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April 16, 1981

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ATTORNEY GENERAL OPINION NO. 81- 93

Mr. Jerry Powell
Employment Relations Administrator
Kansas Department of Human Resources
610 W. 10th, 2nd Floor
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees --
Public Employer-Employee Relations -- Kansas
City Board of Public Utilities; Protection Afforded
Employees; Fire District Employees.

Synopsis: The Board of Public Utilities is the proper governing body of board employees for purposes of the Public Employer-Employee Relations Act. The protected activity provisions of K.S.A. 75-4333 do not apply to public employers that have not elected to be subject to the provisions of the Act. Election by a county commission to bring county employees under the protections granted by the Act does not work to grant employees of a fire district within the county such protections. Cited herein: K.S.A. 1980 Supp. 13-1223, 13-1320, K.S.A. 75-4321, 75-4322 and 75-4333.

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Dear Mr. Powell:

You request our opinion on three questions regarding the Kansas Public Employer-Employee Relations Act. These three questions are as follows:

"1. In light of recent amendments to K.S.A. 13-2220 et seq. would the 'governing body' as defined at K.S.A. 75-4322(g) acting to fulfill the provisions of K.S.A. 75-4321(c) most appropriately be the 'board of public utilities' of the City of Kansas City, Kansas?

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"2. Do the provisions of K.S.A. 75-4333(b)(1), (2), (3) or (4) (protected activity statutes) apply in the event a governing body has voted not to bring such public employer under the provisions of the Act pursuant to the provisions of K.S.A. 75-4321(c)?

"3. Does the resolution dated December 31, 1980 satisfy the requirements of K.S.A. 75-4321(c) as it relates to fire district employees or will a separate election by the commissioners setting [sic], as the board for Fire District Number Two be necessary in order for the district employees to call a representative election?"

Each of these questions will be analyzed and discussed separately in the above order.

Your first question inquires as to the proper "governing body" of employees of the Kansas City, Kansas Board of Public Utilities for the purposes of the Public Employer-Employee Relations Act. You note that the Public Employee Relations Board ruled in 1977 the "governing body" for this purpose was the Board of Public Utilities. However, the statutes regulating the Board of Public Utilities have undergone revision since then and recent court decisions concerning the Board of Public Utilities suggest that possibly the governing body of the City of Kansas City, Kansas is the body affected by the commands of the Public Employer-Employee Relations Act.

The Public Employer-Employee Relations Act applies only to public agencies and public employers and defines these terms as follows:

"'Public agency' or 'public employer' means every governmental subdivision, including any county, township, city, school district, special district, board, commission, or instrumentality or other similar unit whose governing body exercises similar governmental power, and the state of Kansas and its agencies. (Emphasis added.) K.S.A. 75-4322(f).

Hence, "every governmental subdivision" is within the terms of the Act, although such subdivision is not subject to the requirements of the Act unless an election to come under the Act is made by the governing body of the subdivision. See K.S.A. 75-4321(c) and Kansas Attorney General Opinion No. 79-96 and discussion infra.

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The above statutory subsection further illuminates the meaning of the term "governmental subdivision" by listing certain commonly recognized governmental units, districts and agencies. The definition also contains the rather all-encompassing phrase "or instrumentality or other similar unit whose governing body exercises similar governmental powers." Applying the doctrine ejusdem generis to this last phrase would suggest it should be limited to those same kinds of governmental entities contained in the list immediately preceding it. However, this rule of construction and others that might be applicable are of little assistance since the definition itself contains terms identifying very specific units of government like cities, counties and townships, which have very specific meanings and which clearly describe governmental subdivisions, yet this section also contains other, more general, terms like "board," "commission" and "instrumentality."

Clearly, the city of Kansas City, Kansas, falls within the definition; hence, all of its components, agencies and departments would be included. In addition, the Board of Public Utilities is a creature of law which may qualify as an "instrumentality" of the city and certainly as a "board" within the meaning of public agency or public employer. Indeed, recent amendments to the Board of Public Utilities' enabling legislation establish the Board of Public Utilities as "an administrative agency." L. 1980, ch. 72, §2, now at K.S.A. 1980 Supp. 13-1220. In any case, the Board of Public Utilities is a public employer or public agency and the employees of the Board of Public Utilities are public employees. Thus, in our judgment, the Public Employer-Employee Relations Act may be applied to their employment relationship.

The more delicate question is which body is the governing body of this public employer for purposes of electing to come within the provisions of the Act -- the city council or the board.

"Governing body" is defined in the Act as follows:

"'Governing body' means the legislative body, policy board or other authority of the public employer possessing legislative or policy making responsibilities pursuant to the constitution or laws of this state." K.S.A. 75-4322(g).

Unfortunately, this definition is an imperfect guide in determining which body is the "governing body" under the Act.

First, the Board of Public Utilities is now considered an administrative agency, rather than a legislative component of city government. K.S.A. 1980 Supp. 13-1220. It is charged only with responsibility to "manage, operate, maintain and

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control the daily operation" of the water and electric plants of the city. Id. See, also, K.S.A. 1980 Supp. 13-1223.

Second, the Board of Public Utilities lacks commonly accepted powers of governing bodies of government subdivisions. For example, the Board cannot issue bonds or sell real estate or improvements without approval of the city council. See K.S.A. 1980 Supp. 13-1223, 13-1231. Furthermore, the Board of Public Utilities may sue and be sued, but only in the name of and on behalf of the city. K.S.A. 1980 Supp. 13-1223.

These recent statutory limitations on the powers granted the Board of Public Utilities were in part fostered by a prior Kansas Supreme Court decision declaring the Board of Public Utilities to be something less than an independent legal entity. See Board of Public Utilities v. City of Kansas City 227 Kan. 194, 197 (1980). There, the Court examined statutes relating to the issuance of utility bonds (K.S.A. 13-1252 - 13-1264, subsequently amended, L. 1980, ch. 72, §1), and ruled that the "municipality" referred to in such statutes was the City and not the Board of Public Utilities. The Board is not a municipal corporation nor a quasi-municipal corporation. The City, not the Board of Public Utilities, is ultimately responsible for creation of the bonded debt. Id. at 199.

Even more recently, the 1980 amendments to the Board of Public Utilities statutes have been challenged as infringing upon the contracts of bondholders. Board of Public Utilities, et al. v. City of Kansas City, et al., F. Supp. (D. Kan., 1980). The attack on the statutes was dismissed by the district court and the new law allowed to stand.

However, little or nothing in these recent statutory amendments and judicial renderings suggests a change in the relationship of the Board of Public Utilities to its employees. Indeed, the courts in the above-referenced cases did not address the issue of the Public Employer-Employee Relations Act. Likewise, the legislature, in amending the Board of Public Utilities' enabling laws, did not specifically alter the previous administrative determination of the Public Employee Relations Board. Except for statutory designation of two plant manager positions instead of one and the limitation on the Board of Public Utilities' authority to hire legal counsel (K.S.A. 1980 Supp. 13-1224, 13-1225 and 13-1226), the 1980 Kansas Legislature made no reference to the Board of Public Utilities' relationship to, and authority over, its employees.

Although a number of purposes are expressed in the Public Employer-Employee Relations Act, probably the most comprehensive expression of the Legislature's intent is contained in K.S.A. 75-4321(b):

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"Subject to the provisions of subsection (c), it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies."

It is subsection (c) referenced above which gives rise to your question. That subsection provides:

"The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election. Once an election has been made to bring the public employer under the provisions of this act it continues in effect unless rescinded by a majority vote of all members of the governing body. No vote to rescind shall take effect until the termination of the next complete budget year following such vote."

(Emphasis added.)

Although the legislative body of the city is the city council, the policy-making body for purposes of directing the activities and working conditions of Board of Public Utilities' employees is the Board. Those functions are delegated by law to the Board. K.S.A. 1980 Supp. 13-1223 states in pertinent part:

"Except for attorneys, it shall have power to hire and discharge all employees, agents and officers of the water and light departments and fix their compensation. The board may pay the cost of group hospitalization, surgical benefits, and insurance for its employees."

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If we were to view the city council as the governing body for purposes of applying the Public Employer-Employee Relations Act, the provisions regarding prohibited practices would be nonsensical. For example, K.S.A. 75-4333(b)(4) declares it to be a prohibited practice for a public employer or its designated representative to

"[d]ischarge or discriminate against an employee because he or she has filed any affidavit, petition or complaint or given any information or testimony under this act, or because he or she has formed, joined or chosen to be represented by any employee organization."

If the governing body of the public employer were determined to be the city, the prohibition of this section would be directed to a body which lacks authority to discharge any Board of Public Utilities' employee. Likewise, the prohibition against refusing to meet and confer with employee representatives makes little sense when directed to the city governing body which does not negotiate employment contracts for Board of Public Utilities employees. See K.S.A. 75-4333(b)(4).

Finally, as previously noted, four years ago the Public Employee Relations Board ruled the Board to be the applicable governing body for purposes of this Act. That has been the policy of the administrative agency charged with responsibility for enforcing the Public Employer-Employee Relations Act since that time. Such administrative determinations are to be afforded great weight in resolving legal interpretations. See State v. Helgerson, 212 Kan. 412, 413 (1973) and cases cited therein.

Although the statutes have been changed since the Public Employee Relations Board's ruling, the Kansas Supreme Court reached its conclusion about the status of the Board of Public Utilities prior to these recent amendments, basing its decision on the same laws relied upon by the Public Employee Relations Board four years ago. Absent some specific reference in the statutes or case law as to the status of the Board with regard to the Public Employer-Employee Relations Act, we are not inclined to view recent developments as requiring a change in the ruling of the Public Employee Relations Board with regard to the Board of Public Utilities and its employees.

Your second question is asked in the event we determine that the Board of Public Utilities is a "governing body" for pur-

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poses of this Act. The question posed is whether the protected activity provisions of K.S.A. 75-4333 apply to public employers who have not adopted the Public Employer-Employee Relations Act. The several provisions of K.S.A. 75-4333 work to protect certain rights of public employees granted by the Public Employer-Employee Relations Act. These rights do not exist for public employees except where they are created by this Act. As you have noted, this same question was analyzed by Attorney General Curt Schneider in Attorney General Opinion No. 79-96. Attorney General Schneider relied on Wichita Public Schools Employee Union v. Smith, 194 Kan. 2 (1964), to decide that public employees do not have rights of the type granted by the Public Employer-Employee Relations Act except as granted by the Act. The Attorney General opined that K.S.A. 75-4321(c) implies applicability of any provisions of the Act only if the public employer elects to be governed by the Act. That section states in pertinent part thus:

"The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election." (Emphasis added.)

Because the applicability of the Act is conditioned on an affirmative election, the provisions of the Act cannot apply where the governing body elects against the Act or takes no action at all. You point out that certain language in K.S.A. 75-4333 speaks to non-interference by public employers and other employees in the formation of employee organizations. As we stated previously, the right to form public employee organizations as created by this Act and the limitations contained in the Act do not exist where the governing body has not elected to be subject to such provisions.

Your third question arises as a result of action taken by the Reno County Commission. You advise that the Reno County Commission resolved to bring the County under the provisions of K.S.A. 75-4321 et seq. as a public employer on February 21, 1973. On December 31, 1980, the county commission resolved that the decision to be governed by the Public Employer-Employee Relations Act did not apply to any governmental subdivisions other than Reno County. This decision was for the purpose of excluding the employees of Reno County Fire District Number Two from the Act, even though the Reno County Commission acts as the governing body of the fire district.

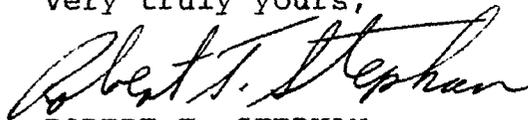
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Fire District Number Two is a fire district created under the provisions of K.S.A. 19-3601 et seq. As you note, we had occasion to analyze the relationship of fire districts to the county of their organization in Attorney General Opinion No. 80-89. We determined there that a county commission functions as a distinct entity when it carries out fire district business. As such, the actions of a county commission sitting as the governing body for a fire district do not carry the weight or power of actions of the county commission. The contrary is also true; actions of the county commission are not actions of the fire district.

The county commission unquestionably carries out the function of "governing body" of the county for the purposes of the Public Employer-Employee Relations Act. It also functions as the body responsible for the policy making of the fire district. However, because the actions of the county commission sitting as the governing body of the county are not considered to be the actions of the governing body of the fire district, the decision of the county commission to place employees of the county under the Act does not require that employees of the fire district be granted the protections provided by the Act. K.S.A. 75-4321 requires that "upon such election the public employer and its employees shall be bound by its [the Act's] provisions." Because the county was not sitting as the public employer of fire district employees when it elected to be subject to the Act as the employer of county employees, such election is not sufficient to bring employees of the fire district under the provisions of the Act.

To summarize, the Board of Public Utilities is the proper governing body of board employees for purposes of the Public Employer-Employee Relations Act. The protected activity provisions of K.S.A. 75-4333 do not apply to public employers that have not elected to be subject to the provisions of the Act. Election by a county commission to bring county employees under the protections granted by the Act does not work to grant employees of a fire district within the county such protections.

Very truly yours,



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Bradley J. Smoot
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