



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 92- 44

The Honorable Rick Bowden
State Representative, Ninety-Third District
State Capitol, Room 281-W
Topeka, Kansas 66612

Re: Schools--Teachers' Contracts; Due Process
Procedure; Contract Termination--Testimony,
Recording and Transcribing; Allocation of Costs;
1992 Senate Bill No. 109; Constitutionality

Synopsis: The amendment proposed in 1992 Senate Bill No. 109, § 1 requires the tenured teacher to pay the costs of transcription if the tenured teacher requests a transcript, or one-half of the costs if both parties request a transcript. However, the state has established no compelling interest in recouping the costs of procedural due process, and cannot impose a significant and unjustified open-ended penalty on the exercise of the right of due process. The state therefore cannot penalize the tenured teacher for exercising the tenured teacher's due process rights by requiring the tenured teacher to pay the costs of transcription as set forth in 1992 Senate Bill No. 109, § 1. Cited herein: K.S.A. 1991 Supp. 60-2101; K.S.A. 72-5436; K.S.A. 1991 Supp. 72-5438; 72-5439; 72-5440; 72-5443; 1992 Senate Bill No. 109; U.S. Const., Amend. XIV.

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Dear Representative Bowden:

As representative for the ninety-third district, you request our opinion regarding whether an amendment proposed in 1992 Senate Bill No. 109 will withstand constitutional scrutiny. The amendment regards the allocation of costs of the due process hearing required upon termination or nonrenewal of a tenured teacher's contract. The amendment has been proposed as a result of court decisions in Ames v. Board of Education, U.S.D. No. 264, No. 91-1278-K (D.Kan. March 6, 1992) and Gunkel v. Board of Education, U.S.D. No. 252, No. 90-C-97 (Lyon County Dist. Ct. May 21, 1991).

K.S.A. 72-5436 et seq. set forth the procedure for conducting the due process hearing that must be accorded a tenured teacher whose contract is terminated or nonrenewed. Pursuant to the due process procedure, the teacher must receive notice of the reasons for nonrenewal, be allowed an opportunity to be heard prior to termination, and select a member of the hearing committee. K.S.A. 1991 Supp. 72-5438. In addition, the teacher has the right to be represented by counsel and to present and cross-examine witnesses. K.S.A. 1991 Supp. 72-5439. K.S.A. 1991 Supp. 72-5440 allows a teacher to have witnesses subpoenaed by the hearing committee. The decision of the three-member hearing committee must be adopted by the board of education. K.S.A. 1991 Supp. 72-5443. The decision of the board of education may be appealed to the district court id., which may receive new evidence and reverse, vacate, or modify the board's decision. K.S.A. 1991 Supp. 60-2101.

K.S.A. 1991 Supp. 72-5440 provides for allocation of the costs of the due process hearing. Each party is required to bear the costs of each party's witnesses, except that the fees payable to subpoenaed witnesses will be borne equally by the parties. Each party is required to bear the costs for the services of the member of the hearing committee designated by that party. The costs for the services of the third member of the hearing committee are to be borne equally by the parties. Testimony at the hearing may be recorded and transcribed at the request of either party. The costs of the recording and transcript would apparently be divided between the parties as "[a]ll costs of a hearing which are not specifically allocated in this section shall be borne equally by the parties." K.S.A. 1991 Supp. 72-5440(d); Gunkel, No. 90-C-97. However, see Ames, No. 91-1278-K, at 11 ("The

costs for any such transcription shall be borne by the board.
K.S.A. 72-5440(c).)

In both Ames and Gunkel, it was determined by the respective courts that such cost allocation imposes an impermissible burden on the right of the teacher to due process. The courts, after acknowledging the similarity between K.S.A. 1991 Supp. 72-5436 et seq. and the due process procedure accorded teachers in Oklahoma, relied on Rankin v. Independent School District No. I-3, 876 F.2d 838 (10th Cir. 1989) and determined that, as in Rankin, the state provided no way to exercise due process rights other than in a penalizing manner. "This penalty, the court reasoned, imposed a chilling effect on the exercise of due process because the tenured teacher's potential liability for costs was unrestricted and partly the result of factors outside his control." Ames, No. 91-1278-K, at 13. The court held that because recoupment by the state of the costs of the due process hearing does not fulfill a compelling state interest, the cost-allocation requirement is unconstitutional.

In response, the legislature has proposed in 1992 Senate Bill No. 109 an amendment to K.S.A. 1991 Supp. 72-5440. Under 1992 Senate Bill No. 109, each party would remain responsible for the costs of each party's witnesses, except that the costs of subpoenaed witnesses would be borne entirely by the board of education. The board of education would also bear the costs of the services of the hearing officer and the certified shorthand reporter. (The hearing committee is replaced with a qualified hearing officer. 1992 Senate Bill No. 109, § 2.) The costs of a transcript are borne by the party requesting transcription, except that "[i]f both parties jointly request that the transcript be transcribed at the hearing-level, the parties shall each pay one-half of the cost of transcription." Each party is responsible for the payment of its own attorney's fees. Any costs of the hearing which have not been specifically allocated under the statute are to be borne by the board of education.

Pursuant to the fourteenth amendment of the constitution of the United States, no person may be deprived of life, liberty, or property without due process of law. A tenured teacher holds a property right in continued employment, which is protected by the due process clause of the fourteenth amendment. Unruh v. U.S.D. No. 300, 245 Kan. 35, 41 (1989); Ames, No. 91-1278-K, at 6. An essential principle of due process is that a deprivation of life, liberty, or property be proceeded by notice and opportunity for hearing

appropriate to the nature of the case. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); Ames, No. 91-1278-K, at 6.

"Under Loudermill the Supreme Court held that before a 'tenured public employee' can be discharged, he 'is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.' 470 U.S. at 546, 105 S.Ct. at 1495 (citations omitted)." Derstein v. State of Kansas, 915 F.2d 1410, 1413 (10th Cir. 1990), cert. denied, Derstein v. Benson, _____ U.S. _____, 111 S.Ct. 1391 (1991) (Emphasis added).

The procedures mandated by Kansas law clearly meet the requirements of the due process clause. Pitts v. Board of Education of U.S.D. 305, Salina, Kansas, 869 F.2d 555, 557 (10th Cir. 1989); See Ames, No. 91-1278-K, at 8. In fact, K.S.A. 72-5436 et seq. confers due process above and beyond that required under the fourteenth amendment. However, "what is due process of law in a state is regulated by the law of the state. . . ." 16A Am.Jur.2d Constitutional Law § 815 (1979). The state may not, through allocation of costs, place a penalty on the exercise of any procedural due process rights. As acknowledged by Judge Patrick Kelly in Ames:

"[T]he state argues that tenured teachers are afforded extra procedural protections under the state law, in excess of the minimal constitutional requirements, and therefore should fairly bear a portion of the financial burden. The identical cost-recoupment argument was presented and rejected in Rankin. In failing to renew [the tenured teacher's] employment contract, the state has created the need for a due process hearing. Thus, the state cannot penalize [the tenured teacher] for exercising a right which it

is constitutionally required to give
him." Ames, No. 91-1278-K, at 14.

It is the state's affirmative obligation to furnish the
tenured teacher a due process hearing when action adverse to
the teacher's liberty or property interests are taken.
Rankin, 876 F.2d at 840.

The amendment proposed in 1992 Senate Bill No. 109, § 1
requires the tenured teacher to pay the costs of transcription
if the tenured teacher requests a transcript, or one-half the
costs if both parties request a transcript. However, the
state has established no compelling interest for recouping the
costs of procedural due process and cannot impose a
significant and unjustified open-ended penalty on the exercise
of the right of due process. The state therefore cannot
penalize the tenured teacher for exercising the tenured
teacher's due process rights by requiring the tenured teacher
to pay the costs of transcription as set forth in 1992 Senate
Bill No. 109, § 1.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General

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