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October 15, 1985

ATTORNEY GENERAL OPINION NO. 85- 141

Louis James  
Larned City Attorney  
P.O. Box 330  
Larned, Kansas 67550

Re: State Departments; Public Officers, Employees--  
Public Officers and Employees--Prohibition on  
Certain Contracts

Synopsis: K.S.A. 75-4304(a) prohibits public officers (which includes city council members) from making or participating in the making of contracts in which they have a substantial interest, but would not preclude a council member from voting on a motion concerning the payment of attorneys fees incurred by the council member in a civil action. However, under common law conflict of interest principles recognized in this state, a city council member is disqualified from making or voting on such a motion. Cited herein: K.S.A. 75-4301; 75-4304.

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Dear Mr. James:

As Larned City Attorney, you request our opinion as to whether a council member of the City of Larned may make or vote on a motion to pay attorneys fees incurred by that council member in a civil action against the city and the council member in his or her individual capacity.

Initially, we note that there appear to be no Kansas statutes which speak to this issue. General conflict of interest statutes exist for public officials at K.S.A. 75-4301 et seq., and include within their scope city council members. K.S.A. 75-4301. However, the prohibitions found in K.S.A. 75-4304(a) deal with the making of contracts with businesses which employ the public official or in which he or she has a substantial interest. The payment of legal fees for services which have already been rendered does not fall under the scope of this language. Accordingly, it is necessary to look to common law principles in resolving this question.

In Anderson v. City of Parsons, 209 Kan. 337 (1972), the Kansas Supreme Court considered the subject of common law conflict of interest. The court stated as follows:

"We, of course, recognize the common law principle that a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public." 209 Kan. at 341.

The court further stated that it adhered "to the rule that members of a public board are disqualified to vote as such on proposals on which they have a prime interest adverse to the municipality they represent." (209 Kan. at 345). While the court indicated a majority vote need not be invalidated where the interest of the member is general or of a minor character, it held that "the vote of a council or board member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action." (209 Kan. at 342).

In our judgment, a council member clearly has an interest in a proposal to pay attorneys fees which he has incurred in a civil action, and that interest is not "general or of a minor character." Accordingly, under the Anderson case, it is our opinion that a city council member is disqualified from making or voting on a motion whereby the city would pay attorneys fees incurred by the council member in a civil action.

Additionally, we note that four council members and the mayor of Larned were sued for allegedly conspiring to violate the constitutional rights of the former city manager, and that the lawsuit was settled by the city's liability insurance carrier. See Attorney General Opinion No. 85-140. Where a conspiracy exists, it is possible that each conspirator has a personal

interest in insuring that his co-conspirators receive reimbursement of attorneys fees, and such an interest may disqualify all members of the conspiracy from making or voting on a motion for such reimbursement. The question of whether a conspiracy existed, thus resulting in a conflict of interest among all members of the conspiracy, can only be answered in the affirmative by a trier of fact, and the existence of such a conspiracy may not be presumed.

Very truly yours,

ROBERT T. STEPHAN  
Attorney General of Kansas

Terrence R. Hearshman  
Assistant Attorney General

RTS:JSS:TRH:jm