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ATTORNEY GENERAL OPINION NO. 90-109

Mr. Ray D. Siehndel, Secretary
Kansas Department of Human Resources
401 S.W. Topeka Blvd.
Topeka, Kansas 66603-3182

Re: Labor and Industries--Employment Security Law--
Administration of Act; Political Activities
Prohibited, Penalties

State Departments; Public Officers and Employees
--Civil Service--Unlawful Use of Authority or
Influence to Cause Persons in Classified Service to
Join Organization or Participate in Political
Activity; Campaign Contributions by Classified
State Employees

Synopsis: K.S.A. 1989 Supp. 44-714, as amended by L. 1990,
ch. 122, § 17, prohibits designated employees of
the Kansas department of human resources from
participating in all forms of political activity
except as a candidate for nonpartisan elective
office. Because the state lacks a legitimate
interest for such a prohibition, that provision of
the statute continues to be unconstitutionally
overbroad.

Employees of the department of human resources are
permitted to: (1) post yard signs at their
residences; (2) participate in fund-raisers; (3)
make contributions; (4) attend party functions; and
(5) work for a particular candidate or party on the
employees' own time. However, those employees
subject to state statute and those employees
subject to the federal Hatch Act are restricted in

solicitation of contributions. Cited herein:
K.S.A. 1989 Supp. 44-714, as amended by L. 1990,
ch. 122, § 17; K.S.A. 75-2953; 75-2974; 5
U.S.C.A. § 1501; 5 U.S.C.A. § 1502.

* * *

Dear Secretary Siehndel:

As secretary of the Kansas department of human resources (department), you request our opinion regarding the political activities in which employees of the department may participate. Specifically you ask whether such employees may: (1) post yard signs; (2) solicit contributions for candidates; (3) participate in fund-raisers; (4) make unsolicited contributions; (5) attend party functions; or (6) work for a particular candidate or party.

The political activities of employees of the department are subject to K.S.A. 1989 Supp. 44-714 (as amended by L. 1990, ch. 122, § 17), K.S.A. 75-2953, 75-2974, and 5 U.S.C.A. § 1501 et seq. (the Hatch Act). Before it can be determined in which political activities employees of the department may engage, the affect of the amendment to K.S.A. 1989 Supp. 44-714 must be determined.

In State, ex rel. v. Wolgast, No. 86-CV-672 (Shawnee County District Court, December 29, 1986) it was determined that K.S.A. 44-714(c)(2), in prohibiting all forms of partisan and nonpartisan political activity, was unconstitutionally vague and overbroad. In L. 1990, ch. 122, § 17, K.S.A. 1989 Supp. 44-714(c)(2) was amended as follows:

"(2) No employee engaged in the administration of the employment security law shall directly or indirectly solicit or receive or be in any manner concerned with soliciting or receiving any assistance, subscription or contribution for any political party or political purpose, other than soliciting and receiving contributions for such person's personal campaign as a candidate for a nonpartisan elective public office, nor shall any employee engaged in the administration of the employment security law participate in any form of political

activity except as a candidate for a nonpartisan elective public office, nor shall any employee champion the cause of any political party or the candidacy of any person other than such person's own personal candidacy for a nonpartisan elective public office. Any employee engaged in the administration of the employment security law who violates these provisions shall be immediately discharged. No person shall solicit or receive any contribution for any political purpose from any employee engaged in the administration of the employment security law and any such action shall be a misdemeanor and shall be punishable by a fine of not less than \$100 nor more than \$1,000 or by imprisonment in the county jail for not less than 30 days nor more than six months, or both." (Emphasis denotes new language.)

The amendment permits political activity as a nonpartisan candidate by employees engaged in the administration of the employment security law. All other forms of political activity continue to be forbidden by K.S.A. 1989 Supp. 44-714, as amended by L. 1990, ch. 122, § 17.

"We read [United States Civil Service Comm' v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973)] as recognizing several important societal interests which would be sufficiently adversely affected by certain conditions potentially attendant on unrestrained political activity of government employees as to justify substantial restrictions on those activities. At least four such societal interests may be identified: the interest in an efficient government; that in a government which enjoys public confidence; that in the right of individual citizens to be free of governmental discrimination based on their political activities or connections; and that in the right of governmental employees to be free of employer pressure in their personal

political activity. The potential conditions which would be harmful or injurious to these important societal interests include the following three. First, the condition could exist in which 'employment and advancement in Government service' is made to 'depend on political performance' rather than on 'official effort' or 'meritorious performance.' . . . A second harmful condition is that of governmental employees 'practicing political justice,' or exercising 'political influence . . . on others,' or channeling 'governmental favor' 'through political connections.' . . . Third, the condition may occur under which 'the political influence of federal employees' is brought to bear without restraint 'on the electoral process,' or the governmental work force is employed to build a powerful 'political machine.'" Wachsman v. City of Dallas, 704 F.2d 160, (C.A.5 Tex. 1983), reh. denied, 710 F.2d 837 (C.A.5 Tex. 1983), cert. denied 464 U.S. 1012, 104 S.Ct. 537, 78 L.Ed.2d 717 (1983).

A number of jurisdictions have held as unconstitutionally overbroad any provisions which restrict nonpartisan as well as partisan political activity. See 51 A.L.R. 4th 702, 741 (1987). However, the foregoing conditions are no less harmful merely because they may be brought about by political pressures generated in a nonpartisan, rather than a partisan, political context. Wachsman, supra, at 167. "In any given case, the relevant inquiry must be whether the threat to the state's interests in the impartiality of its public servants stems from party involvement or from political involvement." Morial v. Judiciary Comm'n of State of Louisiana, 565 F.2d 295, 303 n. 8 (C.A.5 La. 1977), cert. denied, 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978) (emphasis in original). Therefore, restrictions on nonpartisan political activity of designated public employees may be upheld, provided a significant governmental interest is served by the restrictions. See Magill v. Lynch, 560 F.2d 22 (C.A.1 RI. 1977), cert. denied, 434 U.S. 1063, 98 S.Ct. 1236, 55 L.Ed.2d 763 (1978) (fire fighters of city barred from nonpartisan candidacy for city office; "nonpartisan" elections still had strong partisan overtones;

prevents political oppression of public employees and situations in which subordinate city employee runs against employee's supervisor); Morial, supra, (judges required to resign before seeking nonpartisan political office; ensures independence of judiciary from political pressures); Wachsman, supra (nonpartisan political activity of fire and police officers restricted; prevents coercion in election of superiors).

While the state may have a legitimate interest in restricting the nonpartisan political activities of those employees engaged in the administration of the employment security law, it is difficult to envision how K.S.A. 1989 Supp. 44-714 in its entirety serves a valid interest of the state. The statute permits an employee of the department of human resources engaged in the administration of the employment security law to participate in political activity as a candidate for nonpartisan political office. As such, the employee would be permitted to solicit and receive contributions, participate in political activity, and champion the cause of his or her own candidacy. However, those employees of the department subject to K.S.A. 1989 Supp. 44-714, as amended, who support a nonpartisan candidate continue to be prohibited from engaging in such activity. The courts have recognized a legitimate state interest in prohibiting nonpartisan political activity when such prohibition prevents political coercion of the employees of the governmental entity, ensures the independence of the governmental entity, or contributes to the impartiality of the public servants. None of these interests are served by K.S.A. 1989 Supp. 44-714, as amended. Because the prohibition on nonpartisan political activity in K.S.A. 1989 Supp. 44-714, as amended by L. 1990, ch. 122, § 17, fails to serve a legitimate interest of the state, the statute continues to be unconstitutionally vague and overbroad.

The political activities of employees of the department of human resources continue to be subject to the provisions of K.S.A. 75-2953, 75-2974, and the Hatch Act, 5 U.S.C.A. § 1501, et seq.

POSTING YARD SIGNS

Posting yard signs at one's residence does not fall within those political activities that may be proscribed by statute or regulation. See Letter Carriers, supra, 413 U.S. at 556, Broadrick, supra, 413 U.S. at 600. Employees of the department may post yard signs at their residence.

SOLICITING CONTRIBUTIONS FOR CANDIDATES

Both K.S.A. 75-2953 and 75-2974 restrict the solicitation of donations by officers and employees of the state from persons holding positions in the classified service.

K.S.A. 75-2953 states in part:

"No officer, agent, clerk or employee of this state shall directly or indirectly use their authority or official influence to compel any officer or employee in the classified service . . . to pay or promise to pay any assessment, subscription or contribution. . . ."

K.S.A. 75-2974(a) states:

"No supervising official shall solicit any contribution to or on behalf of any state officer or candidate for state office from any state employee under the supervision of such supervising official."

A state employee under K.S.A. 75-2974 is an employee "holding a position in the classified service under the Kansas civil service act." K.S.A. 75-2974(e) (1).

Solicitation of contributions by certain state and local officers is also restricted by 5 U.S.C.A. § 1502(a) which states in part:

"A State or local officer [as defined by 5 U.S.C.A. § 1501(4)] may not --

. . . .

"(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes."

Therefore, no employee may use their authority to compel contributions on behalf of a political candidate from employees within the classified service, no supervising official may solicit contributions from employees under his or

her supervision, and none of those individuals "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency," 5 U.S.C.A. § 1501, may participate in any manner in the solicitation of campaign contributions from a state or local officer or employee [as defined by 5 U.S.C.A. § 1501(4)] for partisan candidates, political parties, or other partisan political purposes.

PARTICIPATION IN FUND-RAISERS

There is no state statute which prohibits employees of the department of human resources from participating in political fund-raisers. The Hatch Act did prohibit the active participation in fund-raising activities for a partisan political candidate or political party by those individuals subject to 5 U.S.C.A. § 1502 until January 1, 1975. On that date, an amendment to 5 U.S.C.A. § 1502(3) became effective, and prohibited political activity was modified from participation in political management or campaigns to candidacies for elective office. See McKechnie v. McDermott, 595 F.Supp. 672, 675 (N.D. Ind. 1984). Employees of the department may therefore participate in political fund-raisers.

MAKING CONTRIBUTIONS

K.S.A. 75-2974(c) states:

"No state employee who lawfully, willingly and voluntarily makes a contribution to or on behalf of any state officer or candidate for state office shall be dismissed, demoted, suspended or subjected to any other disciplinary action because of the making of such contribution."

There are no prohibitions contained in state statute or the Hatch Act against employees of the department making contributions to political candidates.

ATTENDING PARTY FUNCTIONS

Neither state statute nor the Hatch Act prohibits employees of the department from attending party functions.

WORKING FOR A PARTICULAR CANDIDATE OR PARTY

As stated in the section regarding participation in fund-raisers, working for a political candidate or party would have been a violation of 5 U.S.C.A. § 1502 prior to its amendment in 1975. Because 5 U.S.C.A. § 1502 no longer prohibits a state or local officer or employee from taking an active part in political management or in political campaigns, the Hatch Act does not prohibit state or local officers or employees from working for a particular candidate or party. State statute likewise does not prohibit such activity.

While employees of the department are not prohibited by the Hatch Act or state statute from posting yard signs, participating in fund-raisers, attending party functions, and working for political candidates or parties, it must be remembered that K.S.A. 75-2953 forbids any officer, agent, clerk or employee of the state from directly or indirectly compelling any employee in the classified service to take part in such activities. Also, because 5 U.S.C.A. § 1502 prohibits a state or local officer or employee from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office," those individuals subject to the Hatch Act should not permit their names to be used in connection with any of the activities herein considered.

Very truly yours,



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