



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE (913) 296-2215  
CONSUMER PROTECTION 296-3751

ATTORNEY GENERAL OPINION NO. 88- 154

David E. Retter  
Concordia City Attorney  
213 West Sixth  
P.O. Box 676  
Concordia, Kansas 66901

Re: Procedure, Civil--Quo Warranto--Grounds for  
Forfeiture of Public Office

Elections--Recall of Elected Officials--Grounds for  
Recall

Synopsis: The willful neglect of duty or misconduct by a member of a governing body in authorizing improper expenditures from a restricted fund may constitute grounds for ouster pursuant to K.S.A. 60-1205. Such neglect of duty or misconduct may also be grounds for recall under the provisions of K.S.A. 1987 Supp. 25-4302. Cited herein: K.S.A. 12-1617i; K.S.A. 1987 Supp. 25-4302; K.S.A. 60-1205; Kan. Const., Art. 11, §5.

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Dear Mr. Retter:

You request our opinion concerning the use of public funds in a restricted fund. Specifically, you ask whether a member of a governing body who votes to authorize improper expenditures from a restricted fund is subject to ouster (K.S.A. 60-1205) and recall (K.S.A. 1987 Supp. 25-4302).

As you indicate, a fund can become restricted through constitutional provision (see e.g., article 11, section 5 of the Kansas Constitution), statutory provision (see e.g., K.S.A. 12-1617i), or ordinance of a local unit of government. Grounds for ouster are set forth in K.S.A. 60-1205, which statute provides as follows:

"Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, except those subject to removal from office only by impeachment, who shall (1) willfully misconduct himself or herself in office, (2) willfully neglect to perform any duty enjoined upon him or her by law, or (3) who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit his or her office and shall be ousted from such office in the manner hereinafter provided."

Grounds for recall are prescribed by K.S.A. 1987 Supp. 25-4302:

"Grounds for recall are conviction of a felony, misconduct in office, incompetence or failure to perform duties prescribed by law. The county or district attorney of the county where petitions are required to be filed shall determine the sufficiency of the grounds stated in the petition for recall of a local officer. In the case of a recall of the county or district attorney, a judge of the district court of such county shall designate an attorney to determine the sufficiency of the grounds stated in the petition for recall. Such attorney shall perform the duties imposed on the county or district attorney in the recall of other local officers. No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application, or petition by which the submission was procured."

As is readily apparent, misconduct and failure to perform duties prescribed by law are grounds for either ouster or

recall, with the ouster statute requiring that the misconduct or neglect of duty be "willful." Concerning neglect of duty as a ground for ouster, in State v. Kennedy, 82 Kan. 373 (1910), the Kansas Supreme Court stated as follows:

"It is not every oversight or omission within the strict letter of the law which will entail forfeiture of office. The statute must be interpreted in the light of the mischief it was intended to remedy . . . the purpose was to prevent persons from continuing to hold office whose inattention to duty, either because of its habitualness or gravity, endangers the public welfare. Therefore, the neglect contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of the public interests is threatened." 82 Kan. at 386.

In regard to misconduct as a ground for ouster, in Farmer v. Rutherford, 136 Kan. 298 (1932), the court stated that "an act done by a public officer in direct violation of a statute regulating his official duties is official misconduct within the terms of his bond." 136 Kan. at 305. Additionally, when an officer acts in direct violation of a statute regulating his official duties, the court has indicated that confusion arising out of a misunderstanding of the statute will not be a defense in an ouster action. State, ex rel. v. Robinson, 193 Kan. 480, 488 (1964). However, good faith is to be taken into account in an ouster action:

"The act providing for the removal of unfaithful public officers was not designed as a pitfall into which an honest and sincere public official might be plunged if he unintentionally erred in the discharge of his official duty . . . in the State v. Trinkle, 70 Kan. 396, 402, 78 Pac. 854, in which the state sought the removal of a county attorney for non-enforcement of the prohibitory law, it was said that the distinguishing characteristic of every official act must be genuine good faith, and that the law

presumes that a public official thus conducts himself, and that 'the burden rests upon the state to show the contrary to be true, by a preponderance of the evidence.'" State, ex rel. v. Foley, 107 Kan. 608, 614 (1920).

In regard to recall, it has been held that misconduct is "any unlawful behavior by a public officer in relation to the duties of his office, willful in character." Unger v. Horn, 240 Kan. 740, 743 (1987).

Applying the rules laid in the above-quoted cases to the question you pose, it is clear that constitutional or statutory provisions restricting the use of moneys in a public fund regulate the official duties of officers controlling the fund, and that violation of such constitutional or statutory restrictions constitutes unlawful behavior by a public officer in relation to the duties of his office. Accordingly, it is our opinion that the willful neglect of duty or misconduct by a member of governing body in authorizing improper expenditures from a restricted fund may constitute grounds for ouster pursuant to K.S.A. 60-1205. Such neglect of duty or misconduct may also be grounds for recall under the provisions of K.S.A. 1987 Supp. 25-4302.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

RTS:JLM:TRH:jm