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February 14, 1992

ATTORNEY GENERAL OPINION NO. 92- 21

Dennis D. Prater  
General Counsel  
Kansas Commission on Governmental  
Standards and Conduct  
109 West 9th Street, Suite 504  
Topeka, Kansas 66612

Re: Legislature--State Governmental Ethics--Nepotism;  
Agency Authorized to Promulgate Rules and  
Regulations

Synopsis: The department of administration has authority to  
promulgate rules and regulations dealing with  
nepotism in state employment. The commission on  
governmental conduct and standards does not have  
such authority. Cited herein: K.S.A. 1991 Supp.  
46-246a; 46-253; K.S.A. 75-3746; 75-3747; L. 1981,  
ch. 171, §§ 44, 48.

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Dear Mr. Prater:

As general counsel for the Kansas commission on governmental  
standards and conduct (commission), you request our opinion.  
You advise that both the commission and the department of  
administration have proposed regulations dealing with nepotism  
pursuant to K.S.A. 1991 Supp. 46-246a and inquire which agency  
has authority to promulgate such rules and regulations.

K.S.A. 1991 Supp. 46-246a, dealing with nepotism in state  
employment, was enacted as a part of chapter 150 of the 1991  
session laws. This enactment took effect July 1, 1991. In

August of 1991 the department of administration (department) began the process of amending that agency's nepotism regulation, K.A.R. 1-9-21, to conform to the new enactment. K.A.R. 1-9-21 was originally promulgated in 1979 pursuant to the department's general authority to regulate the appointment, transfer, promotion and demotion of state officers and employees. See K.S.A. 75-3747; 75-3746. Subsequently, the revisor of statutes assigned the statute number K.S.A. 46-246a to the new enactment, placing the nepotism provision in the chapter on state governmental ethics. The legislature did not specify that this provision be made a part of the governmental ethics statutes, nor did it amend K.S.A. 46-253 to specifically authorize the commission to promulgate rules and regulations to implement the provision. Compare L. 1981, ch. 171, §§ 44, 48.

The Kansas Supreme Court has set forth the nature and authority of administrative agencies such as the commission and the department:

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.

"Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules and regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law." Pork Motel Corp. v. Kansas Dept. of Health and Environment, 234 Kan. 374, 378-379 (1983). See also Wesley Medical Center v. Clark, 234 Kan. 13, 18-19 (1983); Grauer v. Director of Revenue, 193 Kan. 605, 608 (1964) ("water cannot rise above its source").

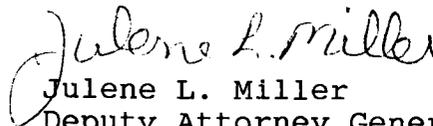
On its face, K.S.A. 1991 Supp. 46-253 appears to give the commission authority to promulgate rules and regulations to implement K.S.A. 1991 Supp. 46-246a. (The statute provides: "The commission may adopt rules and regulations for administration of the provisions of K.S.A. 46-215 to 46-280, and amendments thereto, and K.S.A. 46-248a, and amendments thereto.") Upon review of the legislative enactments, however, it is our opinion that K.S.A. 1991 Supp. 46-253 does not grant the commission such authority. The commission does not derive such authority merely because the revisor chose to place the statute where he did. Neither are we aware of any other statute granting the commission such authority. It therefore appears that the commission's proposed regulation on nepotism, K.A.R. 19-40-4, would be found void.

By contrast, the department of administration has broad authority to implement and administer the Kansas civil service act, K.S.A. 75-2925 et seq., and K.S.A. 75-3745c et seq. These statutes provide for the procedures for appointment, transfer, promotion and demotion of individuals in state service and other personnel administration. K.S.A. 1991 Supp. 46-246a limits otherwise appropriate state employment options in situations where family or household members are involved. We believe this is an area within the department's general grant of authority in K.S.A. 75-3747.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Julene L. Miller  
Deputy Attorney General

RTS:JLM:jm