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ATTORNEY GENERAL OPINION NO. 90- 73

Mr. Gary Hall, President
State Board of Agriculture
109 S.W. 9th
Topeka, Kansas 66612-1280

Re: State Boards, Commissions and Authorities--State
Board of Agriculture--Secretary; Leave of Absence

Synopsis: The decision to approve the secretary of agriculture's leave of absence lies within the discretion of the board of agriculture. In our opinion service as a White House Fellow presents circumstances that overcome the presumption that employment outside the state is insufficient reason for approval of a leave of absence. Additionally, the board has the implied power to appoint an acting secretary to serve during the secretary's leave of absence. Cited herein: K.S.A. 1989 Supp. 74-503; K.S.A. 75-2949; 75-3149; 75-4315b.

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Dear Mr. Hall:

As President of the State Board of Agriculture you inquire whether the secretary of agriculture may be granted a leave of absence. You also inquire whether an acting secretary can be appointed during the leave of absence.

You indicate that the secretary of agriculture (hereinafter secretary) has accepted an appointment as a White House Fellow commencing September 1, 1990 through August 31, 1991. As a White House Fellow, he will be working with the current

administration, gaining insights into governmental processes and agency policies in the federal government which will ultimately prove quite beneficial to the State of Kansas.

Permanent employees in the classified service of the state may be granted a leave of absence for a period of up to one year pursuant to K.A.R. 1-9-6. The secretary holds an unclassified position, K.S.A. 75-3149, but Executive Order 85-84 issued by the governor's office October 4, 1985 makes subsections (a), (e), (f) and (h) of K.A.R. 1-9-6 applicable to employees in the unclassified service. Pertinent to our question are subsections (a) and (e) which state:

"(a) Requests for leave without pay shall be made to the appointing authority in such form and at such time as prescribed by the appointing authority. The appointing authority shall determine whether approval of each request is for the good of the service, and shall approve or disapprove the request. The appointing authority may require use of accumulated vacation leave and compensatory time credits, and if appropriate, accumulated sick leave, before approval of leave without pay.

. . . .

"(e) Desire of an employee to accept employment not in the state service shall be considered by the appointing authority as insufficient reason for approval of a leave of absence without pay, except under unusual circumstances." (Emphasis added).

The issue is thus whether the secretary's absence from the state service to serve as a White House Fellow is "for the good of the service" and whether it provides circumstances unusual enough to overcome the presumption that employment outside the state service is insufficient reason for approval of a leave of absence.

Our courts have not construed the standard "for the good of the service" found in K.A.R. 1-9-6. However, our Court of Appeals has construed the phrase "for the good of the service" in K.S.A. 75-2949, the civil service act provision dealing with disciplinary matters. The phrase was interpreted to mean

"for cause," wherein the cause must relate to and affect the administration of the office. Swezey v. State Department of Social and Rehabilitation Services, 1 Kan.App.2d 94, 99 (1977), citing with approval 63 Am.Jur.2d Public Officers and Employees § 202 (1971), now in Am.Jur.2d Revised 63A Am.Jur.2d Public Officers and Employees § 239 (1984). Since the regulation in question and the statute in Swezey deal with matters regarding personnel in the civil service, application of the court's construction of the phrase seems appropriate. Thus if service as a White House Fellow relates to and beneficially affects the administration of the office of secretary of agriculture, the standard has been met. Furthermore meeting this standard may also provide circumstances unusual enough to overcome the presumption in subsection (e).

The White House Fellowship program, established by President Lyndon B. Johnson in October, 1964, recruits individuals that exhibit a high level of achievement early in their chosen careers or professions, demonstrate leadership ability, have skills that make a "good assistant in the short run" and a "national leader in the long run" and a commitment to others in their community (p. 7). The program offers first hand experience in the process of governing the nation by working in the executive office of the President or an executive branch agency. White House Fellows draw on their specific prior training and return to their respective professions more able to contribute to society (p.5, 6). The President's Commission on White House Fellowships, The White House Fellowships (1987).

The summary above depicting the nature of the appointment as a White House Fellow indicates that the circumstances attending the request for a leave of absence are not only unusual but an honor. Thus in our opinion clearly the board of agriculture has a basis to find that the state will benefit from the secretary's leave of absence to serve as a White House Fellow.

Your second question is whether the board can appoint an acting secretary during the one year leave. You indicate for purposes of this question that the position of secretary of agriculture is for a two-year term and that the current secretary's term expires in January, 1991. Your question presumes that the current secretary will be re-elected.

Members of the state board of agriculture elect a secretary for a two-year term pursuant to K.S.A. 1989 Supp. 74-503. The statute requires every newly elected secretary of the state

board [elected after 1987] be elected subject to confirmation by the senate as provided in K.S.A. 75-4315b.

K.S.A. 74-503 does not, however, address the appointment of an acting secretary. Thus the issue is whether the board has the implied power to appoint an acting secretary pursuant to K.S.A. 1989 74-503. Given that the board has the authority to approve a leave of absence pursuant to K.A.R. 1-9-6, logic dictates that with the power to approve a leave comes the implied power to fill the vacancy. Additionally, public policy and interests require that public offices should be filled at all times, without interruption. 63A Am.Jur.2d Public Officers and Employees § 168 (1984). See K.S.A. 2-2439 (authorizing the secretary to administer and enforce the use of pesticides on animals and plants as an example of the public policy need for filling the vacancy without interruption). Given these considerations we opine the board has the implied power to appoint an acting secretary during the period of the secretary's absence.

In summary, the decision to approve the secretary of agriculture's leave of absence lies within the discretion of the board of agriculture. In our opinion service as a White House Fellow presents circumstances that overcome the presumption that employment outside the state is insufficient reason for approval of a leave of absence. Additionally, the board has the implied power to appoint an acting secretary to serve during the secretary's leave of absence.

Very truly yours,


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