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July 12, 1982

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ATTORNEY GENERAL OPINION NO. 82- 157

E. A. Mosher, Executive Director
League of Kansas Municipalities
112 West Seventh Street
Topeka, Kansas 66603

Re: Automobiles -- Serious Traffic Offenses -- Driving While Under Influence of Alcohol; Effect of Amendments Concerning Fines, Diversion Programs, and Community Service Time Required of Defendant

Synopsis: Section 10 of 1982 Senate Bill No. 699 establishes a state alcohol and drug safety action program, which is funded through the assessment of an \$85 fine against any person who is convicted of, pleads nolo contendere to, or participates in, a diversion program stemming from a violation of K.S.A. 1981 Supp. 8-1567. As subsection (n) of the statute (contained in Section 5 of the bill) provides that a city ordinance on this subject must contain minimum penalties equal to those of the statute, the fee must be assessed against the above three groups of persons in municipal court, as well as in district court, proceedings.

While a city attorney is required to establish procedures and guidelines for a diversion program under Sections 11 through 18 of the bill, he or she is not required to offer diversion to any violator. However, should the prosecutor so elect, the procedures and guidelines set forth therein must be followed. A person who performs community service work, either as a result of such a diversion program or as a condition of a sentence, is an employee of the city for the purposes of the Tort Claims Act,

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K.S.A. 1981 Supp. 75-6101 et seq., creating the potential for tort liability for damages caused by the individual's negligent or wrongful acts or omissions. Cited herein: K.S.A. 1981 Supp. 8-1567, K.S.A. 22-2908, both as amended by 1982 Senate Bill No. 699, K.S.A. 1981 Supp. 75-6101, 75-6102, 75-6103, 75-6104, 1982 Senate Bill No. 699.

* * *

Dear Mr. Mosher:

As Executive Director of the League of Kansas Municipalities, you request our opinion on several questions regarding recent amendments to K.S.A. 1981 Supp. 8-1567 and related statutes concerning the offense of operating a vehicle while under the influence of alcohol. Specifically, you inquire as to the effect on cities of 1982 Senate Bill No. 699, which contains provisions on diversion programs, the performance of community service hours by violators and the imposition of stricter penalties than currently exist in municipal ordinances on this subject. In that the bill has an effective date of July 1, 1982, we have attempted to expedite our replies to your inquiries.

In Section 10 of the bill the legislature has created a new program under the direction of the secretary of social and rehabilitation services. Designated as the state alcohol and drug safety action program, the purpose of the program is to provide, through community based agencies, presentence evaluation reports on persons convicted of, or pleading nolo contendere to, a violation of K.S.A. 1981 Supp. 8-1567. The program also provides for follow-up services designed to assist such a person with treatment and educational programs or other conditions of probation. The program is funded [pursuant to subsection (d)] by the imposition of an \$85 fine against any person who is convicted of, or pleads nolo contendere to, such a violation. Your question concerns the effect of this additional fine on persons who are convicted or who enter such pleas in municipal courts.

Specifically, you ask whether subsection (h) of Section 10 contains a loophole for certain violators. There, it is provided:

"The provisions of this section, including the assessment required by subsection (d), shall apply to any person who is to be or is charged with a violation of K.S.A. 1981 Supp. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, and participates in a diversion program." (Emphasis added.)

As no mention is made in Section 10, subsection (d) of persons who are convicted or enter a no contest plea in municipal court, you inquire whether such courts may impose the fee only upon those persons who participate in a diversion program, per subsection (h).

In our opinion, such is not the case, for a reading of the entire bill discloses that Section 5, subsection (h) requires a city ordinance to provide the same minimum penalties as does K.S.A. 1981 Supp. 8-1567, as amended. As the \$85 assessment is expressly imposed in addition to all other fines, fees, penalties or costs, a municipal court would have no alternative (assuming the city ordinance properly reflected the minimum penalties of the statute) in the case of a person who is convicted or who enters a nolo contendere plea. However, as a diversion program can be in lieu of any or all fines, fees, etc., the \$85 assessment would not, in the absence of subsection (h), necessarily be imposed. To insure adequate funding for the program, the legislature has seen fit to expressly provide for the imposition of the assessment.

A second inquiry concerns sections 11 through 13 of the bill, which deal with diversion programs by a city. At Section 11(b), it is provided:

"Upon the filing of a first complaint, citation or notice to appear alleging a person has violated a city ordinance which prohibits the acts prohibited by K.S.A. 1981 Supp. 8-1567, and amendments thereto, and prior to conviction thereof, the city attorney shall determine whether the defendant shall be allowed to enter into a diversion agreement in accordance with this act." (Emphasis added.)

Although somewhat repetitious, Section 13 goes on to state:

"(a) After a complaint has been filed charging a defendant with violation of an alcohol or drug related offense and prior to conviction thereof, and after the city attorney has considered the factors listed in section 14, if it appears to the city attorney that diversion of the defendant would be in the interests of justice and of benefit to the defendant and the community, the city attorney may propose a diversion agreement to the defendant. The terms of each diversion agreement shall be established by the city attorney in accordance with section 15.

"(b) Each city attorney shall adopt written policies and guidelines for the implementation of a diversion program in accordance with sections 11 to 18, inclusive. Such policies and guidelines shall provide for a diversion conference and other procedures in those cases where the city attorney elects to offer diversion in lieu of further criminal proceedings on the complaint." (Emphasis added.)

Additionally, Section 14 sets forth 10 factors which the city attorney is required to consider in determining whether the diversion of a particular defendant is in the interest of justice and of benefit to the defendant and the city. We note that these factors are taken almost verbatim from K.S.A. 22-2908 (as amended by section 6 of this bill), which relates to diversion programs established by a district or county attorney. You inquire whether these sections mandate the establishment of a diversion program by each city along these guidelines.

In our opinion, Sections 11 through 18 of 1982 Senate Bill No. 699 do not require each Kansas city attorney to offer a diversion program to any violator of a city ordinance patterned after K.S.A. 8-1567, as amended. Rather, the sections set forth factors which are to be considered and procedures which are to be followed if a diversion agreement is entered into. It is clear that a city attorney does have an affirmative duty under section 13(b) to adopt written procedures and guidelines to be used in those cases where diversion is offered in lieu of further proceedings. He or she must also inform the defendant in writing of the diversion program and the procedures and guidelines which have been adopted.

However, a city attorney is under no obligation to offer diversion to any violator of a city ordinance dealing with the operation of a vehicle while under the influence of alcohol, nor can a defendant claim diversion as a right. State v. Greenlee, 228 Kan. 712, 720 (1980). Indeed, like the situation presented in Greenlee, a city prosecutor may use his or her discretion to determine that no person accused of a driving offense involving alcohol will be offered diversion (228 Kan. at 721.). Such a classification by the district attorney as to drug offenders was approved by the court in Greenlee, which cited the serious nature of the drug problem in society today. Given the far-reaching scope of Bill No. 699, the legislature obviously has similar concerns as to drunk drivers, and has left the final decision on diversion to the prosecuting attorney, whether at a city, county, or district level.

Your third question deals with the potential liability of a city for injury or damages suffered or caused by the acts of a person performing community service work, either as a result of a diversion program or as a condition of sentence. In that K.S.A. 1981 Supp. 8-1567(c), as amended by section 5, requires first-time offenders to be sentenced to not less than 48 hours imprisonment or 100 hours of public service, it can be anticipated that a larger number of persons will be performing such work in the future than at present, where only those in diversion programs are so engaged. Additionally, defendants may perform such work in lieu of paying their fine, as provided by subsection (g) of section 5.

In determining questions concerning the liability of a Kansas city for negligent acts, reference must be had to the Tort Claims Act, K.S.A. 1981 Supp. 75-6101 et seq. While the act recognizes (at K.S.A. 1981 Supp. 75-6103) that a city is liable for the negligent or wrongful acts or omissions of its employees, it contains a number of exceptions (at K.S.A. 1981 Supp. 75-6104). Therefore, it must first be determined whether individuals performing community service work in the above-mentioned situations are "employees" within the scope of the act, and, if so, whether any exceptions apply to them, thereby removing the city from liability.

The definition of "employee" found at K.S.A. 1981 Supp. 75-6102(d) is extremely broad in its scope, stating:

"Employee" means any officer, employee or servant or any member of a board, commission or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation, but such term shall not include an independent contractor under contract with a governmental entity. The term 'employee' shall include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity." (Emphasis added.)

As can be seen from the underscored portions above, the statute applies even to those individuals who work without pay and who do not have a formal employee-employer relationship with the city. The use of the term "servant" is of particular importance in light of established law on the subject of master-servant relationships.

General rules describing the existence of such a relationship are set out in Atwell v. Maxwell Bridge Co., 196 Kan. 219, 224 (1966).

"[A] master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. (Evans v. Board of Education of Hays, 178 Kan. 275, 273, 234 P.2d 1068.) It is not the exercise of direction, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control. (Bowler v. Elmdale Developing Co., 185 Kan. 785, 787, 347 P.2d 391; Schroeder v. American Nat'l Bank, 154 Kan. 721, 121 P.2d 186; Davis v. Julian, 152 Kan. 749, 756, 107 P.2d 745.) The necessity of the control element was also recognized in Henderson v. Sutton's Food City, 191 Kan. 145, 379 P.2d 300."

From the above, it is evident that it is the right to control which is the most important aspect of the relationship, not the payment of compensation by the master. As it is the city which will control the tasks given to the defendants engaged in community service, as well as issuing them the necessary equipment and determining if the tasks have been satisfactorily completed, the right to control test would appear to be met.

Associated with the right to control in such a relationship is the liability of the master for the torts of the servant while the latter is acting within the scope of his or her assigned duties. As stated in Hall v. Atchison, Topeka and Santa Fe Railway Company, 349 F. Supp. 326 (D. Kan. 1972):

"The doctrine of respondent superior is predicated upon the master-servant relationship. The vicarious liability of the master is not based upon the knowledge or lack of knowledge of a third party concerning that relationship but upon the relationship itself." 349 F.Supp. at 329.

An instructive, though by no means exhaustive, discussion of the scope of authority concept is found in Hollinger v. Stormont Hospital and Training School for Nurses, 2 Kan.App.2d 302, 311-12 (1978):

"An employee is acting within the scope of his authority when he is performing services for which he has been employed or when he is doing anything which is reasonably incidental to his employment. The test is not necessarily whether the conduct was expressly authorized or forbidden by the employer, but whether such conduct should have been fairly foreseen from the nature of the employment and the duties relating to it. The liability of an employer for the acts of his employee depends not upon whether the injurious act of the employee was willful and intentional or was unintentional, but upon whether the employee, when he did the wrong, was acting in the prosecution of the employer's business and within the scope of his authority or had stepped aside from that business and had done an individual wrong."

Having determined that a participant in community service programs under order of the court or prosecuting attorney is a servant of the city and hence an employee for purposes of the Tort Claims Act, it remains to be determined whether any of the exceptions of K.S.A. 1981 Supp. 75-6104 apply. In examining the exceptions set forth therein, it is our opinion that none would apply to the city, which receives benefits from the work performed. While we would reaffirm with the conclusion of Attorney General Opinion No. 81-222 that the judge prescribing such service hours is performing a judicial function [and so is exempt under subsection (b)], no other exemption in the lengthy list appears to apply to the city for whose benefit the work is done.

You further inquire whether a city could, through the use of a waiver or release form, protect itself from liability. In our opinion, such a procedure is not available to a city. We base this conclusion on the belief that the intent of the Act was to place cities and other units of government in the same position vis-a-vis liability for negligent acts as private employers, thereby codifying the demise of governmental immunity that was begun earlier by Gorrell v. City of Parsons, 223 Kan. 645 (1973). At K.S.A. 1981 Supp. 75-6103(a), it is stated:

"Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

A private employer's efforts to protect itself from liability through the completion of a release or waiver by its employees has been held to violate public policy, both as expressed by the common law (53 Am.Jur.2d Master & Servant, §157) and by statute [Atchison, T. & S.F. Ry. Co. v. Fronk, 74 Kan. 519 (1906)]. Accordingly, a city's efforts toward the same end would likewise be without effect.

In the situation where a person performing community service work is himself injured, liability of a city would be heavily dependent on the particular facts and circumstances. This subject was discussed in Murphy v. Owens-Corning Fiberglass Corp., 447 F. Supp. 557, 561 (D. Kan. 1977):

"Under Kansas law, there is no question but that an employer has a duty not to expose his employees to perils and dangers against which the employer may guard by the exercise of reasonable care, and that a part of this duty is to furnish a reasonably safe place in which to work. E.g., Taylor v. Hostetler, 186 Kan. 788, 352 P.2d 1042 (1960); Fishburn v. International Harvester Co., 157 Kan. 43, 138 P.2d 471 (1943). It is equally clear, however, that a master is not an insurer against all injuries which his servants may suffer in the discharge of their duties. E.g., Uhlrig v. Shortt, 194 Kan. 68, 397 P.2d 321 (1964); Blackmore v. Auer, 187 Kan. 434, 357 P.2d 765 (1960). The Kansas Supreme Court has reiterated time and time again the legal axiom that an employer's duty to furnish safe working conditions is not absolute and that an employee's recovery for breach thereof is dependent upon proof of negligence. In Allen v. Shell Petroleum Corp., 146 Kan. 67, 68 P.2d 651 (1937), the Kansas Supreme Court formulated the test of employer negligence as follows:

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"The master is not required to furnish the best, the safest, or the newest appliances or methods of operation, nor to adopt extraordinary or unusual safeguards against risks and dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances, and methods. The test of his discharge of this duty is the exercise of ordinary care to supply such places, appliances, and methods as persons of ordinary intelligence and prudence commonly furnish in like circumstances."

Accordingly, it would be mere speculation on our part to say whether liability would attach in any individual situation. The potential for liability does, however, exist.

For your final inquiry, you ask what the effect of 1982 Senate Bill No. 699 will be on city ordinances which are modeled on K.S.A. 1981 Supp. 3-1567 as it now reads. In that this question has been dealt with in an opinion issued simultaneously with this one, we are attaching a copy for your reference rather than repeating our conclusions here.

In conclusion, Section 10 of 1982 Senate Bill No. 699 establishes a state alcohol and drug safety action program, which is funded through the assessment of an \$85 fine against any person who is convicted of, pleads nolo contendere to, or participates in, a diversion program stemming from a violation of K.S.A. 1981 Supp. 8-1567. As subsection (n) of the statute (contained in Section 5 of the bill) provides that a city ordinance on this subject must contain minimum penalties equal to those of the statute, the fee must be assessed against the above three groups of persons in municipal court, as well as in district court, proceedings.

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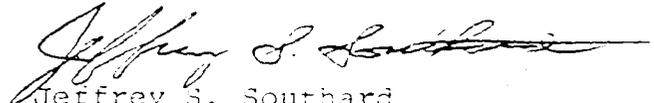
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et seq., creating the potential for tort liability for damages caused by the individual's negligent or wrongful acts or omissions.

Very truly yours,



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