



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. 92- 113

Bob McDanel, Administrator
Board of Emergency Medical Services
109 S.W. 6th Street
Topeka, Kansas 66603-3805

Re: Public Health--Emergency Medical Services--Powers
and Duties of Emergency Medical Services Board;
Rules and Regulations

Synopsis: K.A.R. 109-2-9 which permits the board to waive
licensing requirements for ambulance services fails
to set forth adequate standards to guide the board
in exercising its discretion in granting licenses
and is violative of due process. The regulation
also is void because it permits the board to adopt
binding policies affecting rights and obligations,
without the formalities of publication under K.S.A.
77-415 et seq. Cited herein: K.S.A. 1991
Supp. 65-6110; 77-415; K.A.R. 109-2-9.

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Dear Mr. McDanel:

As administrator for the board of emergency medical services
you ask our opinion on the validity of K.A.R. 109-2-9 which
provides that the board may waive the standard equipment
requirements for classes of ambulance services, which
requirements are set forth in other regulations. We note that
as a general rule an administrative agency may not waive or
violate its own rules and regulations, see Kansas
Commission on Civil Rights v. City of Topeka Street
Department, 212 Kan. 398, syl. ¶ 1 (1973). Here, however,

the board is not technically violating its own rules and regulations, since it has a regulation which purports to permit such waiver.

K.A.R. 109-2-9 provides:

"Requests for a waiver of these regulations may be sent to the board of emergency medical services. The administrator shall make investigations and recommendations to the board as appropriate. A waiver of any requirement may be granted by the board for a period not to exceed 12 months. A waiver may be renewed by the board."

The parenthetical history following the regulation provides:
"Authorized by and implementing K.S.A. 1988 Supp. 65-6110"

For this regulation to be valid, there must be statutory authority for it. In Pork Motel, Corp. v. Kansas Dept. of Health and Environment, 234 Kan. 374, Syl. ¶ 1 (1983) the court said,

"Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the state, 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."

K.S.A. 1991 Supp. 65-6110, the statute purported to authorize K.A.R. 109-2-9, provides:

"(a) The board shall adopt any rules and regulations necessary for the regulation of ambulance services. Such rules and regulations shall include: (1) A classification of the different types of ambulance services; (2) requirements as to equipment necessary for ambulances and rescue vehicles; (3) qualifications and

training of attendants, instructor-coordinators and first responders; (4) requirements for the licensure and renewal of licensure for ambulances and rescue vehicles; (5) records and equipment to be maintained by operators, instructor-coordinators, first responders and attendants and (6) such other matters as the board deems necessary to implement and administer the provisions of this act.

"(b) The provisions of this act shall not apply to rescue vehicles operated by a fire department."

This section makes it mandatory for the board to establish classifications for ambulance services and to establish licensing procedures. Subsection (a)(6), provides very broad authority to the board in carrying out this task. There are limits, however, to the breadth of authority which the legislature may pass to an agency. In Gambhir v. Kansas State Board of Pharmacy, 228 Kan. 579, (1980), the court said, "The legislature may enact general provisions for regulation and grant to state agencies certain discretion in filling in the details, provided it fixes reasonable and definitive standards to govern the exercise of such authority."

K.A.R. 109-2-9 is troublesome because it presents no standards for the exercise of the board's discretion in determining the requirements ambulance services must meet in order to obtain a license.

There is currently a trend in other jurisdictions to hold that due process requires agencies to enact rules providing definite standards by which the agency will exercise its discretion. In Environmental Defense Fund, Inc. v. Ruckelshass, 439 F.2d 584 (D.C. Cir., 1971) the court said, "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." (The Court was reviewing an agency decision to suspend a registration of a pesticide.)

Courts also commonly require agencies to set forth definite standards for discretionary decision making in connection with the decision to grant or suspend various governmental

entitlement benefits. See, e.g., Morton v. Ruiz, 415 U.S. 199 (1974); White v. Roughton, 530 F.2d 750 (7th Cir. 1975); Baker-Chaput Cammett, 706 F.Supp. 1134 (1976). See also 2 Davis, Administrative Law Treatise § 7.26 (2nd ed. 1979).

In essence, the regulation in question allows the board to grant or deny a license to operate an ambulance service, but does not set forth standards by which such decision is to be made. Although Kansas appellate courts have not considered this precise question, we believe the courts would follow Environmental Defense Fund, and require that standards be set forth. Kansas courts have previously recognized that regulations violate due process if vague. See Boswell, Inc. d/b/a Broadacres v. Harkins, 230 Kan. 738, 740-41 (1982).

While we believe that K.A.R. 109-2-9 is violative of due process and therefor invalid for failure to set forth definite standards, we also believe the regulation invalid for other reasons.

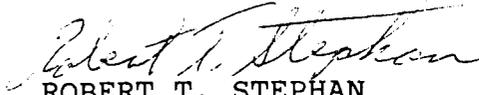
K.S.A. 1991 Supp. 65-6110 directs the board to make rules for classification and licensure of ambulance services. K.S.A. 1991 Supp. 77-415(4) defines "rule" as "a standard, statement of policy or general order . . . issued or adopted by a state agency to implement or interpret legislation enforced or administered or to govern the organization or procedure of such state agency." In a previous opinion we explained that issuance of a formal rule is required instead of an informal policy statement "if the policy statement is intended to create or affect rights and obligations of persons subject to the agency's control." See Attorney General Opinion No. 89-134.

If the board has established any policies for waiver of requirements, such policies affect the rights and obligations of persons subject to board regulation and are therefore "rules." As stated in opinion no. 89-134, under K.S.A. 1991 Supp. 77-415, rules must be formally adopted pursuant to the requirements contained in K.S.A. 77-415 et seq.

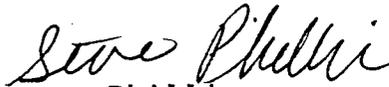
In conclusion we believe that K.A.R. 109-2-9 is invalid and void. The regulation fails to set forth adequate standards and guidelines and violates a licensee's due process rights.

The regulation also circumvents the requirements for formal publication of rules, K.S.A. 77-415 et seq.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steve Phillips
Assistant Attorney General

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