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ATTORNEY GENERAL OPINION NO. 84-8

Marvin A. Harder, Secretary
Department of Administration
Room 263-E, State Capitol
Topeka, Kansas 66612

Re: Kansas Constitution--Legislative--Laws Enacted Only by Bill; All Bills Passed Presented to the Governor

Statutes--Rules and Regulations--Modification, Rejection or Revocation of Same By Concurrent Resolution

Synopsis: The provisions of subsections (c) and (d) of K.S.A. 1983 Supp. 77-426, which allow the legislature to reject, modify or revoke an administrative rule and regulation by means of the adoption of a concurrent resolution, are unconstitutional. Such action by the legislature is an unlawful usurpation of the governor's constitutional power to administer and enforce the laws. Such action violates the constitutional doctrine of separation of powers.

In addition, the legislative oversight mechanism prescribed in subsections (c) and (d) of K.S.A. 1983 Supp. 77-426 is unconstitutional for the reason that it attempts to authorize the legislature to make law, without following the mandatory procedures of the Kansas Constitution. The Kansas constitution requires that any law be enacted only by bill [not by resolution or concurrent resolution]; that every bill contain the constitutionally-specified enacting clause; and that all bills passed by the legislature be presented to the governor for approval

or disapproval. The procedure set forth in subsections (c) and (d) of K.S.A. 1983 Supp. 77-426 does not meet these constitutional requirements and is unconstitutional. Cited herein: K.S.A. 1983 Supp. 77-426; Kan. Const., Art. 2, §§14, 20.

* * *

Dear Secretary Harder:

Your predecessor, Secretary Hurley, recently sought our opinion concerning the constitutionality of subsections (c) and (d) of K.S.A. 1983 Supp. 77-426. More specifically, he noted that these subsections purport to allow the legislature to modify, reject or revoke administrative rules and regulations by means of the adoption of a concurrent resolution, without presentment of any such resolution to the Governor. The question posed is whether this procedure is constitutionally permissible.

This inquiry, we understand, was prompted by a number of recent state and federal court decisions in which it has been concluded that provisions such as those in subsections (c) and (d) of K.S.A. 1983 Supp. 77-426 violate the doctrine of separation of powers and constitutional procedures for the enactment of law, and, thus, are unconstitutional. See Consumer Union of U.S., Inc. v. F.T.C., 691 F.2d 575 (D.C. Cir. 1982), aff'd ____ U.S. ____, 103 S.Ct. 3556, 77 L.Ed.2d 1403 (1983); Consumer Energy, Etc. v. F.E.R.C., 673 F.2d 425 (D.C. Cir. 1982), aff'd ____ U.S. ____, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983); General Assembly of New Jersey v. Bryne, 448 A.2d 438 (N.J. 1982); and State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981). Also, the Kansas Supreme Court, in the recent case of State v. Kearns, 229 Kan. 207 (1981), made it clear that the legislature may enact a law only by the enactment of a bill. The Court specifically overruled its prior decision in State ex rel. v. Knapp, 102 Kan. 701 (1918), in which the Court held a joint resolution, adopted by the legislature and signed by the governor, substantially complied with the constitution and, thus, was a constitutionally-valid law. Thus, these recent decisions prompt this inquiry.

In State ex rel. v. Bennett, 219 Kan. 285 (1976), the Kansas Supreme Court was called upon to determine whether powers conferred upon the State Finance Council by state law constituted a violation of the constitutional doctrine of separation of powers. In resolving the issue, the Court said:

"[T]he Constitution of Kansas contains no express provision requiring the separation

> of powers, but all decisions of this court have taken for granted the constitutional doctrine of separation of powers between the three departments of the state government--legislative, executive and judicial. The separation of powers doctrine was designed to avoid a dangerous concentration of power and to allow the respective powers to be assigned to the department most fitted to exercise them." Id. at 287.

The Court, in Bennett, continued that the problem in any case involving an alleged violation of the separation of powers doctrine is:

> ". . . to determine whether or not a usurpation of powers has taken place. That term has not heretofore been clearly defined. It has been suggested that to have a usurpation one department of the government must be subject directly or indirectly to the coercive influence of the other. (State, ex rel. v. Fadely, supra, at page 696; Leek v. Theis, supra, at page 807.) It seems to us that to have a usurpation of powers there must be a significant interference by one department with the operations of another department. In determining whether or not an unconstitutional usurpation of powers exists, there are a number of factors properly to be considered. First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two? A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be attained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where

> such evidence is available. We do not wish to imply that these are the only factors which should be considered but it seems to us that they have special significance in determining whether a usurpation of powers has been demonstrated." 219 Kan. at 290-291.

After stating the foregoing principles, the Supreme Court summarized the various powers conferred upon the State Finance Council. Among other things, the powers included the authority to approve, modify and approve, or reject proposed rules and regulations submitted by the secretary of administration. The Court noted:

> "The state finance council exercises control and authority over the state department of administration as a whole. The council must approve any and all rules and regulations with respect to the manner of performance of any power or duty of the department and the execution of any business of the department and its relations to and business with other state agencies. (K.S.A. 1975 Supp. 75-3706.) The finance council may hear and determine appeals by any state agency from final decisions or final actions of the secretary of administration or the director of computer services. (K.S.A. 1975 Supp. 75-3711[a][1].) All regulations promulgated by the director of the division of accounts and reports pertaining to old-age and survivors insurance for public employees are made subject to approval of the state finance council (75-3749). The finance council must approve all rules and regulations adopted by the director of architectural services pertaining to uniform standards for mobile homes and recreational vehicles. (K.S.A. 1975 Supp. 75-1220[e].)" (Emphasis by the Court.) 219 Kan. at 294.

The Court then noted the above-indicated powers of the Council were challenged by the attorney general as a usurpation of executive powers by the legislature. The Court then stated:

> "It is obviously a difficult task to classify these powers as executive or legislative and to determine which powers may constitutionally be exercised by the state finance council and

which may not. We have concluded that the statutory power and duties granted to the state finance council to supervise the operations of the department of administration and its various divisions are purely an exercise of executive power. In particular we hold the following duties or powers to be essentially executive or administrative in nature:

. . . .

"(2) Certain powers under the civil service act, such as the adoption of rules and regulations for carrying out the act . . . ;

. . . .

"(7) Approval of rules and regulations governing operations of the department of administration and each of its divisions;

. . . .

"(9) Approval of rules and regulations to carry out the uniform standard code for mobile homes and recreational vehicles;

. . . .

"All of these powers concern the day-to-day operations of the department of administration and its various divisions. The vesting of such powers in the state finance council in our judgment clearly grants to a legislatively oriented body control over the operation of an executive agency and constitutes a usurpation of executive power by the legislative department. All of the powers and functions set forth above are controlled by a majority vote of the nine-member finance council, only one of whom, the governor, is a member of the executive department. It is true that only the governor, as chairman, has the authority to call meetings of the finance council and that the governor has the power to set the agenda for any meeting. The trouble is that the governor has no real choice except to call a meeting of the state finance council since the department of administration cannot really

> function unless its rules and regulations are approved and made effective and unless intra-departmental disputes can be finally determined. The legislature has by these statutes placed the state finance council, a body controlled by legislators, at the apex of the administrative structure of the state department of administration in a position where it exerts, both directly and indirectly, a coercive influence on that executive department. We, therefore, hold that all of the executive powers specifically set forth above may not constitutionally be performed by the state finance council with its present membership." (Emphasis added.) 219 Kan. at 297-298.

Bennett is the only case of which we are aware in which our Supreme Court has specifically held that the adoption of rules and regulations is "purely an exercise of executive power," and, as a consequence, struck legislative enactments which conferred these executive powers on a legislative body. State ex rel. v. Bennett, supra, at 297. However, this determination is not surprising when it is realized the Court has held repeatedly that the power to adopt rules and regulations is administrative in nature, not legislative. Moreover, the power to adopt rules and regulations is not the power to "legislate" in the true sense, and, thus, under the guise of a rule and regulation, legislation may not be enacted. See State ex rel. v. Columbia Pictures Corporation, 197 Kan. 448, 454 (1966). See also Wesley Medical Center v. Clark, 234 Kan. 13,17-19 (1983); Woods v. Midwest Conveyor Co., 231 Kan. 763, 771 (1982); Cray v. Kennedy, 230 Kan. 663, 675-677 (1982); Rhodes v. Harder, 211 Kan. 820, 830 (1973); and Willcott v. Murphy, 204 Kan. 640, 648 (1970). As careful as the Court has been to guard the legislative power to legislate from usurpation by the executive branch, it logically follows that the Court likewise would cautiously guard the executive power to execute and administer the laws from usurpation by the legislative branch. We must conclude that, if the separation of powers doctrine precludes the executive branch from "making the law," it follows that the doctrine also precludes the legislative branch from "executing the law."

In Leek v. Theis, 217 Kan. 784 (1975), the Court was confronted with an alleged usurpation of executive power by the legislature. In disposing of the allegation, the Court said: "There is no quarrel that our constitution creates three distinct and separate departments. In this respect, our state constitution is the same as our federal constitution." (Emphasis added.) Id. at 806.

Recently, the federal courts have determined that one- or two-house "legislative vetoes" of administrative rules and regulations

increases Congress' constitutional powers by allowing Congress, in effect, "to expand its role from one of oversight, with an eye to legislative revision, to one of shared administration." Consumer Energy, Etc. v. F.E.R.C., supra, 673 F.2d at 474. In regard to this, the courts have concluded: "This overall increase in congressional power contravenes the fundamental purpose of the separation of powers doctrine." Id. at 474.

The determinations of other state courts and the federal courts, and the determination of our own Supreme Court in State ex rel. v. Bennett, supra, convince us that the legislative oversight mechanism prescribed in subsections (c) and (d) of K.S.A. 1983 Supp. 77-426 contravenes the constitutional doctrine of separation of powers, and, thus, is unconstitutional. The legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce and administer the laws; and the judicial power is the power to interpret and apply the laws in actual controversies. See, e.g., Van Sickle v. Shanahan, 212 Kan. 426, 440 (1973). The oversight mechanism in these subsections of the law constitutes an unlawful intrusion by the legislature into the executive's power to enforce and administer the laws.

Subsections (c) and (d) of K.S.A. 1983 Supp. 77-426 are invalid for an additional reason. These subsections purport to allow the legislature to enact law without complying with the requirements prescribed in Article 2 of the Kansas Constitution. Specifically, Article 2, Section 20, provides: "The enacting clause of all bills shall be 'Be it enacted by the Legislature of the State of Kansas:'. No law shall be enacted except by bill." Also, Article 2, Section 14(a) of the constitution provides:

> "Within ten days after passage, every bill shall be signed by the presiding officers and presented to the governor. If the governor approves a bill, he shall sign it. If the governor does not approve a bill, the governor shall veto it by returning the bill, with a veto message of the objections, to the house of origin of the bill. Whenever a veto message is so received, the message shall be entered in the journal and in not more than thirty calendar days (excluding the day received), the house of origin shall reconsider the bill. If two-thirds of the members then elected (or appointed) and qualified shall vote to pass the bill, it shall be sent, with the veto message, to the other house, which shall in not more than thirty calendar days

> (excluding the day received) also reconsider the bill, and if approved by two-thirds of the members then elected (or appointed) and qualified, it shall become a law, notwithstanding the governor's veto.
>
> "If any bill shall not be returned within ten calendar days (excluding the day presented) after it shall have been presented to the governor, it shall become a law in like manner as if it had been signed by the governor."

In Harris v. Shanahan, 192 Kan. 183 (1963), the Supreme Court held:

> "Pursuant to Article 2, Section 14 of the Constitution of Kansas, the legislature and the governor exercise co-ordinate functions in enacting laws, and the governor is an essential part of the legislation. Until a bill has the final consideration of the three law-making powers, that is, the house, the senate, and the governor, it is not a law . . . ." Id. at Syl. ¶1. See also, State ex rel. v. Robb, 163 Kan. 502, 515-518 (1947).

Also, in the recent case of State v. Kearns, 229 Kan. 207 (1981), the Court held the requirement of Article 2, Section 20, that each bill have the constitutionally-specified enacting clause, prevented a bill from becoming law which contained the phrase: "Be it resolved by the Legislature of the State of Kansas," instead of the constitutionally-specified enacting clause. This case makes it clear that no law can be enacted except by bill, and that any bill must have the constitutionally-specified enacting clause.

Thus, if the legislature, in rejecting, modifying or revoking an administrative rule and regulation, in fact, is making a law, the action of the legislature must comply with the requirements of Article 2, §§14 and 20.

The question of whether the legislature, in effect, is making a law when it rejects an administrative rule and regulation was answered affirmatively in Consumer Energy, Etc. v. F.E.R.C., supra. The Court said: "[T]here is no question that the effect of a congressional veto is to alter the scope of the agency's discretion [as originally granted to the agency by federal statutes.]" 673 F.2d at 469. Thus, through its power to legislate, Congress, in effect, is amending the law pursuant to which the power to adopt rules and regulations was conferred upon the executive agency.

Moreover, in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska (1980), the Supreme Court of Alaska, relying on decisions from the states of Illinois, California, and New York, held that, whenever the legislature takes action that is to have "a binding effect on those outside the legislature," it is making a law, and "may do so only by following the enactment procedure set forth in the State Constitution." State v. A.L.I.V.E. Voluntary, supra, at Syl. ¶6 and page 773. At issue in that case was the validity of a concurrent resolution passed by the Alaska legislature which purported to reject an administrative rule and regulation. The court found the action of the legislature was an unconstitutional attempt to make law because the concurrent resolution did not comply with the constitutional requirement that laws be enacted by bill.

We are persuaded by the above-referenced decisions that our state legislature, when it rejects, modifies or revokes an administrative rule and regulation, is making law. However, the legislature may make a valid law only by following the enactment procedures set forth in Article 2 of the Kansas Constitution. In subsections (c) and (d) of K.S.A. 1983 Supp. 77-426, the legislature has attempted to dispense with these procedures. Such cannot be done, however, and these subsections of law are unconstitutional.

Thus, in summary, it is our opinion that the provisions of subsections (c) and (d) of K.S.A. 1983 Supp. 77-426, which allow the legislature to reject, modify or revoke an administrative rule and regulation by means of the adoption of a concurrent resolution, are unconstitutional. Such action by the legislature is an unlawful usurpation of the governor's constitutional power to administer and enforce the laws. Such action violates the constitutional doctrine of separation of powers.

In addition, the legislative oversight mechanism prescribed in subsections (c) and (d) of K.S.A. 1983 Supp. 77-426 is unconstitutional for the reason that it attempts to authorize the legislature to make law, without following the mandatory procedures of the Kansas Constitution. The Kansas constitution requires that any law be enacted only by bill [not by resolution or concurrent resolution]; that every bill contain the constitutionally-specified enacting clause; and that all bills passed by the legislature be presented to the governor for approval or disapproval. The procedure set-forth in subsections (c)

and (d) of K.S.A. 1983 Supp. 77-426 does not meet these constitutional requirements and is unconstitutional.

Very truly yours,

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