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ATTORNEY GENERAL OPINION NO. 91- 92

The Honorable William R. Roy, Jr.  
State Representative, 54th District  
2316 SW Mayfair Place  
Topeka, Kansas 66611

Re: Legislature -- Legislative Post Audit --  
Performance Audit; Acceptance or Approval of Reports

Synopsis: Acceptance of a post audit performance report by the legislative post audit committee (LPAC) represents consent by that committee to the cessation or completion of audit procedures. While each factual situation concerning liability must be examined independently, the Kansas tort claims act (KTCA), set forth at K.S.A. 75-6101 et seq., and article 2, section 22 of the Kansas constitution, afford certain immunity to members of the LPAC for actions involved in accepting such reports. It is unlikely that liability would attach to the LPAC's acceptance of a completed report absent a legal duty to change the report or order further inquiries. Cited herein: K.S.A. 46-1101; 46-1103; K.S.A. 1990 Supp. 46-1106; 46-1108; K.S.A. 75-6101; K.S.A. 75-6104, as amended by L. 1991, ch. 209, § 3; K.S.A. 77-201, as amended by L. 1991, ch. 33, § 37; Kan. Const., Art. 2, § 22.

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Dear Representative Roy:

As state representative for the fifty-fourth district, and as chairman of the legislative post audit committee (LPAC) you ask our opinion concerning what it means when the committee votes to accept a performance audit report. You also ask if there are any legal ramifications or liabilities that would accrue to the state, the committee, or to individual legislators on the committee as a result of such an action. You note that a member of the committee has voiced concerns about whether the committee is actually approving a report when it votes to accept it and you indicate that there are several audits underway on the Kansas public employees retirement system. You enclose for our review a 1990 subcommittee report and recommendations concerning acceptance of reports. We have also obtained a copy of the rules adopted by the LPAC.

The 1971 legislature created the LPAC pursuant to K.S.A. 46-1101 et seq. In addition to the mandatory performance of financial compliance audits of state agencies under K.S.A. 1990 Supp. 46-1106, K.S.A. 1990 Supp. 46-1108 permits the post auditor to conduct other types of audits at the direction of the LPAC. These audits are to determine:

"(a) Whether any state agency is carrying out only those activities or programs authorized by the legislature; or

"(b) whether the programs and activities of a state agency, or a particular program or activity, is being efficiently and effectively operated; or

"(c) whether any new activity or program is being efficiently and effectively implemented in accordance with the intent of the legislature, or

"(d) whether there is a need for change in any authorized activity or program of a state agency; or

"(e) whether any reorganization of a state agency, or group of state agencies, is needed or justified to accomplish the

results of programs or activities  
authorized by the legislature; or

"(f) any combination of the purposes  
specified in this or any other section of  
the legislative post audit act."

Although this statute does not set forth the required content of reports, it is assumed that a report given pursuant to K.S.A. 1990 Supp. 46-1108 will address the matters set forth in that statute. The procedure for preparation and presentation of reports is not set forth in K.S.A. 46-1101 et seq. Rather, the LPAC rules establish much of the procedure: Once the post auditor and staff complete a performance audit, a draft report is ordinarily prepared; this draft is presented to the entity being audited for comments; following this, the post auditor and staff present a final draft report to the LPAC, which may include information concerning the nature of the audit, the facts ascertained from the audit, the response (if any) by the entity audited and recommendations. These rules are authorized by K.S.A. 46-1103.

You ask what it means when the LPAC votes to accept a performance audit report. We find no definition of the term "accept" in K.S.A. 46-1101 et seq. or the LPAC rules. K.S.A. 77-201, as amended by L. 1991, ch. 33, § 37, states "words and phrases shall be construed according to the context and the approved usage of the language, but technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings." "Accept" is defined as "to receive with approval or satisfaction; to receive with intent to retain . . . admit and agree to; accede to or consent to; receive with approval; adopt; agree to." Blacks Law Dictionary 12 (5th ed. 1979). "Approve" means "to be satisfied with; to confirm, ratify, sanction, or consent to some act or thing done by another. To sanction officially; to ratify; to confirm; to pronounce good; think or judge well of; admit the propriety or excellence of; be pleased with. Distinguishable from 'authorize', meaning to permit a thing to be done in the future. . . ." Id. at 94. The Kansas Supreme Court in Board of Education of City of Hutchinson v. Reno Community High School, 124 Kan. 175, 178 (1927), stated that "to 'approve' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another." A review of case law from other jurisdictions reveals that, although very similar, definitions

of acceptance differ from definitions of approval. Acceptance often includes physical receipt of something. See 1 Words and Phrases (West 1964). However, both the words "accept" and "approve" indicate consent to something and we note that the definition of accept encompasses approval.

The issue appears to be to what is the LPAC consenting: the content and veracity of the facts and statements in a performance report; the conduct of and preparation involved in preparing the report; the receipt of the report; or the completion of the audit process? This issue may be of special concern to LPAC members who do not agree with the conclusions reached or the sufficiency or accuracy of the facts or recommendations contained in the report.

The LPAC rules and K.S.A. 46-1101 et seq. do not mandate complete agreement with the contents of a performance audit report. Neither do the LPAC statutes or rules contemplate committee intervention in or continuous direction of ongoing audit activities. Rather, LPAC rules permit an audit process relatively free from legislative influence. Once a report is physically received by the LPAC, the committee then has the option of sending the report back for further action by the post auditor and staff, or accepting the report. The information you enclose indicates that all reports are ultimately accepted by the LPAC.

In our opinion acceptance by the LPAC of a performance audit report is no more than a consent to the completion of the audit process. Acceptance by the LPAC does not appear to generally adopt, support or deny the facts or recommendations contained in the report. Rather, the LPAC accepts the completed draft report as presented or upon the corrections adopted by the committee. What is accepted in each situation may differ, just as the preparation and content of an individual report may differ. However, absent a legal duty to make changes in the form or content, the acceptance of a draft report by the LPAC merely denotes conclusions of the audit. If a member of the committee objects to the contents of the report, such objections may be voiced and noted.

The second issue you raise is one of liability. Liability is often, if not always, a very fact-specific issue. Deciding if liability exists includes a review of the parties involved, the existence of any legal duty owed by one party to another, a breach of that duty resulting in an injury to the plaintiff, and any legal defenses available to the defendant. It is not possible for this office to give absolute assurances or

opinions concerning liability in the abstract. Any action by the government or its agents or employees is of course subject to possible claims involving violation of constitutional rights or negligence. However, governmental entities may be protected from some types of liability.

The Kansas tort claims act (KTCA) set forth at K.S.A. 75-6101 et seq. provides certain protections to individuals acting on behalf of a governmental entity. The KTCA protections include exemption from liability for damages resulting from "legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution", K.S.A. 75-6104(a), as amended by L. 1991, ch. 209, § 3, and immunity from liability exists for "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 is abused and regardless of the level of discretion involved." K.S.A. 75-6104(e), as amended. Acceptance of an audit report by the LPAC may be both legislative and discretionary in nature.

Article 2, section 22 of the Kansas constitution further sets forth certain immunities granted to the state legislature: "for any speech, written document or debate in either house, the members shall not be questioned elsewhere. . . ." State v. Kansas House of Representatives, 236 Kan. 45 (1984) examines this constitutional provision and K.S.A. 75-6104(a). In this case the court stated that legislators are immune from lawsuits arising out of the performance of legitimate legislative functions. The actions engaged in by members of the LPAC involved in accepting an audit report may be argued to be performance of legitimate legislative functions.

In summary, pursuant to the KCTA and the Kansas constitution, members of the legislature and their employees enjoy some immunity with regard to liability for acts performed within the scope of their authority. We do not foresee liability attaching to the actions of the LPAC or its members as a result of merely accepting a performance report. Normally, such acceptance appears to be only acquiescence to the completion of the audit procedures, and is discretionary in nature. We find no legal duty to do anything with audit reports. However, it would be difficult for the post auditor and staff to know when they should conclude a project if some action by the LPAC did not indicate completion. There may be actions associated with the preparation or contents of a legislative post audit

performance report that are not a legitimate legislative function or discretionary in nature, not within the scope of authority of the individual, or otherwise outside the protection of the KCTA or the Kansas constitution. Potential liability must be determined on a case by case basis. Each fact situation must therefore be independently examined in order to determine if liability attaches for any actual breach of a legal duty.

Very truly yours,



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