emergency Medical Services Council, K.S.A. 65-4316, and create a new Division of Emergency Medical Services and a new Emergency Medical Services Board. The proposed statute calls for the appointment of four legislators to serve on the thirteen member board and charges the board with the duty of adopting rules and regulations. 1988 House Bill No. 2639, sec. 10(a).

While there is no express provision in the Kansas Constitution that prohibits the legislature from appointing its members to administrative boards or commissions, Parcell v. State of Kansas, 468 F.Supp. 1274, 1278 (1979), the separation of powers doctrine prohibits one branch of government from usurping the powers of another branch. State ex rel., v. Bennett, 219 Kan. 285, 289, 290 (1976). State ex rel. Stephan, v. Kansas House of Representatives, 236 Kan. 45, 59 (1984), Clark v. Ivy, 240 Kan. 195, 201 (1986). The implied constitutional doctrine of separation of powers between each of the three departments of state government -- legislative, executive and judicial -- "is designed to avoid a dangerous concentration of power and to allow the respective powers to be assigned to the department best fitted to exercise them." Leek v. Theis, 217 Kan. 784, 805 (1975), citing Van Sickle v. Shanahan, 212 Kan. 426 (1973). [See Van Sickle for an analysis of the constitutional separation of powers doctrine.] Parcell v. State of Kansas, 468 F.Supp. at 1280, citing State ex rel., v. Bennett, 219 Kan. at 288-89.

Historically the Kansas Supreme Court applied the doctrine strictly, prohibiting one department from performing any duties traditionally assigned to a different department, thereby keeping the functions of the three departments as distinct and separate as possible. See State v. Johnson, 61 Kan. 803 (1900). Recognizing that modern administrative bodies or commissions may perform functions that blend all three departments, recent case law has modified the doctrine. Clark v. Ivy, 240 Kan. 195 (1986), citing State ex rel., Stephan v. House of Representatives, 236 Kan. 45, 59-60 (1984).

The blend of power exercised by some administrative agencies is the basis for finding no violation of the separation of powers in two cases involving legislative members serving on administrative boards. State, ex rel., v. Turnpike Authority, 176 Kan. 683 (1954) (two legislators may constitutionally perform delegable legislative duties as ex-officio members of the Authority); State, ex rel., v. Fadely, 180 Kan. 652 (1957) (four legislators on a six member finance council may perform what one concurring opinion depicts as the "quasi-legislative" duties of the council. 180 Kan. at 701). However, when confronted with a statute requiring the governor to appoint seven legislators to a seven member commission that exercised purely executive powers, the Kansas Supreme Court found a usurpation of the executive department by the legislative in violation of the doctrine of separation of powers. State, ex rel., v. State Office Building Commission, 185 Kan. 563 (1959).

The leading Kansas case on the separation of powers doctrine also involves members of the legislature serving on an executive body. In State ex rel., v. Bennett, 219 Kan. 285 (1986), a quo warranto action seeking to oust legislative members of the state finance council from the exercise of powers and responsibilities placed on them by statute, the Kansas Supreme Court addresses the constitutionality of appointing eight legislators to the nine member board. The Court finds that a usurpation of powers exists when there is a significant interference by one department with the operations of another department and sets forth factors to be considered:

> "First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two? 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? A third consideration of importance 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? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available. We do not wish to imply that these are the only factors which should be considered but it seems to us that they have special significance in determining whether a usurpation of powers has been demonstrated." State ex rel., v. Bennett, 219 Kan. at 290.

In order to determine whether there exists an unconstitutional usurpation of power by the legislature in appointing legislators to the Emergency Medical Services Board, we must examine the administrative body's duties using the above quoted criteria. In other words, we must apply the criteria to all the specific facts and circumstances presented. See also Leck v. Theis, 217 Kan. 784, 785 (1975); State v. Fadely, 180 Kan. 652 (1957).

The task of classifying the powers of an administrative body or commission as executive or legislative in nature is a difficult one. Bennett, 219 Kan. at 297. We therefore look to Bennett for guidance. In Bennett the court concluded that the statutory duties and powers granted to the state finance council to supervise the operations of the department of administration and its divisions was purely an exercise of executive power. The court determined that the legislature had enacted the law in general terms and delegated the power to execute it to an administrative body in the executive department, and that the legislature had vested the power to execute the law in a body controlled by legislators thereby violating the doctrine of separation of powers. 219 Kan. 298.

While the adoption of rules is essentially executive in nature, State, ex rel., v. Bennett, 219 Kan. 285, 297-98 (1976); State, ex rel., Stephan v. House of Representatives, 236 Kan. 45, 60 (1984), the four legislative members do not control the 13-member body vested with the power to execute the law. (However, we recognize that four persons would constitute a majority of a quorum and thus could be controlling in certain circumstances). Furthermore, examination of the other duties of the board helps us to conclude that there is a blending of legislative with executive powers. See Parcell v. State of Kansas, 468 F.Supp. 1274, 1278 (1979) where powers similar to those we are

reviewing were found to be a blending of executive and legislative functions. Because of this blend of powers, we cannot conclude with any degree of certainty that the intent of the legislature is other than to cooperate with the executive by furnishing legislative expertise. Unfortunately, we have no information as to the practical result of this blending of powers because the proposed agency has yet to perform its functions. Taking all of these facts into consideration, we cannot conclusively opine that the legislative membership on the Emergency Medical Services Board is unconstitutional under the separation of powers doctrine.

In conclusion, the Kansas separation of powers cases evince the following general principles: a statute is presumed constitutional unless it clearly violates the constitution; the legislature may by statute appoint members to boards created by the legislature; there is no express constitutional provision that prohibits the legislature from appointing its own members to such boards; the separation of powers doctrine does not prevent legislative membership on administrative boards where their service provides cooperation (i.e. is not controlling over a purely executive function); the doctrine prohibits one department of government from usurping the functions of another; and the facts and circumstances presented determine whether a usurpation of power exists. Bennett, supra, 219 Kan. at 289-290; Clark v. Ivy, 240 Kan. 195, 201 (1986). Therefore, with reservations and in an attempt to uphold these general principles, it is our opinion that under the facts and circumstances presented the legislative membership on the Emergency Medical Services Board is not unconstitutional under the separation of powers doctrine.

Very truly yours,

Robert T. Stephan

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