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ATTORNEY GENERAL OPINION NO. 81- 255

Charles Rooney, Jr.
General Counsel
State Banking Department
818 Kansas Avenue, Suite 600
Topeka, Kansas 66612

Re: Banks and Banking -- Code; Organization -- Issuance
of Certificate of Authority

Synopsis: A state-chartered bank's certificate of authority may not be transferred or assigned by the state banking board or bank commissioner to a successor banking corporation, even though such corporation will be a subsidiary of the existing bank and will succeed in every way to the banking business conducted by the existing bank. The state banking code contains no express authorization for such transfer or assignment of a certificate of authority, and no such power may be implied, since it is not necessary to effectuate the specific statutory powers vested in the banking board or bank commissioner. Cited herein: K.S.A. 1980 Supp. 9-801, 9-804, K.S.A. 9-808, K.S.A. 1980 Supp. 9-1801, 9-1802.

* * *

Dear Mr. Rooney:

You have inquired whether the state bank commissioner or the state banking board has the authority to transfer a bank's certificate of authority to a newly-organized successor bank. You have been informed of the plans of a Kansas bank (hereinafter referred to as "State Bank") to form a wholly-owned subsidiary corporation (hereinafter referred to as "Subsidiary Bank"), to which State Bank will transfer all of its assets and liabilities in exchange for substantially all of Subsidiary Bank's capital stock. In this way, the opening balance

Charles Rooney, Jr.

Page Two

sheet of Subsidiary Bank will be identical to the closing balance sheet of State Bank. Then, when all other necessary prerequisites have been met, State Bank will amend its articles of incorporation, changing its name and corporate powers so that it will no longer be able to engage in the business of banking. At the same time, Subsidiary Bank will amend its articles of incorporation to permit it to engage in the business of banking and changing its name to the name previously used by State Bank. By this procedure, it is proposed that the same banking business will continue to be conducted at the same location, under the same name, with the same assets and liabilities, but with a new organizational structure.

Since Subsidiary Bank will be operating under new articles of incorporation, counsel for State Bank concedes that these articles must be submitted to and approved by the state banking board, as required by K.S.A. 1980 Supp. 9-801. However, in light of the fact that the only real change effected in the banking business now being conducted by State Bank will be in the ownership structure, counsel for State Bank suggests that it is unnecessary for Subsidiary Bank to obtain a new certificate of authority and that, once the organizational changes have been approved, the banking board should transfer or assign State Bank's certificate of authority to Subsidiary Bank. Counsel for State Bank further suggests that such transfer or assignment can be made without the necessity of complying with the statutory and regulatory procedures applicable to the issuance of a new certificate of authority.

K.S.A. 1980 Supp. 9-1801 and 9-1802 prescribe the procedures and standards for the issuance of certificates of authority to conduct the business of banking. K.S.A. 1980 Supp. 9-1801 states in subsection (a):

"No bank hereafter shall be organized or incorporated under the laws of this state, nor shall any such institution transact business in this state, until the application for its incorporation and application for authority to do business first shall have been submitted to and approved by the board; and in so doing the board shall approve or disapprove the organization and establishment of any such institution in the city or town in which the same is sought to be located. The form for making any such application shall be prescribed by the board and any application made to the board shall contain such information

Charles Rooney, Jr.

Page Three

as it shall require. The board shall not approve any such application until it first investigates and examines into such application and the applicants."

Subsection (b) of this statute authorizes the bank commissioner to issue a certificate of authority without prior approval of the banking board where an emergency exists, but it is not contended that the situation here warrants the application of these provisions.

K.S.A. 1980 Supp. 9-1802, relating to the investigation and approval or disapproval of applications for certificates of authority, states in pertinent part:

"Upon the filing of any such application with the state banking board, such board shall make, or cause to be made, a careful examination and investigation concerning (1) the financial standing, general business experience and character of the organizers and incorporators; (2) the character, qualifications and experience of the officers of the proposed bank; (3) the public need for the proposed bank in the community wherein it is proposed to locate the same and whether existing banks are meeting such need; (4) the prospects for success of the proposed bank. If the board shall determine any of such matters unfavorably to the applicants, the application shall be disapproved, but if not, then the application shall be approved. Said board shall not make membership in any federal government agency a condition precedent to the granting of any application for incorporation and authority to do business."

The actual issuance of the certificate of authority is prescribed by K.S.A. 1980 Supp. 9-804, which states:

"When the capital of any bank shall have been paid in, the president or cashier thereof shall transmit to the commissioner a verified statement showing the names and addresses of all stockholders, the amount of stock each subscribed, and the amount paid in by each; and the commissioner then and there shall examine such bank and shall charge the statutory examination fee therefor, and shall examine especially as to the amount of money paid in for

capital, surplus, and undivided profits, by whom paid, and the amount of capital stock owned in good faith by each stockholder, and generally whether such bank has complied with the provisions of law. If the commissioner shall find from such examination that the bank has been organized as provided by law and has complied with the provisions of law, and has secured the preliminary approval of the commissioner as authorized by subsection (b) of K.S.A. 1977 Supp. 9-1801, or the approval of the board, the commissioner shall issue a certificate showing that such bank has been organized and its capital paid in as required by law, and that it is authorized to transact a general banking business as provided by law."

From a reading of the foregoing statutes, several observations may be made. First, with the one exception noted that is not pertinent here, the bank commissioner has no authority to issue a certificate of authority unless the issuance thereof has been approved by the banking board. Second, these statutes make no provision for a transfer or assignment of a certificate of authority. Counsel for State Bank recognizes the absence of such statutory authorization, but suggests that there is a corresponding absence of any prohibition against the transfer or assignment of a certificate of authority. Thus, resolution of your inquiry requires a determination of the power of the banking board or bank commissioner to act on a matter which has not been addressed specifically by the legislature.

The banking board is a governmental agency and, as such, can exercise only such powers as are expressly conferred upon it by law or which are necessary to effectuate its express powers. As stated in Murray v. State Board of Regents, 194 Kan. 686, 689, 690 (1965):

"Governmental agencies are creatures of the legislature, and can exercise only such powers as are expressly conferred by law and those necessary to make effective the powers expressly conferred. (State, ex rel., v. City of Kansas City, 181 Kan. 870, 317 P.2d 806; State, ex rel., v. City of Overland Park, 192 Kan. 654, 391 P.2d 128)."

Therefore, in order for the board to authorize the transfer or assignment of the certificate of authority, its authority

to do so must be based on a specific statute or be necessary to effectuate some specific power granted by statute.

As previously noted, an examination of the pertinent statutes has revealed no specific statute which gives the board the power to transfer or assign a certificate of authority, or to authorize the bank commissioner to do so. Therefore, unless such power is necessary for the board to carry out its specific statutorily authorized powers, it has no authority or power to transfer or assign a certificate of authority, or to authorize the bank commissioner to take such action.

It is our opinion that, even though such authority, if it existed, would be arguably incidental to the board's power to authorize the issuance of a certificate of authority, it is not necessary to the exercise of that power and, therefore, cannot be implied. Cases which have found certain powers to be necessary, and therefore incidental to the powers specifically authorized, have generally done so only where the purpose of the statute could not be fulfilled without implying such power. For example, in State, ex rel., v. Davis, 114 Kan. 270 (1923), the Court stated at 289:

"The words in the sections referred to, make no specific mention of payment of expenses in administering the fund, but expense must be incurred as a necessary incident to the disbursement of the funds. The purpose of the statute cannot be effectuated without the incident of expense, therefore, when in section 1, the statute creates the debt of one dollar per day and states the purpose of the state to pay that sum, and in section 2, authorizes bonds for the purpose set out in section 1, and in section 4, directs the compensation board to carry out the provisions of the act, it, by implication, authorizes the payment of expenses as a necessary means to effectuate the purpose. Every incident necessary to accomplish the purpose of section 1 inheres in the act itself."

Other cases also have limited the determination of implied powers to situations where, without them, the governmental agency would have no way to carry out its express statutory powers. See, e.g., Edwards County Commissioners v. Simmons, 159 Kan. 41 (1944); Womer v. Aldridge, 155 Kan. 446 (1942); The State, ex rel., v. Wooster, 111 Kan. 830 (1922); The State, ex rel., v. Younkin, 108 Kan. 634 (1921); Young v. Regents of State University, 87 Kan. 239 (1912); and Brown County v. Barnett, 14 Kan. 627 (1875). In Edwards County

Commissioners v. Simmons, supra, the authority of the county commissioners to contract for attorneys' services to intervene in a receivership action was challenged. There the Court stated:

"The statute provides that a board of county commissioners may direct that suit be brought against the delinquent utility corporation, that a receiver may be appointed, that such proceedings may be taken as are necessary to collect the delinquent taxes, and that the board may intervene in any suit brought by other parties (79-2101a). It would be a wholly unreasonable construction to hold that the board might do all of that but might not employ attorneys for the purpose. The statute plainly contemplates that the board may employ such reasonable means as are necessary to effect the statutory purpose. How else would the board have intervened in the receivership action in Reno county except by the employment of attorneys?" Id. at 52, 53.

Therefore, it is clear that the only time powers will be implied is when they are necessary to actually accomplish the purpose behind a specific statute. In the situation at hand, the only applicable statutes are K.S.A. 1980 Supp. 9-804, 9-1801 and 9-1802. While these statutes control the issuance of certificates of authority, it cannot be said that their purpose would be frustrated or in any way inhibited by the board's lack of authority to transfer or assign a certificate of authority. To the contrary, to imply such power would, in our judgment, avoid rather than implement the statutory scheme prescribed by the legislature.

Similarly, we find no basis for finding that the bank commissioner has any implied authority to transfer or assign State Bank's certificate of authority to Subsidiary Bank. Other than where an "emergency" exists, the applicable statutes clearly limit the commissioner's authority to the issuance of certificates of authority which have received the banking board's prior approval, and we find nothing in these statutes which would create a necessity for implying powers of the commissioner beyond those specifically stated. In no way would the commissioner's powers or duties be frustrated or inhibited by a failure to imply such authority.

We understand that counsel for State Bank finds the proposal under consideration to be analogous to a conversion of a national bank to a state bank. The latter situation is governed by K.S.A. 9-808, which authorizes the bank commissioner

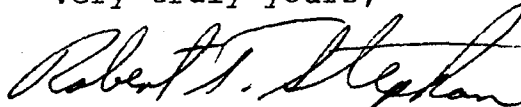
Charles Rooney, Jr.
Page Seven

to issue a certificate of authority to the state bank resulting from the conversion, if the banking board approves the conversion, and it is unnecessary in that instance to follow the normal procedures for obtaining the certificate of authority. Conceding the analogy, for the sake of discussion, the fact remains that the legislature has chosen to address specifically the conversion of a national bank to a state bank, including the issuance of a certificate of authority for the resultant bank, while it has not made special provision for the situation presented for our consideration here.

Counsel for State Bank advances other arguments in support of his contention that it is unnecessary for Subsidiary Bank to follow the statutory procedures prescribed for obtaining a certificate of authority and that State Bank's certificate of authority may be transferred or assigned to Subsidiary Bank. However, since all of these arguments ultimately rest on the implicit administrative authority to effect such transfer or assignment, we find it unnecessary to address those arguments.

In conclusion, therefore, it is our opinion that a state-chartered bank's certificate of authority may not be transferred or assigned by the state banking board or bank commissioner to a successor banking corporation, even though such corporation will be a subsidiary of the existing bank and will succeed in every way to the banking business conducted by the existing bank. The state banking code contains no express authorization for such transfer or assignment of a certificate of authority, and no such power may be implied, since it is not necessary to effectuate the specific statutory powers vested in the banking board or bank commissioner.

Very truly yours,



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