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ATTORNEY GENERAL OPINION NO. 85- 169

M. Leon Foster, President
Independence Community College
College Avenue & Brookside Drive
Independence, Kansas 67301

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Conflict of
Interests -- Prohibition on Certain Contracts;
Community College Board of Trustees

Synopsis: A determination whether a member of a community college's board of trustees has a conflict of interest because of his or her affiliation with a business should be based on the general conflict of interest statutes, K.S.A. 75-4301 et seq. Where those statutes are inapplicable, the determination of a conflict of interest should be based on common law principles. Cited herein: K.S.A. 75-4301; 75-4304.

* * *

Dear Mr. Foster:

In your capacity as President of Independence Community College, you request legal guidelines that would assist members of the college's board of trustees to determine whether they may have a conflict of interest in certain situations. You advise that two trustees own local business firms that have had business dealings with the college, that one trustee is a medical doctor who may receive some student athlete fees, and that yet another has a son on the college teaching staff.

The general conflict of interest statutes for public officials are found in K.S.A. 75-4301 et seq. K.S.A. 75-4304(a) prohibits public officers (which term, as defined, would include members of the board of trustees) from making or "participating in the making of" contracts in which they have a "substantial interest." This latter term is defined in K.S.A. 75-4301 to include an individual's ownership of a legal or equitable interest exceeding \$5,000.00 or 5% of any business.

K.S.A. 75-4304(a) provides that a public officer does not make or participate in the making of a contract if he or she abstains from any action in regard to the contract. A recent advisory opinion from the Kansas Public Disclosure Commission indicates that a "line-item abstention" would be appropriate in such circumstances. (See Opinion 85-16, copy enclosed.) Accordingly, the two trustees who own local business firms should abstain from any and all board action concerning the college's contracts with those businesses.

The general conflict of interest statutes do not include within their scope the receipt of medical fees or the existence of a familial relationship. Accordingly, it is necessary to look to common law principles in resolving these questions. The general common law rule states that a conflict of interest exists if an administrative official votes on a matter in which he has a personal, direct and pecuniary interest. 63 Am.Jur.2d, Public Officers and Employees, §322; Opinion of the Justices, 183 A.2d 909, 912 (N.H. 1962). The term "conflict of interest," when it is used to suggest disqualification of a public official for performing his sworn duty, refers to a clash between the public interest and the private pecuniary interest of the individual concerned. Gardner v. Nashville Housing Authority, 514 F.2d 38, 41 (6th Cir. 1975).

The Kansas Supreme Court has recognized 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." Anderson v. City of Parsons, 209 Kan. 337, 341 (1972).

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 public entity they represent. (209 Kan. at 345). However, the court found that the rule should not apply to disqualify any of the city commissioners or urban renewal commissioners who owned property within the general urban renewal area but not included in the specific urban renewal project under consideration. The court noted that the common law does not forbid the holding of an office and exercising powers thereunder because of a possibility of a future conflict of interest. (209 Kan. at 341-42.)

Similarly, in City of Topeka v. Huntoon, 46 Kan. 634 (1891), the court recognized the common law rule that members of an administrative board are disqualified to vote on propositions in which they have a "direct pecuniary interest adverse" to the public body they represent (46 Kan. at 653). However, the court found no such conflict of interest where a city councilman voted on the establishment of a sewer district which would include and exclude some of his property.

As was stated in Anderson:

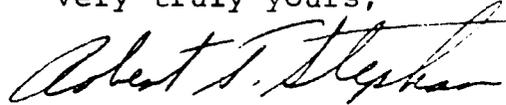
"[t]he difficult problem which is often presented in conflict of interest cases is in determining whether or not the personal interest of the commissioner or board member is of a nature justifying disqualification to act. Usually this is a question to be determined under the peculiar facts and circumstances of the particular case presented to the court for determination." 209 Kan. at 342.

In our judgment, a trustee who collects fees from student athlete charges would have a direct pecuniary interest in any proposal to increase or alter those medical fees. Accordingly, he should abstain from participation in any board action concerning such a proposal. However, a trustee whose son teaches at the college would not, merely by virtue of that relationship, appear to have a direct pecuniary interest in a proposal concerning the terms and conditions of his son's employment.

When the members of the board of trustees are placed in a situation which may be viewed as a conflict of interest, those members should first determine, perhaps with the advice of the

college's legal counsel, whether their decision falls within the general conflict of interest statutes. If those statutes are inapplicable, the board members should then, in reliance upon common law principles, determine whether they have a direct pecuniary interest which is not of a general or minor character and which is adverse to that of the public they seek to represent.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL



Kathryn Gardner
Assistant Attorney General

RTS:JSS:KG:crw