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September 20, 1991

ATTORNEY GENERAL OPINION NO. 91- 114

The Honorable Eric R. Yost
State Senator, Thirtieth District
9132 Funston Court
Wichita, Kansas 67207

Re: State Departments; Public Officers and
Employees--Public Officers and Employees; Conflict
of Interest--Governmental Ethics Applicable to
Local Governmental Subdivisions; Making or
Participating in Certain Contracts Prohibited;
Member of Board of Education

Synopsis: A member of the board of education for a unified
school district does not make or participate in the
making of a contract when casting a vote on a
resolution urging the legislature to adopt or
defeat proposed legislation. Therefore, such
action does not constitute a statutory conflict of
interest. Further, a member of the board is not
prohibited by the conflict of interest statutes
from voting on matters affecting students attending
schools in the district despite the fact that
children of the member of the board may be among
those students affected. Cited herein: K.S.A.
1990 Supp. 25-4302; 25-4320, as amended by L. 1991,
ch. 104, § 2; K.S.A. 25-4329; 75-4301 (repealed,
L. 1990, ch. 306, § 24); K.S.A. 1990 Supp.
75-4301a; 75-4303a; 75-4304.

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Dear Senator Yost:

As senator for the thirtieth district, you request our opinion regarding whether certain actions of a member of the board of education for a unified school district constitute a conflict of interest. Specifically, you ask:

"1. Does a member of a school board violate any conflict of interest law by voting on matters that affect all students within a school district, if that board member happens to have a child who attends school within that district?

"2. Does a school board member violate any conflict of interest law by merely supporting or opposing a nonbinding school board resolution urging the legislature to adopt or not adopt a particular policy, if the school board itself has no actual power whatsoever to adopt that policy?

"3. 1991 Senate Bill 199 . . . would provide vouchers to parents to be used at State-accredited public and State-accredited non-public schools which elect to participate in the voucher program. One of [the school board member's] children attends [a school] which is not State-accredited. . . . As a matter of law, did [the school board member] violate any conflict of interest law by participating in the vote on the nonbinding school board resolution referred to above?"

1991 Senate Bill No. 199 proposed the tuition voucher act which would "establish a pilot program for the 1991-92 school year in unified school district no. 259, Sedgwick county, under which the parents of school age children may exercise choice in the selection of schools for attendance of their children and to provide a means for evaluation of the program in order to ascertain whether the program enhances the quality of elementary and secondary education in USD No. 259, and should be implemented on a statewide basis." During the February 25, 1991 meeting of the board of education for USD No. 259, a resolution expressing the board's opposition to 1991 Senate Bill No. 199 was adopted. Both school board members who voted against the resolution are presently the subject of recall petitions. One of the grounds asserted in one of the petitions includes an allegation of a conflict of interest by the school board member, apparently as a result of voting on the resolution. In view of Attorney General Opinion No. 91-59 and Unger v. Horn, 240 Kan. 740 (1987), you seek our opinion only for the purpose of informing the public as to whether the questioned acts constitute a conflict of interest under the law.

It is assumed that the action in question occurred February 25, 1991. The school board member was subject to the law as it existed at that time. Because amendments to the applicable statutes, set forth in L. 1991, ch. 150, §§ 42, 45, 46, were not in effect until July 1, 1991 (L. 1991, ch. 150, § 52), those amendments are not considered. (In actuality, those amendments would not effect the conclusions expressed in this opinion.)

Statutes regarding conflict of interest of a local governmental officer or employee are located at K.S.A. 1990 Supp. 75-4301a et seq. Under K.S.A. 1990 Supp. 75-4303a, the Kansas public disclosure commission (presently known as the Kansas commission on governmental standards and conduct) was authorized to render advisory opinions regarding interpretation and application of the conflict of interest statutes. Any person who requests and receives an advisory opinion and who acts in accordance with its provisions is presumed to have complied with the general conflict of interest law. K.S.A. 1990 Supp. 75-4303a. Such a presumption does not exist in the present situation as no advisory opinion has been issued to the school board member.

K.S.A. 1990 Supp. 75-4304 states in part:

"(a) No local government officer or employee shall, in the capacity of such an officer or employee, make or participate in the making of a contract with any person or business by which the officer or employee is employed or in whose business the officer or employee has a substantial interest."

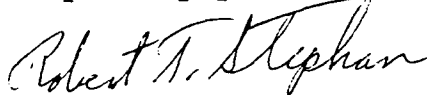
The purpose of the statute is to "prohibit self-dealing, i.e., a contract or agreement whereby a public officer or employee, acting in that capacity, participates in the making of a contract with a business in which he has a substantial interest. Thus, a public officer or employee may not be a party to a contract in connection with which he enjoys a dual role, i.e., acting or participating therein in both his public and private capacities." Attorney General Opinions No. 74-269; 90-4.

For purposes of determining whether a conflict of interest has occurred, contracts are "agreements including but not limited to sales and conveyances of real and personal property and agreements for the performance of services." K.S.A. 1990

Supp. 75-4301a. The item on which the school board voted was merely a resolution, "[a] formal expression of the opinion or will of an official body or a public assembly, adopted by vote." Deluxe Black's Law Dictionary 1310 (1990). A resolution does not constitute a contract. Therefore, a member of the board of education of a unified school district does not make or participate in the making of a contract when casting a vote on a resolution urging the legislature to adopt or defeat proposed legislation.

K.S.A. 1990 Supp. 75-4301a et seq. restricts the actions of a public officer or employee with a business in which the public officer or employee has a substantial interest. Business is defined in the act as "any corporation, association, partnership, proprietorship, trust, joint venture and every other business interest, including ownership or use of land for income." K.S.A. 1990 Supp. 75-4301a. Although the definition has been moved within the act, the definition has remained unchanged since 1970. See K.S.A. 75-4301, repealed, L. 1990, ch. 306, § 24. The commission charged with the obligation of interpreting and applying the act has consistently held that a board of education does not constitute a business or person under the act. Governmental Ethics Commission Opinion No. 79-12; Kansas Public Disclosure Commission Opinion No. 90-14. An interpretation by such commission is entitled to great judicial deference. See State ex rel Stephan v. Kansas Racing Commission, 246 Kan. 708, 719-20 (1990). K.S.A. 1990 Supp. 75-4301a et seq. does not prohibit a member of the board of education from voting on matters affecting students attending schools in the district despite the fact that children of the member of the board may be among those students affected.

Very truly yours,



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