



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 89- 134

Robert Orth, Chairman  
Kansas Board of Emergency Medical Services  
P.O. Box 980  
Sublette, Kansas 67877

Re: Public Health--Emergency Medical Services--Powers  
and Duties of Emergency Medical Services Board;  
Rules and Regulations; Implementation of Policy  
  
Statutes; Administrative Rules and Regulations and  
Procedure--Rules and Regulations--Definitions

Synopsis: A regulatory agency cannot promulgate a policy  
statement in lieu of a regulation if the policy  
statement is intended to create or affect rights  
and obligations of persons subject to the agency's  
control. Additionally, all amendments or  
modifications of a regulation are subject to the  
filing and publishing requirements in article 4,  
chapter 77 of the Kansas Statutes Annotated. Cited  
herein: K.S.A. 1988 Supp. 65-6129; K.S.A. 77-415;  
K.S.A. 1988 Supp. 77-421; 77-436.

\* \* \*

Dear Mr. Orth:

As Chairman of the Kansas Emergency Medical Services Board you  
make several inquiries regarding the promulgation of  
regulations. First, you inquire whether the Board can  
implement and enforce policies in those areas not specifically  
required by statute to be covered by rules and regulations.  
You indicate that you would like to promulgate statements of

policy in regard to areas specifically identified by statute as requiring approval or prescription by the Board. See, e.g., K.S.A. 1988 Supp. 65-6129.

Initially we note that whether a statute specifically "requires" the promulgation of a regulation is not determinative of whether a regulation is necessary nor is it determinative of whether a policy statement will suffice. Thus your inquiry is whether the Board can promulgate and enforce policy in lieu of regulations.

Generally regulations differ from policy statements in both procedure and effect. Procedurally, a regulation is subject to the filing act, K.S.A. 77-415 et seq., that includes a publishing requirement. A policy statement (which is not a regulation) is not subject to this procedure. Substantively, a regulation imposes rights and obligations and has the force and effect of law, and a statement of policy does not. See Attorney General Opinion 89-114 (enclosed) setting forth the criteria to determine whether a directive issued by an agency is a statement of policy or a regulation; see also, State of Alaska v. U.S. Dept. of Transportation, 868 F.2d 441, 445-447 (D.C. Cir. 1989) and Limerick Ecology Action v. U.S. Nuclear Regulatory Commission, 869 F.2d 719, 733-735 (3rd Cir. 1989). Thus, while a regulatory agency such as the Emergency Medical Services Board may promulgate general statements of policy, such statements are not enforceable as rules and regulations that affect rights or create obligations upon those affected. See K.S.A. 77-425 "any rule and regulation not filed and published as required by this act shall be of no force or effect. . . ."

The distinction between statements of policy and regulations is confusing in that most regulations are statements of policy whereas clearly not all statements of policy are regulations. This clouded distinction is evidenced by the statutory definition of a rule or regulation found in subsection (4) of K.S.A. 77-415:

"(4) 'Rule and regulation,' 'rule,' 'regulation' and words of like effect mean a standard, statement of policy or general order, including amendments or revocations thereof, of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the

organization or procedure of such state agency."

Subsection (4) also provides, in paragraphs (a) through (s), circumstances where a regulation is not a regulation within the definition provided. It states in part:

"A rule and regulation as herein defined shall not include any rule and regulation which: (a) Relates to the internal management or organization of the agency and does not affect private rights or interest; (b) is an order directed to specifically named persons or to a group which does not constitute a general class and the order is served on the person or persons to whom it is directed by appropriate means. The fact that the named person serves a group of unnamed persons who will be affected does not make such an order a rule or regulation; . . . (o) is a form, the content or substantive requirements of which are prescribed by regulation or statute; (p) is a pamphlet or other explanatory material not intended or designed as interpretation of legislation enforced or adopted by a state agency but is merely informational in nature."

Presumably if a policy statement comes within any of these exceptions (a) through (s) (note we cite only a partial list), it's promulgation does not trigger the filing and publishing requirements under K.S.A. 1988 Supp. 77-420 and 77-421. (However, subsection (c) of K.S.A. 1988 Supp. 77-436 requires all rules and regulations specifically excluded from the definition of a rule and regulation be reviewed by the Joint Committee on Administrative Rules and Regulations.) While not within the statutory definition of a regulation, policy statements within these exceptions may be valid. See Clark v. Ivy, 240 Kan. 195 (1986) involving an original mandamus action wherein the Kansas Supreme Court found that in spite of the failure to file and publish the policy in question as a regulation, the policy was nonetheless valid against petitioner because he had received actual notice of its adoption. But cf. Aircraft Steel and Supply Co. v. State Commission of Revenue and Taxation, 173 Kan. 524, 531

(1952) (in dicta the court questions whether a policy not filed with the revisor of statutes is legally enforceable.)

Thus, if the policy statement is intended to affect the rights and obligations of persons subject to the Board's control, it must be promulgated as a regulation pursuant to K.S.A. 77-415 et seq. Conversely, if the policy statement is not intended to affect such rights and obligations or fits within one of the exceptions in K.S.A. 77-415, the policy statement is not subject to the filing and publishing requirements in K.S.A. 77-415 et seq.; it is however subject to subsection (c) of K.S.A. 1988 Supp. 77-436, review by the Joint Committee on Administrative Rules and Regulations. Therefore, while there is nothing to preclude you from promulgating statements of policy generally, in our opinion they cannot be promulgated in lieu of regulations that affect the rights of and place obligations on licensees under your jurisdiction.

Your second question is whether a regulation adopting a national association standard may be drafted without a date specific, thus obviating the need to change the regulation every time the Board desires to modify the standard adopted. You cite the example of K.A.R. 109-10-1. It states in part: "(a) the approved curriculum for first responder programs shall be the department of transportation curriculum H.S. 900 025 as modified by the board and as in effect on January 1, 1989." You indicate you would like to change it to: "(a) the approved curriculum for first responder programs shall be the department of transportation curriculum H.S. 900 026 as annually approved by the board."

Reduced to simple terms, your inquiry is whether an amendment or modification of a regulation is subject to the rules and regulations procedure in K.S.A. 77-415 et seq. In short, amendments or modifications of regulations are subject to this act. K.S.A. 1988 Supp. 77-416 requires every state agency file with the secretary of state every rule and regulation adopted by it and every amendment and revocation thereof. See K.S.A. 1988 Supp. 77-421 notice and comment requirements applicable to an amendment of a regulation. See also North American Safety Valve Industries v. Wolgast, 672 F.Supp. 488, 493 (1987) (changes in inspection code previously adopted from private group as regulations not effective as amended regulations until submitted to state officials.) Thus, it is our opinion that adopting a regulation without a date specific would not obviate the need to change the regulation because any modification of the

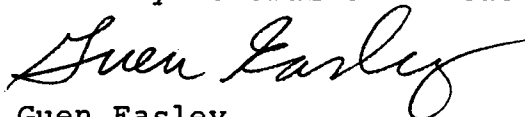
standard adopted by the regulation would require amending the regulation and thus trigger the filing and publishing requirements in article 4, chapter 77 of Kansas Statutes Annotated. (We note your question may also pose an unlawful delegation of legislative authority question that we have not addressed. See Attorney General Opinion No. 87-41.)

In conclusion, it is our opinion that a policy statement cannot be promulgated in lieu of a regulation if the policy statement is intended to impose rights and create obligations on persons subject to the Board's control. In addition, any amendment or modification of a regulation is subject to the filing and publishing requirements in article 4, chapter 77 of Kansas Statutes Annotated.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Guen Easley  
Assistant Attorney General

RTS:JLM:GE:jm