



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 39

Roy P. Britton  
State Banking Commissioner  
State Banking Department  
818 Kansas Avenue  
Topeka, Kansas 66612

Re: Banks and Banking -- Code; Powers -- Oath of  
Director and President

Synopsis: As a necessary incident to the bank commissioner's due and efficient exercise of his general supervisory powers, designed to insure compliance with the banking code, the commissioner has the authority to inquire into the ownership of a bank's stock by its directors, to determine whether such stock is owned in good faith, as required by the banking code. If the commissioner's factual determination indicates the lack of such good faith ownership, it may provide the basis for a criminal prosecution for perjury by the appropriate county attorney or for the removal of offending directors by the banking board. Cited herein: K.S.A. 1981 Supp. 9-1117, 9-1118, K.S.A. 9-1711, K.S.A. 1981 Supp. 9-1805, K.S.A. 9-2004, 21-3805.

\* \* \*

Dear Mr. Britton:

On your behalf, Carl R. Sandstrom, Assistant Bank Commissioner, has requested our opinion on whether the banking department has the responsibility to insure compliance with the requirements of K.S.A. 1981 Supp. 9-1117 and 9-1118. The former statute reads as follows:

"No person shall be a member of the board of directors or a president within the meaning of K.S.A. 1979 Supp. 9-1114 and K.S.A. 9-1115,

of any bank unless such person is the owner of record of common stock, having a par value of not less than five hundred dollars (\$500), in such bank. Such stock may be transferred to and held in a trust if such trust is revocable by the member or president owning such stock, but the stock shall not be pledged, hypothecated or assigned in any other way."

In addition, K.S.A. 1981 Supp. 9-1118 requires that:

"Each director shall take and subscribe an oath that he or she will administer the affairs of such bank diligently and honestly and that he or she will not knowingly or willfully permit any of the laws relating to banks to be violated, and each director and the president of a bank shall swear that he or she is the owner in good faith of shares of common stock having a par value of at least five hundred dollars (\$500) of such bank standing in his or her name and that the same has not been pledged or assigned, except as authorized by K.S.A. 1979 Supp. 9-1117, and amendments thereto. A copy of such oath shall be filed with the commissioner." (Emphasis added.)

Mr. Sandstrom indicates that certain bank holding companies are transferring stock in their subsidiary banks to directors of these banks at a price of one dollar per share, in order that the directors can comply with the foregoing statutory requirements. However, the stock so transferred has a par value ranging from \$25 to \$100 per share and a book value of from \$350 to \$1,000 per share. In addition, it is our understanding that such stock is annotated or lettered, so as to restrict its subsequent sale, by requiring that it must be offered to or sold back only to the holding company, and that dividends on such stock are waived by the stockholder/director for the benefit of the holding company.

Under these factual circumstances, Mr. Sandstrom suggests that it "appears to be a 'sham' when a director makes a certification that he owns such stock in good faith." Therefore, the question presented for our consideration is whether the banking department has the responsibility to "ferret out" such transactions or whether the bank director's oath puts the onus on the director.

In our judgment, the statutes quoted above make it clear that, not only must bank directors "own the stock of record,"

but they must take an oath, to be filed with the bank commissioner, that they are "owners in good faith" of such stock. Considered in pari materia these statutes evidence a legislative intent that directors have a bona fide ownership interest in the banks they serve.

While there is no specific statutory duty requiring the bank commissioner or banking board to "ferret out" potential violations of K.S.A. 1981 Supp. 9-1117 and 9-1118, the purpose of the bank commissioner's general supervision of banks is to assure compliance with the banking code. Accordingly, we believe the commissioner has implicit authority to ensure compliance with the banking code's requirements as to the good faith ownership of a bank's stock by its directors. The fact that the legislature has directed that a copy of a director's oath be filed with the commissioner lends further credence to our conclusion.

In addition, it is pertinent to note two other sections of the banking code, K.S.A. 1981 Supp. 9-1805 and K.S.A. 9-2004. The latter section provides as follows:

"Every officer or employee of a bank required by this act to take an oath . . . [or] affirmation, who shall willfully swear or affirm falsely, shall be deemed guilty of perjury, and upon conviction thereof shall be punished as provided by the law of this state in case of perjury."

K.S.A. 1981 Supp. 9-1805 states, in pertinent part:

"If it shall come to the attention of the [banking] board that any officer or director of any bank or trust company has been dishonest, reckless or incompetent in performing his or her duties as such officer or director or willfully or continuously fails to observe any order of the commissioner or board legally made, the [banking] board, upon proof thereof, may remove such officer or director . . . ."

Furthermore, K.S.A. 9-1711 requires the bank commissioner to notify the county attorney of the county in which a bank is located, of any violations of the banking code which constitute a felony or misdemeanor.

Therefore, if bank directors are not good faith owners of the required amount of stock, yet willfully swear to be owners in good faith of such stock, by virtue of K.S.A. 9-2004 they would be guilty of perjury, which is made a felony by

K.S.A. 21-3805, and K.S.A. 9-1711 requires the commissioner to inform the appropriate county attorney of such violations. Furthermore, under such circumstances, the banking board could remove a director from office in accordance with the procedures set forth at K.S.A. 1981 Supp. 9-1805.

We have little difficulty, in light of the banking code provisions discussed above, in concluding that the bank commissioner has implicit authority to determine compliance with the code's requirements as to the good faith ownership of a bank's stock by its directors. Our conclusion as to the commissioner's responsibility is consistent with the general rule set forth at 67 C.J.S. Officers, §197, p. 649, that:

"Generally, the duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes."

In accord with this general principle is the following statement of the Kansas Supreme Court in The State, ex rel., v. Younkin, 108 Kan. 634 (1921):

"While the powers of a public officer or board are those and those only which the law confers, yet when the law does confer a power or prescribe a duty to be performed or exercised by a public officer, the powers granted and duties prescribed carry with them by necessary implication such incidents of authority as are necessary for the effectual exercise of the powers conferred and duties imposed. In Throop on Public Officers, §542, the correct rule is stated:

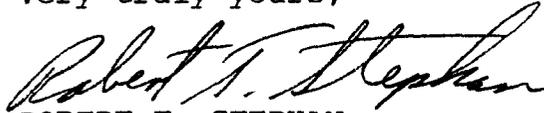
"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers." (See, also, Comm'rs of Brown Co. v. Barnett, 14 Kan. 627.)"  
Id. at 638.

Accordingly, we believe the bank commissioner may inquire into the good faith ownership of a bank's stock by its directors

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as an incident of his general supervisory powers over banks to insure compliance with the banking code. However, while the code requires a director to be a good faith owner of such stock, determination of good faith ownership is in part a question of fact. Thus, we believe it is initially the bank commissioner's responsibility to weigh and consider evidence as to a bank director's lack of good faith in becoming a record owner of bank stock. Such factual determination will provide the basis for seeking criminal prosecution by the appropriate county attorney under K.S.A. 9-2004 and for action of the banking board under K.S.A. 1981 Supp. 9-1805.

Very truly yours,



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