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ATTORNEY GENERAL OPINION NO. 86- 129

The Honorable Marvin Wm. Barkis
State Representative, Fifteenth District
Route 2, Box 150
Louisburg, Kansas 66053

Re: Labor and Industries--Eight Hour Day on Public
Work--Enforcement of K.S.A. 44-201 et seq.

Synopsis: While the Kansas Supreme Court has not specifically precluded the use of criminal sanctions to enforce the eight-hour work day regulations found at K.S.A. 44-201 et seq., it has precluded that option for purposes of enforcing the wage rate provisions of the act. The court has indicated a preference for civil, as opposed to criminal, methods of enforcement for the eight-hour work day provisions as well. If it is a public official who is in violation of K.S.A. 44-201 et seq., an action in mandamus may be brought to enforce the act's provisions, though only by reference of the attorney general or county attorney, or by any citizen with a specific interest or right distinct from that of the general public. If a contractor is violating the statutes, a laborer might be able to enforce those statutes through mandatory injunction or a suit on the contract as third party beneficiary. The Kansas Department of Human Resources has no jurisdiction to adjudicate wage claims based on violations of K.S.A. 44-201 et seq. Cited herein: K.S.A. 44-201; 44-202; 44-203; 44-204; 44-205; 75-6101; 75-6104.

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Dear Representative Barkis:

You request our opinion regarding the enforceability of K.S.A. 44-201. This statute is one of five which attempt to set forth and regulate the state's policy of eight-hour work days and prevalent rate of pay for individuals performing public work. K.S.A. 44-201, 44-203 and 44-204 provide the standards to be followed, while K.S.A. 44-202 and 44-205 provide penalties for violations of those standards.

The parts of these statutes pertinent to our discussion appear as follows:

"Eight hours shall constitute a day's work for all laborers or other persons employed by or on behalf of the state of Kansas or any municipality of said state, except in cases of extraordinary emergency which may arise, in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life. . . . Not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers or other persons so employed. . . .

"And laborers and other persons employed by contractors or subcontractors in the execution of any contract or contracts with the state of Kansas or any municipality thereof shall be deemed to be employed by or on behalf of the state or such municipality so far as the hours of work and compensation herein provided are concerned.

"That the contracts hereafter made by or on behalf of the state of Kansas or by or on behalf of any county, city, township or other municipality of said state with any corporation, person or persons which may involve the employment of laborers, workmen or mechanics, shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor or other person doing or contracting to do the whole or a part of

the work contemplated by the contract shall be permitted or required to work more than eight (8) hours in any one calendar day except in cases of extraordinary emergency (as defined in this act); such contract shall contain a provision that each laborer, workman or mechanic employed by such contractor, subcontractor or other person about or upon such public work shall be paid the wages herein provided: . . ." K.S.A. 44-201.

(K.S.A. 44-203 and 44-204 contain virtually the same provisions as those found in K.S.A. 44-201).

"That any officer of the state of Kansas, or of any county, city, township or municipality of said state, or any person acting under or for such officer, or any contractor with the state of Kansas, or any county, city, township or other municipality thereof, or other person violating any of the provisions of this act, shall for each offense be punished by a fine of not less than \$50 nor more than \$1,000, or by imprisonment not more than six months, or both fine and imprisonment, in the discretion of the court." K.S.A. 44-205.

(The provisions of K.S.A. 44-202 are contained within the provisions of K.S.A. 44-205.)

At first blush, because of the criminal sanctions contained in K.S.A. 44-202 and 44-205, it may appear that the legislature envisioned enforcement of K.S.A. 44-201 et seq. by the state. This possibility was eliminated, however, by the Kansas Supreme Court in State v. Blaser, 138 Kan. 447 (1933), at least insofar as the wage standards are concerned. The court in Blaser held, in part, as follows:

"[F]irst, that the provision in the statute to the effect that the contractor should not pay less than the current rate of per diem wages was not designed or intended by the legislature to form the basis of a criminal prosecution, but that

its purpose was to form the basis of determining civil liability which might grow out of the relations of the parties, [and] second, if it were intended to form the basis of criminal liability, it is void for uncertainty, under the authority of Connally v. General Const. Co., [269 U.S. 385, 46 S.Ct. 126, 70 L.Ed.2d 322 (1926)] . . ." Id. at 456. See also Anderson Constr. Co. v. Weltmer, 224 Kan. 191, 193 (1978).

The court confined its holding to the provision dealing with contractors, however, the opinion also discussed the application of K.S.A. 44-201 to contractors "or others" (138 Kan. at 450), which would include officers of the state or any municipality thereof. The same reasoning would appear to apply in either situation. The court did specifically narrow its opinion to the wage provision. Blaser, 138 Kan. at 454-455. The court has not since held the eight-hour work day provisions do not form the basis for criminal liability, but has indicated that civil remedies are preferable to penal. See Blaser, 138 Kan. 447; State v. Ottawa, 84 Kan. 100, 105 (1911). Further, all of the appellate court cases dealing with K.S.A. 44-201 et seq. subsequent to Blaser have been civil, rather than criminal, actions.

It is possible that the provisions of K.S.A. 44-201 et seq. may be enforced via a writ of mandamus, however the scope of that remedy has been limited by the Supreme Court of Kansas:

"The rule that private citizens without interest or rights distinct from those of other citizens cannot maintain an action in mandamus to compel public officials to perform their duty is well-established in this jurisdiction.

"Long ago in Bobbett v. State ex rel. Dresher, 10 Kan. 9, we held:

'Mandamus will not lie at the instance of a private citizen to compel the performance of a purely public duty.

'Such a suit must be brought in the name of the state, and the county attorney and the attorney general are the officers authorized to use the name of the state in legal proceedings to enforce the performance of public duties.

'Where a private citizen sues out a mandamus he must show an interest specific and peculiar in himself, and not one that he shares with the community in general.' (Syl. §§1, 2 and 3.)"

Dennis v. State Board of Barber Examiners, 174 Kan. 561, 563 (1953).

In Topeka Bldg. and Construction Trades Council v. Leahy, 187 Kan. 112 (1960), the court held that an unincorporated association composed of the unincorporated trade unions whose individual members were engaged in the building and construction trades in Shawnee County did not have standing to bring an action in mandamus to enforce K.S.A. 44-201 and 44-203 because the association had no special interest in any duties or rights provided in those statutes distinct from those of other private citizens. However, neither Leahy nor Dennis held that a citizen with an interest or right distinct from those of other citizens could not maintain mandamus to compel compliance with K.S.A. 44-201 et seq. Both cases indicate that mandamus is ordinarily to be brought by the state on relation of the attorney general or the county attorney, but neither denies the appropriateness of an action in mandamus brought by a private citizen with special interest in the matter. See Leahy, 187 Kan. at 114; Dennis, 174 Kan. at 563.

One of the problems with enforcement of K.S.A. 44-201 et seq. by mandamus occurs when the contractor has a contractual provision as required by the statutes but is not implementing it. The Court in Leahy, 187 Kan. 112, held, in addition to the fact that the plaintiffs in that case had no standing to maintain an action in mandamus, that the statutes do not provide for any plain legal duty which may be controlled by mandamus in that situation. An action in mandamus is brought to compel a public officer to perform an act which is mandated by law. Mandamus will not lie for the performance of an act involving discretion on the part of a public official. The court in Leahy found that the Fish

and Game Commission, the public official involved therein, had no mandatory duty to determine the contract was being violated by the contractor, and further, even if the Commission did find a violation, it had no mandatory duty to file suit. Both decisions were thus held to be discretionary and not controllable by mandamus. Leahy, 187 Kan. at 116.

In a situation such as that described above, where the contractor, rather than the public official, is violating the law, one possible alternative a laborer may have to compel the contractor to comply with K.S.A. 44-201 et seq. would be an action for mandatory injunction. "A mandatory injunction is an extraordinary remedial process resorted to usually for the purpose of effectuating full and complete justice, and commands the performance of some positive act." Prophet v. Builders, Inc., 204 Kan. 268, 273 (1969). However, the court has consistently held that:

"[a] mandatory injunction is rarely granted. The case must be an extreme one to authorize its issue. It is universally restricted to cases where a court of law cannot grant adequate relief, or where full compensation cannot be made in damages." Cave v. Henley, 125 Kan. 214, 218 (1928) [quoting from A.T. & S.F. Rld. Co. v. Long, 46 Kan. 701 (1891)].

"A party seeking a mandatory injunction must clearly be entitled to such decree before it will be rendered." Prophet, 204 Kan. at 273. See also Clawson v. Garrison, 3 Kan. App.2d 188, 195-196 (1979). Because the court has found the wage requirements of K.S.A. 44-201 et seq. to be somewhat indefinite, see State v. Blazer, 138 Kan. 447 (1933), an order of mandatory injunction to compel compliance with such requirements may be difficult to obtain.

A second possibility for enforcement in this particular situation is an action in common law contract brought by the laborer as a third party beneficiary. The contract entered into by the state or municipality and the contractor is to provide for compliance with K.S.A. 44-201 et seq. This contractual agreement might be argued to be in part for the benefit of the laborers, etc. working for the contractor on the public project. Thus, a laborer might be able to argue that he or she stands as a third party or creditor beneficiary of the contract.

We should note that an action in tort against a public official for damages resulting from violations of K.S.A. 44-201 et seq. would appear to be precluded by the Kansas tort claims act, K.S.A. 75-6101 et seq., which provides:

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

"(c) enforcement of or failure to enforce a law. . . ." K.S.A. 75-6104.

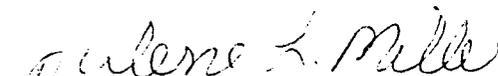
Finally, you correctly point out that the Kansas Department of Human Resources has no authority to investigate and adjudicate wage claims arising under K.S.A. 44-201 et seq. R.D. Anderson Constr. Co. v. Kansas Dept. of Human Resources, 7 Kan. App.2d 453 (1982).

In conclusion, while the Kansas Supreme Court has not specifically precluded the use of criminal sanctions to enforce the eight-hour work day regulations found at K.S.A. 44-201 et seq., it has precluded that option for purposes of enforcing the wage rate provisions of the act. The court has indicated a preference for civil, as opposed to criminal, methods of enforcement for the eight-hour work day provisions as well. If it is a public official who is in violation of K.S.A. 44-201 et seq., an action in mandamus may be brought to enforce the act's provisions, though only by reference of the attorney general or county attorney, or by any citizen with a specific interest or right distinct from that of the general public. If a contractor is violating the statutes, a laborer might be able to enforce those statutes through mandatory injunction or a suit on the contract as third party beneficiary. The Kansas Department of Human Resources has no jurisdiction to adjudicate wage claims based on violations of K.S.A. 44-201 et seq.

Very truly yours,



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Julene L. Miller
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