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August 4, 1981

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ATTORNEY GENERAL OPINION NO. 81-181

William G. Haynes
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1300 Merchants National Bank Building
Eighth and Jackson Streets
Topeka, Kansas 66612

Re: Schools--Teachers' Contracts--Mediation; Request for
Appointment of Fact-Finding Board

Synopsis: The provisions of K.A.R. 49-27-1a allow the Secretary of Human Resources to determine whether a party to impasse resolution proceedings has complied with the time limit prescribed in K.S.A. 72-5427 to request the appointment of a fact-finding board. If a request for the appointment of a fact-finding board is not filed timely, the request is not filed in accordance with the provisions of K.S.A. 72-5427(c), and, thus, the secretary has no authority to appoint a fact-finding board under the provisions of K.S.A. 72-5428. Cited herein: K.S.A. 72-5427, 72-5428, 72-5432; K.A.R. 49-27-1a.

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Dear Mr. Haynes:

As counsel for Unified School District No. 501, Topeka, you seek an interpretation of the provisions of K.S.A. 72-5427 and 72-5428 and K.A.R. 49-27-1a, each of which concerns impasse resolution procedures under the Collective Negotiations Law, K.S.A. 72-5413 et seq.

K.S.A. 72-5427, in part relevant to your inquiry, provides:

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"(a) Upon finding that an impasse exists in professional negotiation or upon receipt of a joint notice of the existence of impasse filed by the parties under subsection (d) of K.S.A. 72-5426, the secretary shall appoint forthwith a mediator to assist in resolving the impasse

. . . .

"(c) If either party determines, after the seven-day period immediately succeeding the appointment of the mediator, that mediation has failed to resolve the impasse, such party may within ten days after the unsuccessful conclusion of mediation file a written request with the secretary to appoint a fact-finding board to assist in resolving the impasse and the secretary shall immediately notify the other party of the request. Within three (3) days thereafter, each of the parties shall prepare and submit to the secretary a written memorandum containing a description of the issues upon which the impasse exists and shall include therein a specific description of the final position of the party on each issue." (Emphasis added.)

K.S.A. 72-5428, in part, provides:

"(a) Upon receipt of a written request filed by either party under K.S.A. 72-5427 and upon notification of the other party of the request, the secretary shall appoint forthwith a fact-finding board of not more than three (3) members and shall notify the parties of the appointment."

K.A.R. 49-27-1a provides:

"(a) If a board of education or a recognized employee organization determines, after the seven (7) day period following the appointment of the mediator, that mediation has failed to resolve an impasse, the board of education or recognized employee organization shall file with the secretary notice of the failure. The secretary shall furnish a copy of the notification to the remaining party to the impasse.

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"(b) The party filing notice of the failure of mediation may, within ten (10) days of the filing date, request the secretary to appoint a fact-finding board.

"(c) The party receiving the notice from the secretary stating the failure of mediation may, within ten (10) days from receipt of the notice, state their concurrence that mediation has failed and request the secretary to appoint a fact-finding board.

"(d) Requests for appointment of fact-finding boards shall be considered timely if the request is postmarked by the U.S. Postal Service no later than the tenth day."

Also relevant to your inquiry are the provisions of subsection (a) of K.S.A. 72-5432, which provide:

"The secretary of human resources may adopt such rules and regulations as are necessary to implement and administer the provisions of K.S.A. 72-5413 to 72-5431, inclusive, and acts amendatory thereof and supplemental thereto, which place specific duties and responsibilities upon the secretary of human resources."

Under the provisions of K.S.A. 72-5428(a), the secretary of human resources (hereinafter referred to as "secretary") is required to appoint a fact-finding board, "[u]pon receipt of a written request filed by either party under K.S.A. 72-5427." Under K.S.A. 72-5427, if a party desires to have a fact-finding board appointed, said party must file a request for the appointment of such a board, "within ten days after the unsuccessful conclusion of mediation." K.S.A. 72-5427(c). Thus, the secretary may appoint a fact-finding board only upon receipt of a request filed in accordance with the requirements of K.S.A. 72-5427(c). However, neither the provisions of K.S.A. 72-5427, nor those of any other statute, specify a manner for determining the day upon which the "unsuccessful conclusion of mediation" has occurred. Without some manner of determining that date, the secretary cannot ascertain whether a request for the appointment of a fact-finding board has been timely submitted. Thus, in order to implement the provisions of K.S.A. 72-5428, the secretary adopted the provisions of K.A.R. 49-27-1a.

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Subsection (a) of that regulation establishes a procedure whereby the secretary and a party to negotiations have some way of knowing that the other party to the impasse resolution proceedings has made the determination that mediation has unsuccessfully concluded. Since subsection (c) of K.S.A. 72-5427 does not specify a maximum period of time within which a party may determine that mediation has failed to resolve the impasse, the secretary would not have been justified in specifying a period of time within which notice of that determination was to be filed. As written, the regulation is consistent with the statute.

Subsections (b) and (c) of the regulation merely fix a date certain for the respective parties as to when the "unsuccessful conclusion of mediation" has occurred, and from which date the respective parties may request the appointment of a fact-finding board. For a party filing notice with the secretary under K.A.R. 49-27-1a(a), the unsuccessful conclusion of mediation occurs on the date the secretary receives notice that mediation has failed to resolve the impasse. For the other party, the unsuccessful conclusion of mediation occurs on the date that party receives notification from the secretary of the other party's determination that mediation has failed.

Under the regulation, if the parties concur that mediation has come to an unsuccessful conclusion, each party individually, or both parties jointly, are required, under the provisions of subsection (a), to notify the secretary of that determination. Thereafter, both of the parties are bound by the limitation prescribed in K.A.R. 49-27-1a(b). If, however, only one of the parties determines that mediation has unsuccessfully concluded, that party is required to file notice with the secretary of its belief that mediation has failed to resolve the impasse. As to that party, the secretary accepts its judgment that mediation has concluded, and, as to that party, mediation is deemed to have unsuccessfully concluded as of the date of receipt of the filing of notice required under K.A.R. 49-27-1a(a). However, that party may, or may not, request the appointment of a fact-finding board, or may file such a request after notifying the secretary that mediation has concluded unsuccessfully. In no event, however, can that party request the appointment of a fact-finding board more than ten days from the date of filing notice with the secretary of the unsuccessful conclusion of mediation. If such a party elects, at any time during the interval that it is authorized to do so, to request the appointment of a fact-finding board, the secretary will notify the other party of the request, as is required under the provisions of K.S.A. 72-5427(c). Within three days of such notification, each party,

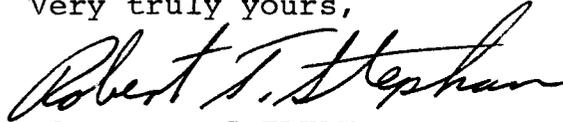
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under the requirements of K.S.A. 72-5427(c), must prepare and submit to the secretary a written memorandum containing the information specified under the same subsection of the statute.

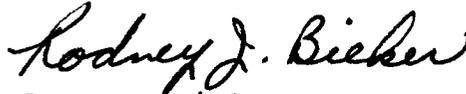
However, if the party filing notice with the secretary under K.A.R. 49-27-1a does not request appointment of a fact-finding board at the same time that it files the notice, the other party is given the opportunity to request such appointment, within ten days after receiving notice of the other party's determination that mediation has unsuccessfully concluded.

Thus, due to the provisions of K.A.R.49-27-1a, the secretary can determine whether a party has complied with the time limit prescribed in K.S.A. 72-5427(c) for the appointment of a fact-finding board. If the request is not filed timely, the request is not made in accordance with the provisions of K.S.A. 72-5427(c), and the secretary is not authorized to appoint a fact-finding board under the provisions of K.S.A. 72-5428(a).

Very truly yours,



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RTS:BJS:RJB:jm