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ATTORNEY GENERAL OPINION NO. 79- 199

Dr. James A. McCain
Secretary of Human Resources
Kansas Department of Human Resources
401 Topeka Avenue
Topeka, Kansas 66603

Re: Labor and Industries--Regulation of Labor and
Industries--Authority to Remove Hazardous
Substances

Synopsis: The Secretary of Human Resources may remove hazardous materials and chemicals from schools and private businesses where such conditions or products could reasonably be expected to cause death or serious physical harm immediately or before such danger can be eliminated through the enforcement provisions otherwise provided by law.

* * *

Dear Dr. McCain:

You inquire whether the Department of Human Resources has authority to remove dangerous chemicals from schools, private colleges, industrial plants and other business establishments. Specifically, you advise that many local schools have hazardous chemicals on school property that school officials would like to remove; yet, the schools lack the expert personnel and special equipment to properly remove and dispose of such products. In the past the Industrial Safety Section of the Department of Human Resources has physically removed such products from the school premises.

K.S.A. 1978 Supp. 44-636 authorizes the Secretary of Human Resources to enter and inspect premises of "any factory or mill, workshop, private works, public works or state agency or institution, mercantile establishment, laundry or any other place of business where labor is or is intended to be performed for any purpose." This same section authorizes the Secretary to notify the "owner, proprietor, agent, administrator or lessee of such building, establishment, or place" of any dangerous conditions, including the presence of "hazardous materials or substances." The statute, likewise, authorizes the Secretary to order the elimination of the dangerous condition and provides an agency appeal procedure for any person aggrieved by the order. K.S.A. 1978 Supp. 44-636(a) and (b).

Clearly, the law contemplates that the owners or custodians of the premises in question will normally be responsible for the elimination of the dangerous condition and bear the costs of correcting such conditions. However, the Secretary is given additional powers to act in cases of imminent danger. K.S.A. 1978 Supp. 44-636(d) states:

"If the secretary of human resources determines that conditions or products in any place of employment are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately, or before such danger can be eliminated through the enforcement provisions otherwise provided by law, the secretary may order the immediate taking of any steps necessary to avoid, correct or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct or remove such imminent danger or to prevent any avoidable loss of production facilities or product."
(Emphasis added.)

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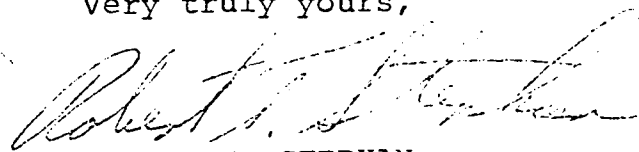
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We believe this grant of authority is of sufficient breadth to permit the Department of Human Resources to act directly to remove hazardous substances from premises subject to the Act where "danger exists which would reasonably be expected to cause death or serious physical harm immediately, or before such danger can be eliminated through the enforcement provisions otherwise provided by law." Clearly, schools are subject to inspections, orders and actions of the Secretary pursuant to K.S.A. 1978 Supp. 44-636(a), as schools are included in the definition of "public works" in K.S.A. 1978 Supp. 44-637(f).

Finally, you inquire as to the tort liability of the State for such inspections and corrective measures made by the Department pursuant to the above-cited authority. Your questions are hypothetical as no particular tort has been alleged. We must respectfully decline to advise you in detail as to the State's liability in the general fact situations you present. As you are aware, the Kansas Tort Claims Act (L. 1979, ch. 186) now governs state liabilities in such instances. Although we would call your attention to the exemption from liability relevant to agency inspections contained in New Section 4(j) of the Act, we cannot speculate as to potential liability in any given situation. Such liability will depend on the specific facts of each case, and no definitive answer can be given in advance of such occurrence.

In summary, the Secretary of Human Resources may remove hazardous materials and chemicals from schools and private businesses where such conditions or products could reasonably be expected to cause death or serious physical harm immediately or before such danger can be eliminated through the enforcement provisions otherwise provided by law.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk