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ATTORNEY GENERAL OPINION NO. 80-233

The Honorable Fred W. Rosenau  
State Representative  
Thirty-Ninth District  
3050 South 65th Street  
Kansas City, Kansas 66106

Re: Cities of the First Class--Public Utilities--  
Liability of Board of Public Utilities and Its  
Employees for Certain Acts and Omissions

Synopsis: Pursuant to L. 1980, ch. 72, §3, "personal liability" is imposed upon boards of public utilities and their employees in certain circumstances. Such imposition of "personal liability" does not violate constitutional requirements of equal protection and due process, and is not invalid or unenforceable on the ground of vagueness.

Employees of a board of public utilities and board members are not entitled to be indemnified or defended against the personal liability imposed by L. 1980, ch. 72, §3. Cited herein: K.S.A. 13-1220, K.S.A. 1979 Supp. 13-1221, 13-1223, 13-1227, 13-1228, 13-1258, K.S.A. 13-1271, K.S.A. 1979 Supp. 75-6101; L. 1980, ch. 72, §§3, 7, 8, 14, 19, and 22; Kan. Const., Bill of Rights §§1, 2; and U.S. Const., Fourteenth Amendment.

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Dear Representative Rosenau:

You request our opinion concerning the validity of the last paragraph of Section 3 of Chapter 72 of the 1980 Session Laws of Kansas (L. 1980, ch. 72, §3). Said paragraph is part of an

act affecting the operation of the board of public utilities in the city of Kansas City and provides as follows:

"The board or any employee of the board shall be personally liable for any expenditure or loss incurred by the city through failure or refusal of the board, or such employee, to comply with any ordinance adopted by such city under authority granted by this act, or the act of which this section is amendatory."

K.S.A. 13-1220 et seq. provide for the establishment of a board of public utilities in certain cities owning and operating a municipal waterworks plant and a municipal electric-light plant. Such a board has been established in the city of Kansas City. The board is to be elected pursuant to the procedure prescribed by K.S.A. 1979 Supp. 13-1221, and is to "manage, operate, maintain and control the daily operation of the water plant and electric-light plant" of the city. The provision in question, imposing "personal liability" upon the board and its employees in certain circumstances, is one of numerous 1980 amendments to the 1929 act establishing and governing the operation of the board. Even a cursory reading of the 1980 amendments reveals that the intent of the Legislature, in enacting L. 1980, ch. 72, was to restrict the powers of the board, and make it more responsive to the demands of the city governing body. It is in this context that the provision imposing personal liability upon the board and its employees must be considered.

The subject provision imposes "personal liability" for failure or refusal "to comply with any ordinance adopted by such city under authority granted by this act, or the act of which this section is amendatory." (Emphasis added.) The initial problem, in considering the extent of liability imposed by the statute is, therefore, to determine what ordinances may be adopted by the city "under authority granted by" the subject act. A review of the act reveals numerous powers granted to the city which might be exercised by adoption of city ordinances or resolutions. Such powers include the following:

1. Any sale of real property or improvements thereon must be approved by the governing body of the city. K.S.A. 1979 Supp. 13-1223, as amended by L. 1980, ch. 72, §3.
2. Upon direction of the city, the board of public utilities must install, repair, replace and remove fire hydrants at a reasonable cost determined by the city, and

must provide an adequate water supply through such hydrants at a reasonable cost determined by the city. K.S.A. 1979 Supp. 13-1227, as amended by L. 1980, ch. 72, §7.

3. Upon direction of the city, the board must install, repair, maintain and replace street lighting equipment and traffic signal equipment at a reasonable cost determined by the city, and must provide an adequate supply of electricity to such street lights and traffic signals at a reasonable cost determined by the city. K.S.A. 1979 Supp. 13-1228, as amended by L. 1980, ch. 72, §8.

4. Provision must be made by the board, pursuant to the direction of the city, for the payment of revenue bonds. K.S.A. 13-1258, as amended by L. 1980, ch. 72, §14.

5. Under certain circumstances, the board must, at the direction of the city, transfer a portion of gross operating revenues to funds to be used for governmental functions of the city. K.S.A. 13-1271, as amended by L. 1980, ch. 72, §19.

6. The board must, at the direction of the governing body of the city, bill, collect, and enforce collection of sewer service charges through the administrative departments of the board in accordance with rules and regulations and on terms and conditions established by the governing body of the city. L. 1980, ch. 72, §22.

It must be recognized that numerous of the above powers would, ordinarily, be exercised by the adoption of resolutions, rather than by the adoption of city ordinances, and in that circumstance no personal liability is imposed upon the board and its employees by L. 1980, ch. 72, §3. Although the statutes of Kansas do not distinguish an ordinance from a resolution or declare when it is proper to use one or the other, the distinctions between the two have been judicially considered. Benson v. City of De Soto, 212 Kan. 415, 420 (1973). In our opinion, where city ordinances, concerning the above enumerated matters, are properly adopted, any failure or refusal of board members or employees to comply therewith will result in imposition of personal liability. Personal liability is imposed only in these restricted circumstances, and the liability imposed is not, when construed in this manner, invalid or unenforceable on the ground of vagueness.

Another question which arises is whether employees and board members subjected to "personal liability" under the act are entitled to be indemnified and defended against such liability

pursuant to the provisions of the Kansas Tort Claims Act, K.S.A. 1979 Supp. 75-6101 et seq. Although there is no ambiguity inherent in the provisions of L. 1980, ch. 72, §3, when such provisions are considered in isolation, an ambiguity arises when it is construed together with the Kansas Tort Claims Act. That ambiguity is whether the Legislature intended to alter the defense and indemnification requirements imposed upon governmental entities by K.S.A. 1979 Supp. 75-6108 and 75-6109 with respect to the personal liability imposed by L. 1980, ch. 72, §3. Stated more simply the question is whether it is reasonable to conclude that the Legislature intended that employees who fail or refuse to comply with ordinances adopted by a city under authority of L. 1980, ch. 72, be defended and indemnified against the personal liability imposed by Section 3 of the act.

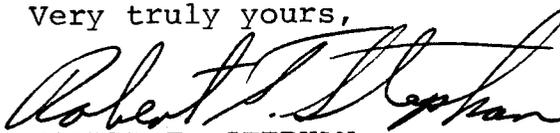
In addressing the above-stated question, it should first be noted that the Board of Public Utilities is a "quasi-legal entity" which operates water and electric plants as an agency of the city. Seely v. Board of Public Utilities, 143 Kan. 965, 973 (1936); Board of Public Utilities v. City of Kansas City, 227 Kan. 194, 198 (1980). The board may be sued only in the name of and on behalf of the city (L. 1980, ch. 72, §3), and the city must satisfy any judgment rendered against the board which remains unsatisfied. Seely v. Board of Public Utilities, supra at 973. If it were held that the Kansas Tort Claims Act operates to indemnify board members and employees against the personal liability imposed by Section 3 of the act, the city could never recover any loss, because either the city, or its "administrative agency" (the board of public utilities), would be responsible for indemnifying the employee or board member involved. Such an incongruous result clearly mitigates against any conclusion that the Legislature intended that the Kansas Tort Claims Act be unaffected by L. 1980, ch. 72, §3.

Additionally, it has been held that the provision imposing personal liability upon board members and employees "appears to be an attempt to give the city some control over board members, and in effect does no more than require the board and its employees to comply with the law or suffer pecuniary consequences." Board of Public Utilities, et al. v. City of Kansas City, Kansas, et al., \_\_\_\_ F. Supp. \_\_\_\_, 1980. Clearly, the city will lose control over board members, and board members and employees of the board will suffer no pecuniary loss if the indemnification and defense obligations of the Kansas Tort Claims Act are unaffected by L. 1980, ch. 72, §3.

We believe that the Legislature intended L. 1980, ch. 72, §3, to stand alone as a statement regarding the liability of board members and employees in the circumstances enumerated, and that the subject act amends, by implication, the Kansas Tort Claims Act with regard to the indemnification and defense rights set forth therein. This conclusion avoids the absurdity apparent in the alternative construction, i.e. that the Legislature intended that a city (or its administrative agency) must indemnify and defend a board member or employee against a right of action granted to the city. It is also consonant with the maxim of statutory construction that "a statute should be construed if possible as not to charge the legislature with a ridiculous result." Keck v. Cheney, 196 Kan. 535, 537 (1966). Therefore, it is our opinion that board members and employees are not entitled to be indemnified or defended against the personal liability imposed by L. 1980, ch. 72, §3.

Finally, in our judgment, neither the equal protection clause of the Fourteenth Amendment to the United States Constitution nor Sections 1 and 2 of the Kansas Bill of Rights are violated by the provisions of L. 1980, ch. 72, §3. Although the board and its employees are subjected to a liability unlike that imposed upon employees of other units of local government, there is no violation of equal protection in imposing liability based on the unit of government involved. Brown v. Wichita State University, 219 Kan. 2, 14 (1976). The Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. Id. Nor is constitutional due process violated where legislation bears a "reasonable relation" to a permissible legislative objective. Manzanares v. Bell, 214 Kan. 589, 602. It is a permissible legislative objective, in our judgment, to provide a remedy for a city which incurs losses through failure or refusal of a board of public utilities (or its employees) to comply with ordinances adopted under the authority of L. 1980, ch. 72. The constitutionality of the provision imposing personal liability was upheld in Board of Public Utilities, et al. v. City of Kansas City, Kansas, et al., supra. In short, it is our opinion that the last paragraph of L. 1980, ch. 72, §3, does not violate constitutional requirements of equal protection and due process, and is not invalid or unenforceable on the ground of vagueness.

Very truly yours,



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