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September 27, 1988

ATTORNEY GENERAL OPINION NO. 88-139

The Honorable William R. Brady
State Representative, Sixth District
1328 Grand
Parsons, Kansas 67357

Re: Accountants, Certified Public--State Board of Accountancy; Rules and Regulations; Restraining Exercise of Trade

Synopsis: K.A.R. 74-6-2 requires an additional office of a certified public accountant (CPA) have a resident manager who devotes more than half of his working time to the affairs of that office. This regulation is outside the scope of the legislatively delegated powers in that it violates the Fourteenth Amendment of the United States Constitution. Cited herein: K.S.A. 1-202 et seq.; K.S.A. 1987 Supp. 77-425, as amended by L. 1988, ch. 366, sec. 38; K.A.R. 74-6-1; 74-6-2; 74-6-1; U.S. Const., Fourteenth Amend.

* * *

Dear Representative Brady:

As Representative of the Sixth District, you request an opinion regarding Kansas Administrative Regulation (K.A.R.) 74-6-2, that requires an additional office of a certified public accountant (CPA) have a resident manager who devotes more than half of his working time to the affairs of that office. Specifically you inquire whether K.A.R. 74-6-2, as it is applied by the board of accountancy, constitutes a restraint of trade or exceeds the authority of the board to

adopt rules and regulations it deems necessary for the proper administration of its duties.

You indicate that the regulation imposes a hardship on sole-practitioner CPA's in small rural communities in that a sole-practitioner cannot under this regulation open a part-time office in a neighboring community not served by an accountant. You further indicate that the board of accountancy has advised you that such a part-time office would be acceptable if the CPA did not advertise, which would preclude even a published telephone number. In your judgment the public would be better served by allowing the accountant to travel to a neighboring community to serve his clients rather than requiring the clients to travel to the accountant's office. You also feel that advertising such an office with an accurate listing of the time the CPA is in that office would be appropriate and responsible.

We will assume for purposes of your question that a sole-practitioner is one who works as a sole proprietor and employs no CPA's. K.A.R. 74-6-2 states:

> "An office as defined by regulation 74-6-1, and located in this state must have a resident manager in charge who is the holder of a valid permit to practice as a certified public accountant issued by this state. The resident manager of such an office must devote more than half of his working time to the affairs of that office. (Authorized by K.S.A. 1-202; effective Jan. 1, 1966)."

K.A.R. 74-6-1 defines an office as any office space identified to the public or connected with an individual, partnership or professional corporation practicing as certified public accountants, or for which there is a separate telephone listing.

Initially we note that Administrative regulations when adopted have the force and effect of law. K.S.A. 1987 Supp. 77-425, as amended by L. 1988, ch. 366, sec. 38; Kansas Gas Electric Co. v. Kanss Comm'n on Civil Rights, 242 Kan. 763 (1988). Generally legislative rules (regulations) are valid if (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable as a matter of due process. Davis, Administrative Law Treatise §7:8 Rules, p. 36 (1979); Pork Motel Corp. v. Kansas Dept. of Health &

Environment, 234 Kan. 374, 378-79 (1983). The Board of Accountancy has adopted the regulation in question pursuant to a delegation of legislative power. See K.S.A. 1-202. The regulation in question is thus a legislative rule and subject to the aforementioned test for validity.

In applying the test we must determine first whether the board's promulgation of the regulation in question is within the board's legislatively granted power. Thus the issue is whether the statutory authority asserted by the agency as the basis for its regulation is broad enough to authorize the regulation. Malone Oil Co. v. Department of Health and Environment, 234 Kan. 1066, 1068 (1984). Pursuant to K.S.A. 1-202, the board has the general authority to adopt such rules and regulations as it may deem necessary for the proper administration of its duties and for effectuation of the purposes of the act. The act, K.S.A. 1-202 et seq., regulates the practice of accountancy under the general police powers of the state and is generally a licensing act for the public benefit. The board of accountancy is the administrative agency charged with effectuating the statutory mandate of the act by promulgating regulations. There is, however, no common law power that can be exercised by an administrative agency, and thus regulations that go beyond authority conferred, violate the statute or are inconsistent with the statutory power are void. Pork Motel Corp. v. Kansas Dept. of Health and Environment, 234 Kan. 374, 378-79 (1983). The general policy of the rule in question seems on its face to be unrelated to the act. The licensing act K.S.A. 1-201 et seq. does not address whether a sole-practitioner can practice his trade from two different offices nor how much time must be spent on the affairs of each office. Thus, we have a question of discretion. In addressing the issue of how much discretion is vested in an administrative body, the court in Cray v. Kennedy, 230 Kan. 663 (1982) states:

> "The issue presented is not without difficulty. In many areas of regulation, the legislature has established rather broad, nonspecific standards for regulation and has vested the executive director of the agency with a corresponding broad discretion to enforce the statute. In other areas, the legislature has established specific legislative standards which bind the director of the agency and do not permit

> any discretion in departing from them. The Kansas cases have consistently held, whether in the case of administrative acts or in the case of the adoption of rules and regulations, that administrative agencies must act within the ambit of their specific statutory authority and not beyond." 230 Kan. at 675.

In our judgment it begs the question to attempt to determine whether the discretion vested in the board of accountancy includes the authority to dictate for the public benefit how a satellite office is to be managed and what amount of time a CPA must spend on the affairs of that office. The necessity for timeliness in the work of an accountant makes the issue of discretion more difficult.

In any event, because the regulation in effect restrains the exercise of a trade, the more important test for its validity is whether it offends notions of due process under the 14th Amendment of the United States Constitution. In State, ex rel., v. Gillen, 126 Kan. 368 (1928) the Court addressed a similar restraint of practice in the field of cosmetology. The question was whether the Kansas board of cosmetologists had the authority to require a period of six months of practice in Kansas before a license could be issued without examination, even though the statute in question made no such requirement. The Court found that because the board's interpretation in effect restrained the exercise of a trade, a strict construction of the statute was necessary; the Court held the board's interpretation erroneous. See also Willcott v. Murphy, 204 Kan. 640 (1970); Marcotte Realty & Auction, Inc. v. Schumacher, 225 Kan. 193 (1979); Kansas Commission on Civil Rights v. City of Topeka Street Department, 212 Kan. 398, cert. denied 414 U.S. 1066, 94 S.Ct. 573, 38 L.Ed.2d 470 (1973).

Unlike Gillen, we have no specific statute that authorizes the board's regulation (other than the statute providing broad discretion). However under an analysis of due process, the regulation, in our judgment, is unreasonable.

Under this analysis the issue is whether there is a reasonable relationship between the terms of the rule and the statutory purpose of regulating accountants and thereby protecting the public by licensing requirements, etc. Implicit in this question is a recognition that while an administrative agency's regulatory power by necessity encompasses a wide

latitude of discretion and freedom, even general regulatory power does not encompass the latitude to infringe on notions of due process or to have an unjustified intrusion on private rights. See Brown v. American Hospital Assn., 476 U.S. 610, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986) (the presumption of regularity afforded an agency in fulfilling its statutory mandate is not equivalent to the minimum rationality a statute must sustain in order to withstand analysis under the Due Process Clause; rather the agency must explain the rationale and factual basis for its decision).

Considering the factual basis for the board's decision, the regulation in question requires that any certified public accountant's office, identified to the public as such, have a resident manager who devotes more than half of his working time to the affairs of that office. While clearly not requiring physical presence, the regulation in effect precludes a sole practitioner, one who does not employ any other CPA's, from opening a satellite office. The sole practitioner obviously could not devote more than half of his time to the affairs of both offices. While we do not and cannot question the wisdom of a regulation that attempts to keep a CPA from overextending himself to the detriment of the public, an administrative agency cannot under the guise of a regulation substitute its judgment for that of the legislature. See In Re Department of Energy Stripper Well Exemption Litigation, 520 F.Supp. 1232, reversed 690 F.2d 1375, cert. denied Energy Reserves Group, Inc. v. Hodel, 459 U.S. 1127, 103 S.Ct. 763, 74 L.Ed.2d 978, on remand 578 F.Supp. 586, certified question answered Exxon Corp. v. U.S. Dept. of Energy, 744 F.2d 98, cert. denied 469 U.S. 1077, 105 S.G. 576, 83 L.Ed.2d 515 (D.C. Kan. 1981); Peoples Natural Gas Division of Northern Natural Gas Co. v. State Corporation Commission, 7 Kan. App.2d 519 (1982). See also State, ex rel., v. Columbia Pictures Corporation, 197 Kan. 455 (1966).

In conclusion, the board of accountancy having promulgated K.A.R. 74-6-2, is subject to the same test as to reasonableness and basic facts justifying the regulation as would be applied if the legislature had enacted the regulation as a statute. 73 C.J.S. §92 Public Administrative Law (1983). The power of a body to make or adopt regulations does not include the power to adopt regulations inconsistent with a constitutional provision, nor does it include the power to make rules affecting or creating substantive rights. Therefore, in our opinion, K.A.R. 74-6-2 is outside the scope of the board of accountancy's legislatively granted powers and

thus the board has exceeded its authority to promulgate rules and regulations it deems necessary for the proper administration of its duties.

Very truly yours,

Robert T. Stephan

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