



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89- 41

The Honorable Ross O. Doyen
State Senator, Twenty-Third District
State Capitol, Room 422-S
Topeka, Kansas 66612

Re: Cities and Municipalities--Plumbing and Electrical
Wiring; Plumbers and Plumbing in Cities and
Counties--Competency and Examination; Standards

Synopsis: The adoption of standards for determining the
competency of plumbers and electricians in K.S.A.
1988 Supp. 12-1508 and 12-1525, respectively, does
not involve the unlawful delegation of legislative
authority to a private entity or nongovernmental
agency in contravention of Article 2, Section 1 of
the Kansas Constitution. Cited herein: K.S.A.
1988 Supp. 12-1508, 12-1525; Kan. Const., Art.
II, sec. 1.

* * *

Dear Senator Doyen:

As Senator for the Twenty-Third District you inquire about the
examination standards for determining the competency of
plumbers and electricians found in K.S.A. 1988 Supp. 12-1508
and 12-1525, respectively. Specifically your inquiries
concern the language in the statutes that designate the codes
published by Block and Associates as the standard for
examinations to determine competency for licensure.

K.S.A. 1988 Supp. 12-1508 states:

"Standard examinations for the determination of competency of plumbing contractors and master and journeyman plumbers, based upon codes and standards effective on July 1, 1986, prepared and published and available upon such date from Block and Associates, Florida Farm Bureau Building, 5700 S.W. 34th St., #1303, Gainesville, Florida 32608, are hereby designated as the standard examinations for determining the qualification of persons seeking licensure as plumbing contractors and master and journeyman plumbers for the purposes of this act." (Emphasis added.)
(The provisions of K.S.A. 1988 Supp. 12-1525 are identical for the competency determination of electrical contractors, master and journeyman electricians and residential electricians.)

Your first inquiry is whether the underscored language allows unlawful delegation of legislative authority to Block and Associates. Unlawful delegation of legislative authority involves the delegation of the power to make laws in contravention of Article 2, Section 1 of the Kansas Constitution that vests the power to make laws in the House of Representatives and the Senate. The underscored language of K.S.A. 1988 Supp. 12-1508 and 12-1525 clearly designates codes effective July 1, 1986 and published by Block and Associates as the standard for examinations to determine the competency of plumbers and electricians. The adoption of a standard is an essential element of the legislature's lawmaking power. 16 Am.Jur.2d Constitutional Law §339 (1979). Thus the legislature has the discretion to adopt whatever standard they deem appropriate as the legal standard to determine competency for licensure. The vice of delegation lies not in the adoption of a standard but in the conferring of the legislature's discretion to another and thus allowing another (be it another department of government, nongovernmental agency or a private individual) to determine what the law shall be. 1 Am.Jur.2d Administrative Law §§101, 107 (1962).

The legislation in question adopts a specific code promulgated by a private entity as the standard for the determination of competency. The issue is whether the adoption of this standard allows Block and Associates the power to determine

what the law is. Kansas Courts have addressed the issue of unlawful delegation of legislative authority to a private entity. State v. Crawford, 104 Kan. 141 (1919); Quality Oil Co. v. Du Pont & Co., 182 Kan. 448 (1958); Poe v. Menghini, 339 F.Supp. 966 (D. Kan. 1972); Gumbhir v. Kansas State Board of Pharmacy, 228 Kan. 579 (1980); North American Safety Valve Industries v. Wolgast, 672 F.Supp. 488 (D. Kan. 1987). Two of these cases are particularly pertinent; they both deal with the adoption of a code, promulgated by a private entity, as a standard. In Crawford, dealing with a statute that provided all electrical wiring be in accordance with the national electric code, the Court found an unlawful delegation of legislative authority because the statute gave the entity the authority to develop and change the code. 104 Kan. at 144. In Wolgast, involving an agency's adoption of the National Board's Inspection Code (for boiler safety) by reference, the Court found that because the legislature retained the power to be the final arbiter of all rules and regulations adopted under the statute (including subsequent amendments made by the private entity), there was no unlawful delegation. 672 F.Supp. at 493. Thus if the legislature adopts a nongovernmental agency's code as a standard and retains the ultimate authority to approve the standard, no unlawful delegation occurs.

Applying this test to the legislation in question, the statute establishes a code effective July 1, 1986 as the standard; it does not require compliance with any future changes nor does it delegate to the publishers of the code, Block and Associates, the power to do anything. Accordingly, it is our opinion that K.S.A. 1988 Supp. 12-1508 and 12-1525 do not involve unlawful delegation of legislative authority to a private entity because the legislature retains the ultimate authority to examine, modify and amend what the standard of competency shall be.

Your second question is whether Block and Associates can change the examination codes and thereby require an amendment to the statute or whether the underscored language requires only that the examinations be based on codes in force and effect on July 1, 1986. The statutes clearly adopt the examinations based on the codes in effect July 1, 1986 as the standard of competency for licensure. Thus it is our opinion that an amendment to the statute would only be necessary if the legislature determined that the codes in force and effect on July 1, 1986 are no longer sufficient as the standard for determining the competency of plumbers and electricians.

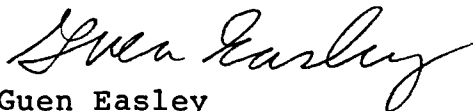
Your third and last question is whether the statutes would remain constitutional if amended to require only that the examinations be based upon the codes and standards effective on July 1, 1986, without any requirement that such examinations be "prepared and published and available upon such date." While the deletion of the date of July 1, 1986 would create an unconstitutional delegation of legislative authority to Block and Associates (see above), the deletion of the language that emphasizes such date does not. Thus in our opinion the proposed deletion of the requirement that such examinations be "prepared and published and available upon such date" does not make the statute subject to constitutional challenge.

In conclusion, K.S.A. 1988 Supp. 12-1508 and 12-1525 adopting examinations based upon codes effective July 1, 1986 and published and available from Block and Associates does not involve any unlawful delegation of legislative authority in contravention of Article 2, Section 1 of the Kansas Constitution.

Very truly yours,



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Attorney General of Kansas



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