



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 61

Larry E. Wolgast, Ed.D.
Secretary
Department of Human Resources
401 S.W. Topeka Avenue
Topeka, Kansas 66603

Re: State Departments; Public Officers and Employees--
Kansas Tort Claims Act--Application to Kansas
Boiler Advisory Board

State Departments; Public Officers and Employees--
Department of Human Resources--Creation of
Advisory Boards

Synopsis: The Kansas Boiler Advisory Board was created pursuant to K.S.A. 75-5724 which authorizes the secretary of human resources, with the approval of the governor, to create advisory boards. Such boards are "within the department of human resources as a part thereof." Accordingly, for purposes of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., the members of the board are "employees" of a governmental entity, and so are covered by the provisions thereof. Cited herein: K.S.A. 75-5724; 75-6101; 75-6102; 75-6103; 75-6104; 75-6109.

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Dear Secretary Wolgast:

You have requested the opinion of this office regarding the application of the Kansas Tort Claims Act, K.S.A. 75-6101 et

seq., to the Kansas Boiler Advisory Board. Concerns have been raised by board members as to their potential for tort liability in the implementation of the Kansas Boiler Rules and Regulations.

The Kansas Boiler Advisory Board was created pursuant to K.S.A. 75-5724 which provides, in part, as follows:

"The secretary of human resources may create advisory boards, commissions or committees with the approval of the governor, and members of any such board, commission or committee shall be appointed by the secretary. Any such advisory board, commission or committee so created shall be within the department of human resources as a part thereof. Such advisory boards, commissions or committees shall consult with and advise the secretary with reference to the management, control and operation of any programs under the jurisdiction of the department or with reference to any law administered by the department or any division thereof." (Emphasis added.)

We are told that the advice rendered by this board is considered by the secretary in determining whether boiler products and facilities meet the safety standards required by law. The members of the board are not paid for their services.

The Kansas Tort Claims Act was enacted to make governmental liability the rule for negligent acts or omissions, and immunity the exception. K.S.A. 75-6103 imposes liability on governmental entities for the negligent or wrongful acts or omissions of employees acting within the scope of their employment. K.S.A. 75-6109 provides further that the governmental entity is liable, and shall indemnify its employees against damages caused by the employee while acting within this scope of employment.

The definitional section of the act, K.S.A. 75-6102, states in pertinent part:

"As used in K.S.A. 75-6101 through 75-6118, and amendments thereto, unless the context clearly requires otherwise:

"(a) 'State' means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

. . . .

"(c) 'Governmental entity' means state or municipality.

"(d) 'Employee' means any officer, employee, servant or member of a board, commission, committee, division, department, branch 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." (Emphasis added.)

Given that K.S.A. 75-5724 provides that the advisory boards created thereunder "shall be within the department of human resources as a part thereof," that the Kansas Boiler Advisory Board was created pursuant to K.S.A. 75-5724 and that the department of human resources is a state agency, it is clear that the members of the Kansas Boiler Advisory Board are "employees" for purposes of the act. This result is not changed by the fact that the board members are not paid for their services because the definition clearly includes members of boards and persons acting on behalf of a governmental entity in an official capacity, with or without compensation. Therefore, members of the Boiler Advisory Board are to be indemnified by the department of human resources for damages caused by board members while acting within their scope of employment.

Though the activities of the Boiler Advisory Board fall within the Tort Claims Act, it is possible that a court may determine its functions to be excepted from liability pursuant to K.S.A. 75-6104. That statute provides, in part:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . . .

"(b) judicial function;

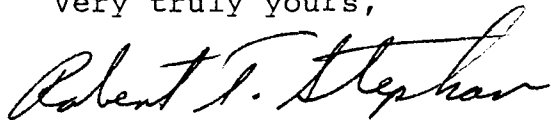
"(c) enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution;

"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused; . . ."

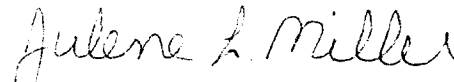
If the board's functions are found to fall within one of the exceptions from liability, then neither the board member or the governmental entity would be held responsible for acts or omissions of a board member acting within the scope of his employment.

In conclusion, the Kansas Boiler Advisory Board was created pursuant to K.S.A. 75-5724 which authorizes the secretary of human resources, with the approval of the governor, to create advisory boards. Such boards are "within the department of human resources as a part thereof." Accordingly, for purposes of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., the members of the board are "employees" of a governmental entity, and so are covered by the provisions thereof.

Very truly yours,



ROBERT T. STEPHAN
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