



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

November 12, 1975

ATTORNEY GENERAL OPINION NO. 75- 426

Mr. William L. Muir
Financial Administrator
Office of the Attorney General
1st Floor - State Capitol
Topeka, Kansas 66612

Re: State Officers--Payment of Defense Expenditures

Synopsis: Defense expenses incurred under K.S.A. 1974 Supp. 75-4360 may lawfully be paid only by the State Finance Council from funds appropriated to it for that purpose, which funds do not include the state emergency fund, such legal defense expenditures not being permitted therefrom under K.S.A. 75-3713.

* * *

Dear Mr. Muir:

You inquire concerning the payment for services rendered by certain Special Assistant Attorneys General pursuant to K.S.A. 1974 Supp. 75-4360, which provides for the payment of counsel for the defense of

"the governor, the adjutant general, the superintendent of the highway patrol or any officer or trooper of the highway patrol, or agent of the Kansas bureau of investigation, or any persons employed by the state correctional institutions in a correctional or supervisory or custodial capacity"

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when such persons are prosecuted in any civil action for acts committed in the performance of their duties. The provision states in pertinent part thus:

"Provided, That the attorney general shall be first consulted in regards to the selection of the attorney for the defense, and shall have approved thereof: And provided further, That the attorney general may, if he sees fit, assume the responsibility for the defense of such person and conduct the same personally or by one or more of his assistants. The expenses of such defense shall be paid by the state finance council out of appropriated funds upon vouchers approved by the attorney general." [Emphasis supplied.]

In 1973 and 1974, the Legislature provided for payment of these obligations by placing no limit on the expenditure of funds for defense expenses, and by inserting a proviso purporting to authorize transfer of money for that purpose to the fund therefor, such monies to be transferred by the State Finance Council from the state emergency fund. See ch. 17, § 7(b), L. 1974, and ch. 16, § 6(b), L. 1973. The 1974 provision, which is identical to that in 1973, appears thus:

"Payment of defense expenses. No limit
Provided, That the state finance council is hereby authorized to transfer from the state emergency fund to this fund the amounts necessary to pay expenses of defense of certain state officers and employees under provisions of K.S.A. 75-3217 and 48-241a as amended."

K.S.A. 75-3713 prescribes the permissible uses of the state emergency fund thus:

"The state finance council, by unanimous vote of all its members, is hereby authorized and empowered to make allocations to, and authorize expenditures by, state agencies from the state emergency fund for the following purposes, subject to the limitations hereinafter prescribed:

(1) Preservation of the public health and the protection of persons and property from extraordinary conditions arising after, or which were not foreseen at the time, appropriations were made by the preceding regular legislative session.

(2) Repair or replacement of any building or equipment owned by the state which has been destroyed or damaged by sabotage, fire, flood, wind, tornado, catastrophe or act of God if such building or equipment is absolutely necessary for carrying out the function of the state agency using such building or equipment."

The elasticity of the language in subsection (1), authorizing expenditures for the "protection of persons and property from extraordinary conditions arising" was challenged in *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 308 P.2d 537 (1957), on the ground that it afforded excessively imprecise guidance for the use of the funds. The court rejected this contention and went on to state thus:

"Furthermore, when the statute is considered in its entirety, we think it may reasonably be said that the term 'extraordinary conditions' was intended to relate to the conditions specified in subsection (2), *i.e.*, sabotage, fire, flood, wind, tornado, catastrophe or act of God, and as thus construed, the standards provided are sufficient." 180 Kan. at 665-666.

Clearly, the proviso quoted above from the appropriation acts contemplates an unlawful use of the state emergency fund.

In 1975, the Legislature made a somewhat different, albeit equally interesting, provision for the payment of these expenses. In ch. 21, § 2, L. 1975, the following appropriation was made from the general fund in subsection (a) thus:

"Payment of defense expenses 3,341
Provided, That expenditures shall be made only for the defense of certain state officers and employees under the provisions of K.S.A. 1974 Supp. 48-241a

and 75-4360: *Provided further*, That expenditures shall be made only upon approval of the state finance council."

Subsection (b) of this provision makes the following appropriation from special revenue funds as follows, insofar as pertinent herein:

"Payment of defense expenses 0
Provided, That the state finance council is hereby authorized to transfer from the state emergency fund to this fund the amounts necessary to pay expenses of certain state officers and employees under provisions of K.S.A. 75-4360 and 48-241a as amended."

The payment of the defense expenditures in question is clearly controlled by K.S.A. 1974 Supp. 75-4360, and its direction that they "shall be paid by the state finance council out of appropriated funds upon vouchers approved by the attorney general." In a recent opinion, no. 75-388, I have explored the attempted amendment of statutes other than in compliance with Article 2, § 16 of the Kansas Constitution. The title of ch. 21, L. 1975, is as follows:

"AN ACT making appropriations and transfers and imposing certain limitations for the fiscal year ending June 30, 1976."

Although K.S.A. 1974 Supp. 75-4360 is referred to in provisos in both subsections (a) and (b) of section 2 thereof, nothing in either of the provisos or in the title of the bill even remotely suggests that K.S.A. 1974 Supp. 75-4360 has been amended by enactment of the appropriation act. Thus, it remains intact, and the expenditures in question must be paid in accordance therewith, *i.e.*, by the State Finance Council out of appropriated funds, meaning, of course, funds appropriated to the State Finance Council and lawfully available for that purpose. The general fund appropriation of \$3,341 is not such a fund, for it is appropriated to the Attorney General, and not to the Council. Similarly, the state emergency fund may not be used for such expenditures, for defense expenditures are clearly outside the scope of K.S.A. 75-3713(1), as construed in *Fadely, supra*.

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Accordingly, I can only conclude that any vouchers which you may have prepared for payment of defense expenditures incurred under K.S.A. 1974 Supp. 75-4360 be referred to the State Finance Council. Under that statute, the liability for payment thereof rests with the Council, to be satisfied out of whatever funds may be lawfully available to it for the purpose, which does not, of course, include the state emergency fund. If any of these defense expenditures are hereafter sought to be paid from the state emergency fund, steps will be taken to assure that any moneys unlawfully paid are recovered from those authorizing such payments. Given the abundant powers of the State Finance Council to achieve flexibility in appropriations, it is not unlikely that the necessary funds may be made available from appropriations to the Department of Administration, of which the Council is a part. K.S.A. 1974 Supp. 75-3708a.

Yours very truly,



CURT T. SCHNEIDER
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