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ATTORNEY GENERAL OPINION NO. 84- 91

Lynn R. Muchmore
Director of the Budget
Department of Administration
Room 152-E, State Capitol
Topeka, Kansas 66612

Re: Kansas Constitution--Legislature--Appropriations

Kansas Constitution--Executive--Executive Power of
Governor

Synopsis: The legislature may refuse to appropriate moneys to provide funds for a particular lease of office space already entered into by a state agency and may direct that no appropriated moneys shall be used for such purpose. However, the legislature may not prescribe that an agency may not enter into any lease for office space without the prior approval of the State Finance Council or some other legislatively-dominated committee. Such a limitation on prospective action by a state agency violates the doctrine of separation of powers and is unconstitutional. Attorney General Opinion No. 81-83 is reaffirmed. Cited herein: K.S.A. 75-3708, 75-3711, K.S.A. 1983 Supp. 75-3711c, 75-3725a, L. 1984, ch. 23, §5, L. 1984, ch. 244, §§1, 2, 23, L. 1981, ch. 32, §69.

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Dear Mr. Muchmore:

You request the opinion of this office in regard to a matter involving the transfer of regulatory authority over emergency

medical services from the Department of Health and Environment to the Kansas Highway Patrol. Specifically, in 1984 the legislature abolished the office of emergency medical services established under the supervision of the Secretary of Health and Environment pursuant to K.S.A. 1983 Supp. 75-5631 [now repealed] and, in its place, established the Bureau of Emergency Medical Services, within and as a part of the Kansas Highway Patrol. See L. 1984, ch. 244, §§1, 2 and 23. In order to accomplish the transfer, the legislature made the following appropriation to the highway patrol:

"KANSAS HIGHWAY PATROL

"(a) There is appropriated for the above agency from the state general fund for the fiscal year specified, the following:

Fiscal Year
1985

"Emergency medical services--state operations \$248,362
Provided, That no expenditures shall be made from this account for rental of office space, except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto . . ." (Emphasis added.) L. 1984, ch. 23, §5.

You request our opinion on whether the proviso in this item of appropriation is constitutional. In doing so, you indicate the proviso appears to violate the doctrine of separation of powers, since the acquisition of office space by state agencies is an executive or administrative function and precludes interference by the legislature or the legislatively-dominated State Finance Council. Additionally, you indicate that even if the proviso does not violate the separation of powers doctrine, the question remains whether the proviso is a proper delegation of legislative authority to the finance council under the current standards governing action by that body.

On several occasions, the Kansas Supreme Court has been called upon to determine whether powers conferred upon the State Finance Council constituted a violation of the separation of powers doctrine. See State ex rel. v. Bennett, 222 Kan. 12, 564 P.2d 1281 (1977) (Bennett II); State ex rel. v. Bennett, 219 Kan. 285, 547 P.2d

786 (1976) (Bennett I); and State ex rel. v. Fadely, 180 Kan. 652, 308 P.2d 537 (1957). A thorough review of the finance council's origin is provided in Bennett I at pages 291-293 and need not be repeated herein. For purposes of this opinion, it is necessary to note only that the finance council is composed of the governor and eight members of the legislature who constitute the leadership of that governmental body. K.S.A. 75-3708. Additionally, in matters presented to the council, the governor has one vote and the legislative members have eight votes. Unless a particular matter is required by law to receive the unanimous vote of the council, approval of the governor and approval by a majority vote of the legislative members of the council is required. K.S.A. 75-3711(b) and K.S.A. 1983 Supp. 75-3711c(c). Pursuant to subsection (c) of 75-3711c, action by the council is authorized, except in regard to the issuance of certificates of indebtedness under K.S.A. 1983 Supp. 75-3725a:

"only when the legislature is not in session, upon findings, in addition to any enhancement or alteration thereof by legislative enactment, that:

"(1) Unforeseeable occurrence or unascertainable effects of a foreseeable occurrence characterize the need for the requested action, and delay until the next legislative session on the requested action would be contrary to paragraph (3) of this subsection.

"(2) The requested action is not one that was rejected in the next preceding session of the legislature, and is not contrary to known legislative policy.

"(3) In cases where the action is requested for a single state agency, the requested action will assist the state agency in attaining an objective or goal which bears a valid relationship to powers and functions of the state agency."

Additionally, under K.S.A. 75-3711(c), a matter is allowed to come before the State Finance Council "only if the matter is characterized as a legislative delegation."

A review of the proviso in section 5 of chapter 23 indicates the legislature has characterized the matter of leasing office space for the Bureau of Emergency Medical Services as a legislative

delegation and has directed that a decision on this matter by the council be based upon the guidelines prescribed in subsection (c) of K.S.A. 1983 Supp. 75-3711c. You, in essence, question whether this matter is, in fact, a legislative matter, and thus subject to delegation by the legislature, or, even if so, whether the guidelines prescribed in 75-3711c(c) are sufficient to guide the finance council in regard to this matter.

In Attorney General Opinion No. 81-83, we were asked to determine whether the doctrine of separation of powers would be violated by a proposed statute which would have prescribed that any state agency contract for the lease of office space, buildings or land for a term of more than ten years or for a term which is renewable for more than ten years could not be entered into without first have been approved by the Joint Committee on State Building Construction. We reviewed decisions of our Supreme Court relating to the doctrine of separation of powers, applied the test set forth in those decisions, and concluded the proposed legislation would constitute a significant interference by a legislative body with the operations of the executive department of government. Thus, we concluded the proposed legislation would violate the separation of powers doctrine. Id. at 8.

In reaching our conclusions, we carefully considered whether the leasing of office space by state agencies was essentially an executive or administrative function or whether it was legislative in nature. We concluded, based upon the decision of the court in State ex rel. v. State Office Building Commission, 185 Kan. 563, 345 P.2d 674 (1959) and a consideration of numerous statutes concerning this subject, that the leasing of office space "is a purely executive or administrative power that has traditionally been exercised by the executive department." Id. at 4. In our opinion, however, we stated:

"[T]he legislature may exert control over the lease of office space by state agencies through appropriations, and the conditions, limitations and qualifications imposed on them, and through the enactment of substantive laws prescribing such restrictions on state agencies' powers in this regard as the legislature deems necessary and appropriate."
(Emphasis added.) Id. at Synopsis.

Our opinion numbered 81-83 was issued on April 9, 1981. On March 17, 1982, the Supreme Court filed its decision in Manhattan Buildings, Inc. v. Hurley, 231 Kan. 20, 643 P.2d 87 (1982). In that case, the owners of the building located

at 420 Southwest Ninth Street in the City of Topeka (Manhattan Buildings, Inc.) and the Secretary of Administration had entered into a ten year lease agreement for the property. The lease contained a clause which specified the lease could be terminated by the secretary at any time during its term if the legislature failed to appropriate moneys with which to make the lease payments due under the agreement. This clause is standard in state office space lease agreements and is known as the "termination for fiscal necessity" clause. The lease was entered into on January 8, 1981, and funding for the first rental payments was to come from appropriations to be made by the 1981 Legislature. However, instead of providing funds for this lease, the legislature enacted the following provisions as part of the 1981 omnibus appropriations bill:

"No moneys appropriated to any state agency, as defined by K.S.A. 1980 Supp. 75-3701, and amendments thereto, shall be expended for the lease of the property located at 420 Southwest Ninth Street in the City of Topeka (commonly known as The Woman's Club) nor shall any other funds of any agency of state government be utilized for such purpose. It is the intent of this section to invoke and exercise the 'termination for fiscal necessity' clause of the lease entered into by the department of administration for the property described in this section." (Emphasis added.) L. 1981, ch. 32, §69.

Manhattan Buildings challenged this section, alleging it violated several constitutional provisions, two of which are relevant to your inquiry. The first such contention was that this section contained subject matter foreign to the subject of the bill and thus violated the one-subject-in-a-bill limitation of Article 2, Section 16 of the Kansas Constitution. The court rejected this argument, saying:

"It [the section in question] specifically and clearly states that no funds shall be expended for a particular purpose. In the recent case of State ex rel. Stephan v. Carlin, 230 Kan. 252, 258, 631 P.2d 668 (1981) . . . we said:

'Appropriation bills may direct the amounts of money which may be spent, and for what purposes; they may express the legislature's direction as to expenditures;

they may transfer funds from one account to another; they may direct that prior unexpended appropriations lapse.' (Emphasis by the Court.)

"By Section 69 the legislature was clearly expressing its direction as to expenditures, stating that appropriated moneys and other public funds could not be spent for a certain purpose. It falls squarely within the language of Stephan v. Carlin, emphasized above. We find no violation of Article 2, Section 16." 231 Kan. at 31.

Then the court turned to the contention that the section under review constituted a usurpation of the powers of the executive department by the legislative department, in violation of the separation of powers doctrine. In addressing this issue, the court said:

"The separation of powers doctrine has been discussed and explained at length in several recent and illuminating unanimous opinions of this court, and we do not need to expound at length on the subject here. See State v. Greenlee, 228 Kan. 712, 620 P.2d 1132 (1980); State, ex rel., v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976); Leek v. Theis, 217 Kan. 784, 539 P.2d 304 (1975); and Van Sickle v. Shanahan, 212 Kan. 426, 511 P.2d 223 (1973).

"Statutes are, of course, presumed to be constitutional; all doubts must be resolved in favor of validity, and before a statute may be stricken down, it must clearly appear that the statute violates the constitution. When a statute is challenged as violating the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented. The cited cases conclude that absolute separation of powers is impossible, and that a slight degree of blending or admixture of the three powers of government is unavoidable. To constitute a usurpation of powers, one **department of the government** must be subjected,

directly or indirectly, to the coercive influence of the other; there must be a significant interference by one department with the operations of another.

"In considering whether a usurpation of powers exists, a court should consider various factors. In State, ex rel., v. Bennett, 219 Kan. at 290, 291, these are said to include:

"(a) The essential nature of the power being exercised;

"(b) The degree of control by the legislative department in the exercise of the power;

"(c) The nature of the objective sought to be attained by the legislature;

"(d) The practical result of the blending of powers as shown by actual experience over a period of time.

"The assignment of office space for executive agencies in both state-owned and leased buildings is traditionally a function of the executive branch, and the actual leasing of space is also an executive function. The legislature, however, appropriates the funds which are expended by all branches of government, and it is concerned with the overall picture and cost of housing state government. New buildings cannot be acquired by construction or purchase without specific legislative authorization through the appropriation process. As we have seen, the 1981 legislature was concerned with the new ten-year lease at hand, since it was considering the construction or purchase of a new facility. The legislature appropriated funds for the leasing of various buildings, including one or more properties owned by Manhattan, but stopped short when it came to the funding of this new long-term lease of the Woman's Club building. It thus limited the executive branch in one specific and isolated area, and for various stated reasons. No similar legislation during the past several years has been called to our attention, and we know of

no attempt by the legislature to regularly limit or direct the executive branch in this specific area.

"Upon careful consideration of all of the facts before us, we conclude that Section 69 of 1981 Senate Bill No. 470 is not a significant interference by the legislative branch with the executive branch, and that Section 69 does not constitute a usurpation of powers. We find the legislation constitutional." (Emphasis added.) 231 Kan. at 31-33.

We quote so extensively from Manhattan Buildings, Inc. in order to indicate the difference between the action taken by the legislature in that case and the action taken by the legislature here. In the Manhattan Buildings, Inc. case, the legislature reviewed a particular long-term lease that had been entered into by the Secretary of Administration. The legislature determined that the specific lease was not conducive to the best interests of the state. Thus, the legislature withheld funding for that particular lease. Thus, as the court said the legislature could do in an appropriations bill, the legislature expressed its direction as to a particular expenditure. See, e.g., Manhattan Buildings, Inc. v. Hurley, supra, 231 Kan. at 31. In that case, however, it was the legislature itself that took action. It did not attempt to allow a committee thereof to make a determination on behalf of the entire legislative body. Moreover, the legislature did not attempt to thrust itself or any of its committees into a position of participating prospectively in the executive department function of entering into lease agreements. In short, the legislature did not attempt to expand its role from one of legislative oversight to one of shared administration.

In this case, however, the legislature has no specific, executed lease of office space for the Bureau of Emergency Medical Services to review, as no such lease has been entered into. Moreover, the legislature has not expressed its direction as to a particular expenditure. Instead, it has attempted to allow an entity under the control of its leadership to approve or disapprove of an executive agency action. Unlike the situation in Manhattan Buildings, Inc., the legislature has attempted to expand its role from one of appropriate legislative oversight to one of shared administration. Rather than reviewing action already taken by an executive agency, the legislature is attempting to inject a controlling influence on prospective action by the executive department. This, in our judgment, may not be done under the separation of powers doctrine, and constitutes a significant interference by the legislative

department with a function essentially executive in nature. See Manhattan Buildings, Inc. v. Hurley, supra, 231 Kan. at 32. Therefore, we are constrained to conclude the proviso in section 5 of chapter 23 of the 1984 Session Laws of Kansas is unconstitutional as violating the doctrine of separation of powers.

Having reached the above conclusion, it is not necessary to address your second question regarding whether action to be taken by the finance council under section 5 of chapter 23 is constrained by adequate legislative standards. However, due to the importance we attach to your inquiry, we choose to make the following observations.

We note that under the language of the proviso contained in section 5 of chapter 23, the legislature merely has required that the finance council be guided by the standards set forth in K.S.A. 1983 Supp. 75-3711c(c), quoted hereinabove. The legislature did not "enhance" those standards in any manner, although such is contemplated under 75-3711c(c). For example, the legislature did not confine the council to granting its approval where a maximum amount was not to be exceeded for the lease of office space. However, the minutes of the Senate Ways and Means Committee for April 23, 1984, specifically indicate that the committee knew the estimated amount of space needed for this bureau and discussed a maximum amount that should be expended for office space. However, instead of fixing a maximum amount to be expended for the rental of office space as a standard to guide the finance council, the legislature simply made any proposed action concerning the leasing of office space a matter to be approved or rejected by the finance council.

In light of these facts and upon a consideration of the apparent inappropriateness of the broad, general standards prescribed in K.S.A. 1983 Supp. 75-3711c(c) to this particular matter, it is doubtful the power conferred upon the finance council is sufficiently "canalized" as to constitute a lawful delegation of legislative power even if the subject was a legislative matter. See, e.g., State ex rel. v. Bennett, 219 Kan. 285, 299-301, 547 P.2d 786 (1976); State ex rel. v. Hines, 163 Kan. 300, 308-309, 182 P.2d 865 (1947); and State ex rel. Tomasic v. Kansas City, Kansas Port Authority, 229 Kan. 538, 626 P.2d 209 (1981), opinion on rehearing, 230 Kan. 404, 636 P.2d 760 (1981).

In making this statement, we do not want to be perceived as having overlooked the Court's decision in State ex rel. v. Bennett, 222 Kan. 12, 564 P.2d 1281 (1977). We have not. However, the subject left to the control of the finance council

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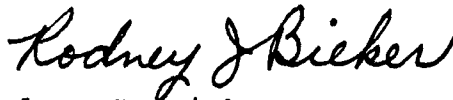
under section 5 of chapter 23 of the 1984 Session Laws of Kansas is totally unrelated to the matters considered by the court in that case. Thus, that case does not necessarily validate the activity authorized under section 5 of chapter 23. However, further elaboration on this point is unnecessary due to our conclusion on your first inquiry.

In summary, we conclude the legislature may refuse to appropriate moneys to provide funds for a particular lease of office space already entered into by a state agency and may direct that no appropriated moneys shall be used for such purpose. Manhattan Buildings, Inc. v. Hurley, supra. However, the legislature may not prescribe that an agency may not enter into any lease for office space without the prior approval of the State Finance Council or some other legislatively-dominated committee. Such a limitation on prospective action by a state agency violates the doctrine of separation of powers and is unconstitutional.

Very truly yours,



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