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April 21, 1981

ATTORNEY GENERAL OPINION NO. 81- 97

Mr. James T. Akers
Superintendent of Schools
U.S.D. No. 386
P. O. Box 398
Madison, Kansas 66860

Re: Schools -- Boards of Education; Organization, Powers, Finances -- Distribution of Health Insurance Premium Refunds

Synopsis: In the absence of contractual provisions indicating otherwise and where an employment contract requires a fixed employer contribution to an insurance premium paid by employees, any refund of such premiums shall be paid to the employees and the employer may not retain any portion thereof unless the refund exceeds the entire employee contribution.

* * *

Dear Mr. Akers:

You request the opinion of this office regarding the proper distribution of Blue Cross-Blue Shield insurance premium refund money received by U.S.D. No. 386 from Blue Cross-Blue Shield of Kansas. You inform us that:

> "USD 386 has for a number of years designated Blue Cross Blue Shield of Kansas as the official carrier of our health insurance policy covering employees, both certified and non-certified in the school system.
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> "As a part of the individual compensation and benefit program extended to USD 386 employees, our Board of Education has paid a portion of the monthly health insurance premium for each

> employee. The amount of the board's contribution to the Blue Cross Premium has varied from year to year according to the total compensation and benefit package negotiated annually between the Board of Education and the Madison Teachers Association. The monthly health insurance premium benefit extended to USD 386 employees has ranged over the past seven years from a low of $10 per month, to the present $60 per month provided in the 1980-81 Negotiated Agreement between the Association and the Board of Education. The employees of the district, if they desire to be included in the Blue Cross Insurance Plan, contribute the balance of the cost of the monthly health insurance premium.
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> "Blue Cross Blue Shield of Kansas has, over past years, forwarded to the district office checks representing refunds on premiums determined by an internal Blue Cross formula related to total group usage of health insurance in any given year. These refund payments are totally unanticipated by the district and vary in amount from year to year with no refund being received during some years . . . . It has been the policy of our district to pro-rate the Blue Cross Blue Shield Refund money among subscribers to the Blue Cross Blue Shield Plan and our Unified District General Fund on a basis bearing a direct relationship to the amount of the premium contributed by each party during the year for which the refund was applicable. The premise behind this distribution policy has been, that since both Board of Education and the individual subscriber contributed a part of the monthly premium, both parties should share in any refunds which accrued to the district."

A similar question has been litigated at least once in Kansas, in Bd. of Education, U.S.D. No. 392, Osborne County v. Able, Dist. Ct. Osborne County, Kansas, No. 7754. In that declaratory judgment action, the court ruled in favor of the teachers holding that the teachers were entitled to the entire amount of the insurance premium refund. That decision was never appealed and we have been unable to find any Kansas appellate decisions with respect to the refund issue.

There are, however, appellate decisions from other jurisdictions concerning circumstances similar to those presented by

you regarding distribution of insurance refunds. In Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir. 1940), a former employee of the defendant company brought a class action to compel his former employer to account for dividends paid to employer by insurer under a group policy. The policy provided that "divisible surplus" was to be distributed or applied by the employer according to the respective rights, if any, of the parties contributing to the premium payment. The court upheld the trial court decision in favor of the defendant, stating in relevant part:

> "[B]efore plaintiff could recover, it was necessary for him to show by some contract either express or implied, a liability upon the defendant to pay plaintiff. Failing to do so, the complaint was fatally defective."

Keniston v. Amer. Nat. Insurance Co., 31 Cal. App. 3d 803, 107 Cal. Rptr. 583 (1973), involved a class action against a group life and credit disability insurer. According to the court:

> "The action was brought to recover a portion of credit insurance premiums allegedly refunded by American to Budget pursuant to the provisions of group credit life and group credit disability insurance policies which American issued to Budget, and under which plaintiff and the other members of the class became insured upon borrowing money from Budget and paying premiums for coverage under the group policies." Id. at 584.

Although deciding many issues not relevant to our inquiry, the California Court of Appeals held:

> "A policy of group insurance is a contract, and the rights and duties of the parties thereto are governed by the provisions of the master policy. (See: Boseman v. Connecticut General Life Ins. Co., 301 U.S. 196, 202-203, 57 S.Ct. 686, 81 L.Ed. 1036, 1039-1040 [1937].) Therefore, where the master policy expressly provides that premium refunds or dividends are to be paid to the policyholder, the individual members of the group insured under the policy have no right to receive such payments from the insurer. (Slattery v. Pullman Co., 38 Del. Ch. 387, 153 A.2d 575, 577 [1959].)" Id. at 587.

Finally, in Peterson v. City of Colorado Springs, 548 P.2d 1285 (Colo. App. 1976), city employees brought a class

action to recover a proportionate share of annual surplus distributions paid to the city by an insurer under a group life insurance policy paid partially by the city and partially by employee payroll deductions. Deciding in favor of the defendant city, the court stated:

> "Plaintiffs' right, if any, to a proportionate share of the annual surplus distributed prior to December 7, 1964, must be premised upon the policy, Massachusetts Mutual Life Insurance Co. v. De Salvo, 174 Colo. 115, 482 P.2d 380; 3 J. Appleman, Insurance Law and Practice §1571, or upon a contract, express or implied, between the City and the employees. Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir.), cert. denied, 311 U.S. 700, 61 S.Ct. 138, 85 L.Ed. 454 . . . .
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> "Plaintiffs contend that since all employees are required to pay a portion of the premium from which the surplus distributions are derived, a contract to share in those distributions should be implied. However, the record does not contain the insurance policy, the City council resolution authorizing the insurance program, nor any agreement, employment contract, or contracts between the City and the employees relating to the policy program.
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> "Since plaintiffs have shown no right to share in the surplus distributions, there is no need to discuss the City's statute of limitations defense." Id. at 1286.

The similarities between the above cases and the fact situation outlined in your request are obvious. The decisions rendered in those cases therefore would be persuasive in the present case, should this case be litigated. We would summarize the above case law somewhat more succintly as follows: Where surplus distributions (refunds) are paid to an employer (contract holder) by an insurer under an insurance policy paid for partially by the employer and partially by the employees (contract subscribers/beneficiaries), the rights to the surplus distributions (as between the employer and employees) are contractual and depend upon the provisions, if any, of the master policy, or upon a contract, express or implied, between the employer and the employees.

In the present case, there appear to be no provisions in the master policy, in which U.S.D. No. 386 is designated "Holder," which specify the method of distribution of any refunds.

This is unusual. Blue Cross-Blue Shield of Kansas informs this office that, as a general rule, a "Divisible Surplus Rider" (Form No. 80-3500 1/80) is attached to the master policy of group insurance plans of the type held by U.S.D. No. 386. That rider states in pertinent part:

> "[A]ny part of the Divisible Surplus that is paid in cash and is in excess of the Contract Holder's share of the dues shall be applied for the sole benefit of the Subscribers."

If the policy held by U.S.D. No. 386 contained this rider and there was no other contract, express or implied, between the school district and its employees as to disposition of refunds, it would appear this language would entitle the school board to retain any amount of refund moneys less than or equal to the total amount of the insurance premiums paid by the school board. However, as noted above, the rider appears not to have been a part of your master policy.

Absent such a rider, and absent any contract, express or implied, between U.S.D. No. 386 and its employees, case law suggests the school board would be entitled to the entire amount of the refund. E.g., Pelelas v. Caterpillar Tractor Co., supra. The burden of proof that a refund disposition contract between the employer and employees existed would be on the employees. See, e.g., Peterson v. City of Colorado Springs, supra.

The remaining inquiry, therefore, is whether an express or implied refund disposition contract existed between U.S.D. No. 386 and its employees. According to 17 Am.Jur.2d Contracts §3 (1964):

> "Contracts are said to be either express, implied or constructive. Contracts are express when their terms are stated by the parties, and they are often said to be implied when their terms are not so stated. Thus, an implied contract is one inferred from the conduct of the parties, though not expressed in words.
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> "Contracts may be implied either in law [Williams v. Jones, 105 Kan. 282, 182 P.391 (1919)] or in fact. Contracts implied in fact are inferred from the facts and circumstances of the case, and are not formally or explicitly stated in words.

> "It is often said that the only difference between an express contract and a contract implied in fact is that in the former the parties arrive at their agreement by words, whether oral or written, while in the latter their agreement is arrived at by a consideration of their acts and conduct, and that in both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it." (Footnotes omitted.) Id. at 334-335.

Also, as stated in 66 Am.Jur.2d. Restitution and Implied Contracts §2 (1973):

> "[Implied contracts] . . . are more properly called quasi-contracts or constructive contracts. They are contracts in the sense that they are remediable by the contractual remedy of assumpsit. In the case of such contracts, the promise is purely fictitious and is implied in order to fit the actual cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement of presumed intention. The intention of the parties in such case is entirely disregarded, while in cases of express contracts and contracts implied in fact the intention is of the essence of the transaction. As has been well said, in the case of actual contracts the agreement defines the duty, while in the case of quasi-contracts the duty defines the contract . . . .
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> "It has been said that the doctrines of 'unjust enrichment' and 'restitution' -- modern terms -- have largely supplanted the former designation of 'quasi-contracts.' (Footnotes omitted.) Id. at 943 and 945.

The concept of unjust enrichment is explained in 66 Am.Jur.2d. Restitution and Implied Contracts §3 (1973) thusly:

> "The phrase 'unjust enrichment' is used in law to characterize the result of effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor . . . .

> "Recovery in an action of unjust enrichment depends upon whether, by the receipt of the funds in controversy, the defendant was enriched at the loss and expense of the plaintiff. A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. A person who has been unjustly enriched at the expense of another is required to make restitution to the other . . . .
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> "One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution. No person is unjustly enriched unless the retention of the benefit would be unjust." (Footnotes omitted.) Id. at 945-946.

From the facts we have gathered, it is clear U.S.D. No. 386 and its employees do not have an express contract as to disposition of health insurance premium refunds, because there is no written or oral agreements regarding such refunds. An "implied in fact" contract arguably exists, however, because the past practice of the Board is to distribute such refunds, when made, in proportion to the amount paid. Part is retained by U.S.D. No. 386 and the rest is paid to the participating employees. Arguably, this course of conduct is evidence of an implied in fact contract to so distribute such health insurance premium refunds. We are, however, forced to reject this reasoning because the result is contrary to the terms of the teachers' employment contract and unjustly enriches the district at the expense of the teachers.

A final possibility is that an implied in law or quasi-contract exists. As noted above, this is a contract born of equity rather than law. By express contract, U.S.D. No. 386 has agreed to pay $60.00 per month toward each participating employee's health insurance premium. If the school board retains all or any part of such refunds, the actual cost to the board of its share of the insurance premiums is less than the $60.00 sum it had agreed to pay. The $60.00 sum was identified in the employment contract as a fringe benefit to the teachers in lieu of salary; thus, if the actual cost to the board for its share is lowered, the teachers are not receiving the full benefit promised pursuant to the negotiated contract and the board is unjustly enriched.

The reason for such refunds is important. Such refunds are made as a result of a lower incidence of use of insurance benefits by the subscribers (the U.S.D. No. 386 employees) than is anticipated when the contract is made. Therefore, it is the behavior of the subscribers which determines whether refunds are made. If the total actual cost of a share of the insurance premium cost is to be lowered, given the fact the board has contractually agreed to pay a flat sum of $60.00 per month, it should be the teachers' share of the premium cost which should be lowered. The board agreed to pay $60.00 and the participating employees agreed to pay the difference necessary to purchase the health insurance. Under the above facts, when the total actual cost of the insurance coverage is lowered as a result of the premium refund, such refund is to be distributed to the employees since the employees' contribution was not fixed by contract while the employer contribution was so fixed and did not flucuate depending on the total cost of subscription.

The result could be different if the contract between the Board and the teachers was for the former to pay a percentage of the premiums. In such a case equity could dictate the Board's retention of the same percentage of the refund as it paid towards the total premium cost. But here, U.S.D. No. 386 agreed to pay a flat sum and now should not suggest that its actual contributions to the cost of the insurance premiums should be lowered as a result of lower incidence of insurance benefit use by the employee subscribers.

It is, therefore, our opinion that any moneys in this case, received by U.S.D. No. 386 from Blue Cross-Blue Shield of Kansas which are designated divisible surplus (insurance premium refunds) should be paid over to the subscribers (teachers) and that the Board is not entitled to retain any of such divisible surplus for its own use, unless the refund exceeds the entire employee contribution.

Very truly yours,

Robert T. Stephan

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BJS

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RTS:BJS:hle