



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 155

Charles J. Schwartz, Secretary
Kansas Department of Economic Development
400 West 8th, 5th Floor
Topeka, Kansas 66603

Re: State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Liability of Personnel of
Quasi-Public Corporations

Synopsis: Under provisions of the Kansas Tort Claims Act,
K.S.A. 75-6101 et seq., a member of the Board
of Directors of the Kansas Technology Enterprise
Corporation will, upon proper request, be provided
with legal representation in, and will not be
personally liable for judgments resulting from,
lawsuits in which the member has acted within the
scope of his employment. Cited herein: K.S.A.
68-2003; 75-3223; 75-6101; 75-6102; 75-6103;
75-6104; 75-6108; 75-6109; L. 1986, ch. 284.

* * *

Dear Secretary Schwartz:

You have requested an opinion on an issue concerning the
Kansas Tort Claims Act. Specifically, you inquire concerning
the status of members of the newly-formed Kansas Technology
Enterprise Corporation (hereafter referred to as KTEC) under
the Kansas Tort Claims Act, K.S.A. 75-6101 et seq.

The Board of Directors of the KTEC was established by L. 1986, ch. 284, §4 as the governing body. The board consists of the governor, or at his discretion, the secretary of commerce; four members of the legislature; and ten members appointed by the governor subject to senate approval. The board is granted the power, among other things, to hire a corporate president, transact corporate business, and receive compensation and expenses as provided in K.S.A. 75-3223, and amendments thereto.

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.)

Accordingly, under K.S.A. 75-6102(d), a member of the KTEC Board of Directors would be included within the term "employee" under the Kansas Tort Claims Act provided that such person was "acting on behalf or in service of a governmental entity." Thus, for determining the status of KTEC board members, the essential issue is whether the Kansas Technology Enterprise Corporation is a "private" or "public" entity.

The Kansas Technology Enterprise Corporation is created by L. 1986, ch. 284, which provides in pertinent part thus:

"There is hereby created a body politic and corporate to be known as the Kansas technology enterprise corporation. The Kansas technology enterprise corporation is hereby constituted a public instrumentality and the exercise of the authority and powers conferred by this act shall be deemed and held to be the performance of an essential governmental function." (Emphasis added.)

Though the KTEC, by this same law, has the ability to sue and be sued; make contracts; acquire, own, hold, dispose of and encumber real or personal property; borrow money and give guaranties and be exempted from all franchise, corporate business and income taxes levied by the state, we cannot escape the realization that this law attaches the KTEC to the state.

Furthermore, we are told the language creating the KTEC was lifted directly from K.S.A. 68-2003, creating the Kansas turnpike authority. Finding that true and that the courts have consistently held the Kansas turnpike authority to be "an arm or agency of the state, created by the legislature to perform an essential governmental function," [See Woods v. Kansas Turnpike Authority, 205 Kan. 770 (1970); Miller v. Kansas Turnpike Authority, 193 Kan. 18 (1964); Hosterman v. Kansas Turnpike Authority, 183 Kan. 590(1958); Anderson Cattle Co. v. Kansas Turnpike Authority, 180 Kan. 749 (1957); Pennington v. Kansas Turnpike Authority, 180 Kan. 638 (1957); State, ex rel., v. Kansas Turnpike Authority 176 Kan. 683 (1954)], our determination of KTEC's status is in harmony with past judicial determinations.

It is possible that a court may determine the KTEC's 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:

. . . .

"(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.

K.S.A. 75-6108(a) establishes (with four exceptions) that legal representation shall be provided to an employee, upon proper request, when he has acted within the scope of his employment, either in his official or individual capacity. As per K.S.A. 75-6102(d), this encompasses any action on behalf of or in the service of a governmental entity in any official capacity including participation of boards or commissions. It is important to note that a governmental entity will not be liable for punitive or exemplary damages. See K.S.A. 75-6109.

Legal representation by the state is initiated by the employee who has been sued. K.S.A. 75-6108(e) provides that an employee must make a request for legal defense to the attorney general (if a state employee) or the governing body of the municipality (if an employee thereof) within fifteen (15) days after being served with process. Subject to exceptions in K.S.A. 75-6108(c), such a request will result in the state or municipality providing a defense to the claim. If the request is not made within the fifteen day time period, it is at the discretion of the attorney general or governing body to decide if such representation should be provided.

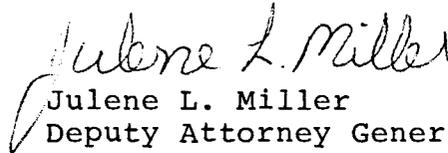
The state may decline to provide defense counsel if the KTEC or this office determines that the acts or circumstances fall under one of the exceptions listed in K.S.A. 75-6108(c). However, an employee retains the right to petition the court to compel a governmental entity to provide legal defense.

In summary, a member of the Board of Directors of the Kansas Technology Enterprise Corporation will be afforded protection from personal liability and legal representation under the Kansas Tort Claims Act as long as such member falls within the reach of the term "employee," as defined by K.S.A. 75-6102(d), and has acted within the scope of his employment pursuant to K.S.A. 75-6103(a).

Very truly yours,



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RTS:JLM:crw