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ATTORNEY GENERAL OPINION NO. 87- 110

Charles V. Hamm
Special Assistant to the Secretary
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620

Re: Public Health--Maternity Hospitals or Homes and
Homes for Children--Attorney General Opinion No.
86-163

Synopsis: The Kansas Department of Health and Environment
does not violate the due process rights of an
employee suspected of child abuse when it issues an
emergency order suspending a day care facility's
license, even though such action may result in the
employee being terminated from employment. Cited
herein: K.S.A. 38-1523(e); 65-504(d); 65-516, as
amended by L. 1987, ch. 233, § 1; 65-524

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Dear Mr. Hamm:

As Special Assistant to the Secretary of the Department of
Health and Environment, you request our opinion regarding due
process. Specifically, you ask whether, in light of Attorney
General Opinion No. 86-163, the Kansas Department of Health
and Environment (KDHE) violates the due process rights of an
employee suspected of child abuse when it issues an emergency
order suspending a day care facility's license when that
action results in the employee being terminated from
employment. You explain the situation as follows:

"K.S.A. 65-524 authorizes the Secretary to:

'[S]uspend any license, certificate of registration, or temporary permit issued under K.S.A. 65-501 to 65-522, inclusive, and amendments thereto prior to any hearing when, in the opinion of the secretary, the action is necessary to protect any child in the boarding home for children or family day care home from physical or mental abuse, abandonment or any other substantial threat to health or safety. . . .'

"K.S.A. 38-1523(e) requires the Department of Social and Rehabilitation Services (SRS) to promptly report to KDHE 'any investigation involving a facility subject to licensing or regulation by the secretary of health and environment.'

"If, after reviewing SRS's investigation report, the Secretary determines that the presence in the day care facility of an employee who is suspected of child abuse poses a substantial threat to the health and safety of children in the licensee's care, an order is issued immediately suspending the license. The day care home provider is at this point faced with the option of discharging or suspending the employee or lose[ing] its license. In other words, an employee could be fired from his/her employment based on an investigation and prior to being given notice and an opportunity to be heard."

In our opinion, the scenario you describe is distinguishable from that discussed in Attorney General Opinion No. 86-163. In that case, "validated" individuals were automatically excluded from employment at these types of homes pursuant to K.S.A. 65-516. That is, the licensee had no choice but to fire the individual upon learning that the individual had been validated. Failure to do so would have been in direct violation of the statute, and would have subjected the licensee to license revocation pursuant to K.S.A. 65-504(d).

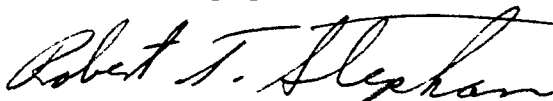
In the instant case, however, a suspension order is issued in order to protect the child or children from possible harm. The licensee is afforded due process after the suspension, pursuant to the emergency adjudicative proceedings of the Kansas administrative procedure act. At this point, the licensee merely needs to show that the danger no longer

exists. This end may be accomplished through many means. For instance, the employee could be given a leave of absence until such time as SRS concludes its investigation. Or, as an alternative, if the licensee believes that the employee does pose a threat to the safety of those children at the facility, the licensee could fire the employee for cause. In either case, the action affecting the employee is at the hands of the licensee, not the State.

The due process rights of the employee do not attach unless and until the employee is validated by SRS and then is subsequently fired. Validation consists of SRS placing the alleged perpetrator's name in a registry as a child abuser. This registry is shared by government agencies for a variety of purposes. Validation in conjunction with termination is sufficient to pass the "stigma-plus" test, as discussed in Paul v. Davis, 424 U.S. 693 (1976), thereby necessitating that due process rights are afforded before validation. See Attorney General Opinion No. 86-163. The first of these two components, state action creating a stigma, is not present in the situation you describe. To help insure that this is so, any emergency hearing conducted by KDHE to temporarily suspend a license should be conducted in a fashion consistent with the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., yet affording the individual employee sufficient privacy.

In conclusion, the Department of Health and Environment does not violate the due process rights of an employee suspected of child abuse when it issues an emergency order suspending a day care facility's license, even if that action results in the employee being terminated from employment.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm