



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

October 12, 1981

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81-236

Mr. Floyd L. Grimes, Chairman
State Board of Education
120 East Tenth Street
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--Education--
State Board of Education

Synopsis: The State Board of Education lawfully may adopt rules and regulations governing the certification of teaching, administrative and other supportive personnel in unified school districts, relying upon its constitutional authority and disregarding any statutory authority or lack thereof. The legislature may not prescribe, amend, modify, or otherwise alter the content of such rules and regulations.

Although the procedures prescribed in K.S.A. 77-415 et seq. do not apply to regulations issued by the State Board of Education pursuant to the authority possessed by the State Board under Article 6, Section 2(a) of the Kansas Constitution, the State Board would be well advised to adopt similar procedures in order to provide adequate notice and opportunity for hearing. Cited herein: K.S.A. 1980 Supp. 77-415 (as amended by L. 1981, ch. 365, §1), K.S.A. 1980 Supp. 77-421 (as amended by L. 1981, ch. 324, §33), Kan. Const., Art. 2, §1, Art. 6, §§1, 2.

*

*

*

Mr. Floyd L. Grimes

Page Two

Dear Mr. Grimes:

On behalf of the State Board of Education, you inquire: (1) whether the State Board of Education lawfully can adopt rules and regulations governing the certification of teaching, administrative and other supportive personnel in unified school districts, relying upon its constitutional authority and disregarding any statutory authority; and (2) whether the State Board of Education, operating in strict compliance with the constitutional authority granted it, may adopt rules and regulations relating to the certification of teachers, administrators and supportive staff, without complying with the statutory laws relating to the promulgation of rules and regulations.

A consideration of Article 2, Section 1 and Article 6, Sections 1 and 2 of the Constitution of the State of Kansas, together with decisions of the Kansas Supreme Court regarding those sections of the constitution, is necessary to answer your inquiries.

By Article 2, Section 1 of the Kansas Constitution, the "general legislative power" of this state is vested in the House of Representatives and the Senate. See, e.g., Hines et al. v. City of Leavenworth et al., 3 Kan. *186 (1865). The Kansas Supreme Court has referred to this section of our constitution as "the general grant of legislative power to the legislature." See, e.g., Leek v. Theis, 217 Kan. 784, 813 (1975). In Theis, supra, the Court held: "All governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions." Id. at Syl. ¶7. Thus, except for such sovereign power as is granted to other departments of the government or as is expressly withheld from the legislature by constitutional restrictions, the legislature possesses all governmental sovereign power.

In addition to the general grant of legislative power by Article 2, Section 1, Article 6, Section 1 of the Kansas Constitution charges the legislature with the duty to "provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." Thus, the state constitution not only grants general legislative power to the legislature, but also requires the legislature to exercise that power to provide for education by establishing and maintaining public schools and related activities.

Also, Article 6, Section 2(a) of the Kansas Constitution states:

"The legislature shall provide for a state board of education which shall have general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents. The state board of education shall perform such other duties as may be provided by law."
(Emphasis added.)

By requiring the establishment of a state board of education, this constitutional provision imposes another positive duty upon the legislature in regard to the matter of education. However, the balance of this section has been viewed as a limitation on legislative authority. In State, ex rel., v. Board of Education, 212 Kan. 482 (1973), commonly referred to as "the Peabody case," the Kansas Supreme Court held:

"That part of article 6, §2(a) of the Kansas Constitution granting to the state board of education authority to exercise general supervision of the public schools, educational institutions and educational interests of the state, except educational functions delegated by law to the state board of regents, is self-executing in effect." Id. at Syl. ¶6.

The Court also stated: "A self-executing provision of a constitution is a provision requiring no supplementary legislation to make it effective and leaving nothing to be done by the legislature to put it in operation." Id. at Syl. ¶3.

Moreover, the Court held:

"Where a constitutional provision is self-executing the legislature may enact legislation to facilitate or assist in its operation, but whatever legislation is adopted must be in harmony with and not in derogation of the provisions of the constitution." Id. at Syl. ¶7.

Thus, based upon the Peabody case, we must conclude it is settled that, while Article 2, Section 1 of our Constitution grants general legislative power to the Legislature and Article 6, Sections 1 and 2 require the exercise of legislative power to establish public

Mr. Floyd L. Grimes

Page Four

schools, educational institutions, related activities and the State Board of Education, the portion of Article 6, Section 2(a), emphasized above, is self-executing. Consequently, we also must conclude that this portion of Article 6, Section 2(a) leaves nothing to be done by the Legislature to put it in operation, *i.e.*, it requires no enabling legislation. Finally, we must conclude that, while the Legislature may enact legislation to facilitate or assist in the operation of these self-executing provisions, the Legislature is powerless to adopt legislation which is not in harmony with said provisions. In short, pursuant to the above-emphasized provisions of Article 6, Section 2(a) of the Kansas Constitution, it is the State Board of Education, and not the Legislature, that possesses "general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents." (Emphasis added.) Kan. Const., Art. 6, §2(a).

However, NEA-Fort Scott v. U.S.D. No. 234, 225 Kan. 607 (1979), makes it absolutely clear the power of the State Board of Education as to "general supervision" is not a carte blanche grant of authority. Instead, "Article 6, section 2 limits the power of the State Board of Education to 'general supervision' of public schools." Id. at 612. Thus, it is only within the limited sphere of "general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents," that the State Board of Education's power is inviolate by legislative interference.

Having thus delineated the respective constitutional powers of the State Board of Education and the Legislature, all that remains to answer your inquiries is to determine whether the subject of each inquiry is in the exclusive "general supervision" domain of the State Board. If so, the State Board is free to regulate the subject as it sees fit, without interference by the Legislature. State, ex rel. v. Board of Education, supra.

You first inquire whether the State Board of Education lawfully can adopt rules and regulations governing the certification of teaching, administrative and other supportive personnel in unified school districts, relying upon its constitutional authority and disregarding any statutory authority.

In NEA-Fort Scott v. U.S.D. No. 234, supra, the Court was called upon to determine whether the 1977 amendments to the Teachers' Collective Negotiations Act, which gave the Secretary of Human Resources a prominent position in the negotiation and mediation process between teachers and school boards, conflicted with the

Mr. Floyd L. Grimes
Page Five

State Board of Education's "general supervision" of the educational interests of the state. In answering this question in the negative, the Court said:

"The authority granted the secretary in no way conflicts with the basic mission of the State Board of Education. The board's [basic] mission is to equalize and promote the quality of education for the students of this state by such things as statewide accreditation and certification of teachers and schools. See K.S.A. 1978 Supp. 72-7513. The functions of the Secretary of Human Resources under the act are limited and confined to professional negotiations, an area not considered by this court to be within the basic mission of the public schools of this state." (Emphasis added.)
225 Kan. at 610-611.

Based upon the above-quoted statements of the Court, we conclude the subject of certification of teachers, administrators and other supportive personnel in public schools is an area within the basic mission of the State Board of Education. Consequently, it is a matter subject to the general supervisory powers of the State Board of Education, under Article 6, Section 2(a) of the Kansas Constitution. Therefore, we are of the opinion the State Board of Education lawfully may govern this matter pursuant to the State Board's constitutional authority, notwithstanding any statutory authority or lack thereof.

You also inquire whether the State Board of Education, operating in strict compliance with the constitutional authority granted it, may adopt rules and regulations relating to the certification of teachers, administrators and supportive personnel, without complying with the statutory laws relating to the promulgation of rules and regulations. By this inquiry, we assume you are asking us to state the procedures to be followed by the State Board of Education in adopting measures governing the certification of teachers and other school personnel.

Accordingly, we note that Article 6, Section 2(a) of the state constitution does not prescribe, nor relate to, procedures to be followed in the exercise of the general supervisory power granted therein to the State Board. Moreover, those constitutional provisions neither expressly nor impliedly prohibit the Legislature from prescribing the procedure to be followed by the State Board of Education in adopting rules and regulations relating to any matter within the exclusive jurisdiction of the State Board.

Mr. Floyd L. Grimes
Page Six

We are of the opinion the procedure to be followed by any state agency, in imposing conditions, limitations, requirements, or other restrictions on the citizens of this state, are a matter of general public concern. Such procedures have nothing to do with the basic mission of the State Board of Education. Consequently, we believe such procedures are a matter rightly subject to the Legislature's sovereign power under Article 2, Section 1 of the Kansas Constitution. Thus, while we do not believe the Legislature may prescribe, alter, amend or modify the content of rules and regulations adopted by the State Board of Education under the authority of Article 6, Section 2(a) [State, ex rel., v. Board of Education, supra], we do believe the Legislature may prescribe the procedures to be followed by all state agencies, including the State Board of Education, in adopting rules and regulations. See, e.g., NEA-Fort Scott v. U.S.D. No. 234, supra.

In K.S.A. 77-415 et seq., the Legislature has prescribed a detailed procedure to be followed in adopting "rules and regulations," as that term is defined in K.S.A. 1980 Supp. 77-415(4), as amended by L. 1981, ch. 365, §1. In that statute, "rule and regulation" generally is defined thusly;

"'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."
(Emphasis added.)

In Attorney General Opinion No. 75-35, it was said in regard to the above-quoted provisions:

"Thus, rules and regulations subject to the provisions of K.S.A. 77-415 et seq. are those adopted either 1) to implement or interpret . . . legislation enforced or administered by the agency, or 2) to govern the organization or procedure of the agency. A regulation which is adopted to implement or interpret a self-executing constitutional provision, and not to implement or interpret statutory provisions, is not one which falls within the scope of K.S.A. 77-415 et seq." Id. at 5.

We agree with that conclusion, and it is our opinion the State Board of Education, when proceeding under the constitutional authority granted it by Article 6, Section 2(a), may establish requirements which must be met, and procedures which must be followed, by persons desiring to be certificated by the State Board of Education as a teacher, administrator or other school professional, without complying with the requirements of K.S.A. 77-415 et seq. However, we hasten to reiterate our opinion that the Legislature, without infringing upon the authority of the State Board of Education under the provisions of Article 6, Section 2(a), can specify the procedure to be followed by the State Board of Education in issuing requirements concerning certification and other matters within the jurisdiction of the State Board. Due to this fact, we recommend the State Board of Education follow the notice and hearing requirements of K.S.A. 1980 Supp. 77-421, as amended by L. 1981, ch. 324, §33. In relevant part, that statute provides:

"(a) . . . [T]he adopting state agency shall give at least 15 days' notice of its intended action The notice . . . shall contain a statement of the terms, or the substance of the proposed rules and regulations or a description of the subjects and issues involved. Such notice shall state the time and place of the public hearing to be held thereon and the manner in which interested parties may present their views thereon. . . .

"(b) On the date of the hearing, all interested parties shall be given reasonable opportunity to present their views or arguments on adoption of the rule and regulation, either orally or in writing. When requested to do so, the state agency shall prepare a concise statement of the principal reasons for adopting the rule and regulation or amendment thereto. . . .

. . . .

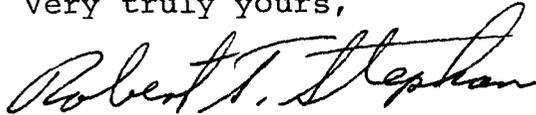
"(d) No rule and regulation shall be adopted except at a meeting which is open to the public and notwithstanding any other provision of law to the contrary, no rule and regulation shall be adopted unless it shall receive approval by roll call vote of a majority of the total membership of the adopting board, commission, authority or other similar body."

Mr. Floyd L. Grimes
Page Eight

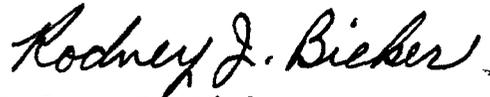
By following the procedures of this statute, the State Board would be acting in accordance with "rule and regulation" adoption procedures currently mandated by the legislature for other state agencies, which procedures could be extended to apply to the State Board of Education.

In summary, it is our opinion the State Board of Education lawfully may adopt rules and regulations governing the certification of teaching, administrative and other supportive personnel in unified school districts, relying upon its constitutional authority and disregarding any statutory authority or lack thereof. The legislature may not prescribe, amend, modify or otherwise alter the content of such rules and regulations. It further is our opinion that, although the procedures prescribed in K.S.A. 77-415 et seq. do not apply to regulations issued by the State Board of Education pursuant to the constitutional authority possessed by the State Board under Article 6, Section 2(a) of the Kansas Constitution, the State Board would be well advised to adopt similar procedures in order to provide adequate notice and opportunity for hearing.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:jm