



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.AG.KS.GOV

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ATTORNEY GENERAL OPINION NO. 2016- 3

The Honorable Julia Lynn  
State Senator, 9<sup>th</sup> District  
State Capitol, Room 445-S  
300 S.W. 10<sup>th</sup> Avenue  
Topeka, KS 66612

Re: State Departments; Public Officers and Employees—Public Officers and Employees—Kansas Open Meetings Act; Meetings of State and Subdivisions Open to Public; Exceptions; Closed or Executive Meetings

Labor and Industries—Workers Compensation—Workers Compensation and Employment Security Boards Nominating Committee; Meetings Required to Be Open

Synopsis: Whether the Kansas Open Meetings Act applies to a specific body is a fact specific determination. If the Workers Compensation and Employment Security Boards Nominating Committee is a public agency subject to the Kansas Open Meetings Act, it may not recess into closed or executive session to interview and/or discuss the applicants for workers compensation administrative law judges, workers compensation appeals board members, or employment security board of review members because such applicants are not personnel within the meaning of the Kansas Open Meetings Act.

Cited herein: K.S.A. 2015 Supp. 44-551; K.S.A. 44-555c; K.S.A. 44-709; K.S.A. 75-4317; K.S.A. 75-4319; K.S.A. 75-5708.

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Dear Senator Lynn:

As State Senator for the 9<sup>th</sup> District, you request our opinion on an issue related to the Kansas Open Meetings Act (KOMA).<sup>1</sup> In your letter, you ask:

[W]hether the workers compensation and employment security boards nominating committee . . . created under K.S.A. 44-551(e) may use executive session to interview, and discuss applicants or prospective employees which the committee is responsible for selecting, with binding action occurring only during public session.

*The Workers Compensation and Employment Security Boards Nominating Committee*

In 2013, the Kansas legislature created the workers compensation and employment security boards nominating committee (nominating committee),<sup>2</sup> which meets:

as needed to provide the workers compensation and employment security board of review appointing authorities with nominees for appointments to the position of:

- (1) Workers compensation administrative law judge;
- (2) workers compensation appeals board member; and
- (3) employment security board of review.<sup>3</sup>

The nominating committee consists of seven members appointed by the governor as follows:

Each of the following shall select one member to serve on the nominating committee by giving written notice of the selection to the governor who shall appoint such representatives to the committee:

- (1) The Kansas secretary of labor;
- (2) the Kansas chamber of commerce;
- (3) the national federation of independent business;
- (4) the Kansas AFL-CIO;

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<sup>1</sup> K.S.A. 75-4317 *et seq.*

<sup>2</sup> K.S.A. 2015 Supp. 44-551(e).

<sup>3</sup> K.S.A. 2015 Supp. 44-551(h).

- (5) the Kansas state council of the society for human resource management (KS SHRM);
- (6) the Kansas self-insurers association; and
- (7) the secretary of labor, who shall select a nominee from either an employee organization as defined in K.S.A. 75-4322, and amendments thereto, or a professional employees' organization as defined in K.S.A. 72-5413, and amendments thereto.<sup>4</sup>

When a vacancy for a workers compensation administrative law judge (ALJ) or workers compensation appeals board (appeals board) member occurs, the nominating committee reviews qualified applications as submitted to it by the director of workers compensation (director).<sup>5</sup> The committee then nominates one of the qualified applicants to fill the vacancy and submits that nomination to the secretary of labor (secretary). The secretary may accept the nomination and appoint the nominee to the position of ALJ or appeals board member, or the secretary may reject the nomination and request that the nominating committee forward another nominee for that position. If the secretary requests another nominee, the nominating committee nominates another person for the position.<sup>6</sup> Thus, the nominating committee simply recommends persons for appointment by the secretary and does not appoint any ALJ or appeals board member.

The application and appointment process for the employment security board of review (board of review) follows a different process. In 2013, the legislature created the board of review,<sup>7</sup> which reviews unemployment compensation benefit decisions made by a referee.<sup>8</sup> When a vacancy occurs on the board of review, the nominating committee submits a nominee to the governor. The governor may accept the nomination and submit the nominee to the senate for confirmation, or reject the nomination and request another nomination from the nominating committee.<sup>9</sup> As with an ALJ or appeals board member, the nominating committee simply recommends persons for appointment. However, the legislature did not establish a method by which the nominating committee receives applications. Additionally, the governor appoints and the senate confirms board of review members.

*Functions of Workers Compensation Administrative Law Judge, Workers Compensation Appeals Board and the Employment Security Board of Review*

The secretary may appoint up to 10 ALJs to consider matters pursuant to the workers compensation act.<sup>10</sup> ALJs have the same powers as district court judges.

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<sup>4</sup> K.S.A. 2015 Supp. 45-551(e).

<sup>5</sup> K.S.A. 2015 Supp. 44-551(i); K.S.A. 2015 Supp. 44-555c(d).

<sup>6</sup> K.S.A. 2015 Supp. 44-551(i).

<sup>7</sup> K.S.A. 2015 Supp. 44-709(f)(1). See also L. 2013, Ch. 104, § 3.

<sup>8</sup> K.S.A. 2015 Supp. 44-709(f)(7).

<sup>9</sup> K.S.A. 2015 Supp. 44-709(f)(2).

<sup>10</sup> K.S.A. 2015 Supp. 75-5708(b).

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges.<sup>11</sup>

ALJs must be attorneys admitted to practice law in Kansas but may not engage in the private practice of law during their term as an ALJ.<sup>12</sup> ALJs also are subject to disciplinary action, including dismissal and suspension, by the secretary of labor,<sup>13</sup> receive a salary for their service,<sup>14</sup> and are allowed reasonable and necessary expenses incurred during the discharge of their duties.<sup>15</sup>

If a party wishes to appeal an ALJ's decision, that appeal is taken to the appeals board. The appeals "board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act."<sup>16</sup> The appeals board reviews questions of law and fact from evidence presented before an ALJ.<sup>17</sup> The appeals board thus acts as an appellate court.

Appeals board members are appointed by the secretary of labor, and must be attorneys admitted to practice law in Kansas.<sup>18</sup> As with ALJs, each appeals board member may not engage in the private practice of law, receives a salary for their service, and is allowed reasonable and necessary expenses incurred during the discharge of their duties.<sup>19</sup> The appeals board is housed "within the division of workers compensation of the department of labor and all budgeting, personnel, purchasing and related management functions of the board shall be administered under the supervision and direction of the secretary of labor."<sup>20</sup>

Finally, the review board reviews unemployment compensation benefit decisions made by a referee.<sup>21</sup> The board:

on its own motion, may affirm, modify or set aside any decision of a referee on the basis of the evidence previously submitted in the case; may

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<sup>11</sup> K.S.A. 2015 Supp. 44-551(l)(1).

<sup>12</sup> K.S.A. 2015 Supp. 75-5708(b).

<sup>13</sup> K.S.A. 2015 Supp. 75-5708(c).

<sup>14</sup> K.S.A. 2015 Supp. 44-551(k).

<sup>15</sup> K.S.A. 2015 Supp. 44-551(m).

<sup>16</sup> K.S.A. 2015 Supp. 44-555c(a).

<sup>17</sup> *Id.*

<sup>18</sup> K.S.A. 2015 Supp. 44-555c(a), (b).

<sup>19</sup> K.S.A. 2015 Supp. 44-555c(c).

<sup>20</sup> K.S.A. 2015 Supp. 44-555c(a).

<sup>21</sup> K.S.A. 2015 Supp. 44-709(f)(7).

direct the taking of additional evidence; or may permit any of the parties to initiate further appeal before it. The board shall permit such further appeal by any of the parties interested in a decision of a referee which overrules or modifies the decision of an examiner. The board may remove to itself the proceedings on any claim pending before a referee. Any proceedings so removed to the board shall be heard in accordance with the requirements of subsection (c).<sup>22</sup>

Review board decisions are subject to review pursuant to the provisions of the Kansas judicial review act.<sup>23</sup>

### *The Kansas Open Meetings Act*

We believe that a review of the KOMA is beneficial. A common-law right to attend meetings of governmental bodies does not exist in Kansas. Instead, the right to attend such meetings is established and governed by the KOMA.<sup>24</sup> The purpose of the KOMA is stated as follows: “In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.”<sup>25</sup> The KOMA is interpreted liberally and exceptions narrowly construed to carry out the public purpose of the law.<sup>26</sup>

After convening an open meeting, a public body may recess into a closed or executive session in order to privately discuss a subject listed in K.S.A. 75-4319 as long as the statutory procedure is followed for going into executive session.<sup>27</sup> One of the subjects which may be discussed in an executive session is “personnel matters of nonelected personnel.”<sup>28</sup> It has been acknowledged that the purpose of this exception is to protect the privacy interests of employees, save personal reputations and encourage qualified applicants to remain in government employ.<sup>29</sup>

We assume without deciding that the nominating committee is subject to KOMA.<sup>30</sup> Your question then turns on whether the nominees are “personnel” under the meaning of the KOMA.

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<sup>22</sup> *Id.*

<sup>23</sup> K.S.A. 2015 Supp. 44-709(i).

<sup>24</sup> *State ex rel. Stephan v. Board of Seward County Comm’rs*, 254 Kan. 446, Syl. ¶ 2 (1994); *Associated Press v. Sebelius*, 31 Kan. App. 2d 1107, Syl. ¶ 7 (2003).

<sup>25</sup> K.S.A. 2015 Supp. 75-4317(a).

<sup>26</sup> *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982).

<sup>27</sup> K.S.A. 2015 Supp. 75-4319(a).

<sup>28</sup> K.S.A. 2015 Supp. 75-4319(b).

<sup>29</sup> *State of Kansas v. USD 305*, 13 Kan. App. 2d 117, 119 (1988).

<sup>30</sup> The KOMA only applies to certain bodies. See K.S.A. 2015 Supp. 75-4318(a). For purposes of answering your question, we will assume the nominating committee is one such body although we do not conduct the fact-specific analysis necessary to make that actual determination. Whether the KOMA applies to the nominating committee depends on whether the nominating committee is a “legislative and administrative bod[y]” of the state or an “agenc[y] of the state.” *Id.* This is a fact-specific determination,

Although the KOMA does not define the term “personnel,” this office has opined that the term includes employees of a public agency<sup>31</sup> and applicants for employment<sup>32</sup> but does not include persons appointed to boards or committees<sup>33</sup>, independent contractors<sup>34</sup> and municipal court judges<sup>35</sup>. In other words, if the nominees are public officers instead of employees, they would not qualify as “personnel” under the KOMA.

The Kansas Supreme Court addressed the distinction between employees and public officers in *Durflinger v. Artiles*.<sup>36</sup> In that case, the court determined “whether staff doctors at a state mental institution are public officers or public employees.”<sup>37</sup> As summarized by several Attorney General Opinions,<sup>38</sup> *Durflinger* “concluded that the essential characteristics of public office are: (1) a position created by statute or ordinance, (2) a fixed tenure, and (3) the power to exercise ‘some portion of [the] sovereign function of government.’”<sup>39</sup> In discussing these characteristics of public office, the court stated that:

[The] key element of such test is that “officer” is carrying out sovereign function. *Spring v. Constantino*, 168 Conn. 563, [568,] 362 A.2d 871, 875 [(1975)]. Essential elements to establish public position as “public office” are: position must be created by constitution, legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity.<sup>40</sup>

We now apply the *Durflinger* characteristics of public office to ALJs, appeals board members and review board members.

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and the five-part test to determine whether a body is an agency of the state for purposes of the KOMA was set forth by the Kansas Supreme Court in *State ex rel. Murray v. Palmgren*, 231 Kan.524, 535 (1982) (citing *Open Meetings Profile: The Prosecutor’s View*, 20 Washburn Law Journal 241 (1981)). See also *Memorial Hospital Association, Inc. v. Knutson*, 239 Kan. 663, 669 (1986); *Kansas One-Call Systems, Inc. v. State*, 294 Kan. 220, 234-35 (2012).

<sup>31</sup> Attorney General Opinion Nos. 1992-51, 1987-169 and 1981-39.

<sup>32</sup> Attorney General Opinion No. 1996-61.

<sup>33</sup> Attorney General Opinion No. 1987-10.

<sup>34</sup> Attorney General Opinion Nos. 2002-28 and 1987-169

<sup>35</sup> Attorney General Opinion Nos. 1983-133 and 2002-28.

<sup>36</sup> 234 Kan. 484 (1983) (disapproved of on other grounds by *Boulanger v. Pol*, 258 Kan. 289, 298 (1995)).

<sup>37</sup> *Durflinger*, 234 Kan. at 501.

<sup>38</sup> See, e.g., Attorney General Opinion No. 2015-19 (Deputy Secretary in the Environment Division at the Kansas Department of Health and Environment is not a public office by appointment); Attorney General Opinion No. 2013-19 (the term “officer” can include appointed individuals); Attorney General Opinion 1999-11 (public works director is not a city officer); Attorney General Opinion No. 95-68 (a member of a judicial nominating committee is a public officer).

<sup>39</sup> *Durflinger*, 234 Kan. at 503.

<sup>40</sup> *Durflinger*, 234 Kan. at 503 (quoting Black’s Law Dictionary (5<sup>th</sup> ed. 1979)).

As to the first characteristic of public office from *Durflinger*, we find that statutes created the positions of ALJs, appeals board members, and review board members. Although not using direct language, the legislature established the position of ALJ by authorizing the secretary to appoint up to 10 ALJs<sup>41</sup> and by legislating details about the position such as qualifications and salary.<sup>42</sup> The appeals board was established by statute.<sup>43</sup> The review board also was established by statute.<sup>44</sup>

The second characteristic of public office from *Durflinger* is whether the ALJs, appeals board members and review board members are appointed for a fixed tenure. The answer is yes for all three. ALJs are appointed to four year terms and may be reappointed.<sup>45</sup> Appeals board members also are appointed for four years and may be reappointed.<sup>46</sup> Review board members are appointed to four year terms<sup>47</sup> and may not serve more than two consecutive terms.<sup>48</sup>

The final characteristic of public office from *Durflinger* is whether the ALJs, appeals board members and review board members may exercise the sovereign function of government. In an opinion regarding a municipal court judge, this office previously opined that “one holding the position of judge at any level of government is vested with a part of the powers of the sovereign, and is entrusted with an important public responsibility.”<sup>49</sup> Therefore, we opined that a judge could not be an independent contractor.

We previously have opined on the issue of whether, based on the facts presented, “the Emporia municipal court judge qualifies as ‘personnel’ as that term is used in K.S.A. 2001 Supp. 75-4319(b)(1).”<sup>50</sup> The facts important to our decision at that time included: specific term of office; appointed panel which reviewed the applicant qualifications and made recommendations to the city commission; statutory description of duties; supervisory and discretionary authority; independence of office; direct control and supervision of an employer; and, qualifications prescribed by law. We stated that “[m]ost judges possess these distinguishing criteria, thus signifying that a judge is a public officer having a significant degree of independence in exercising sovereign powers.”<sup>51</sup>

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<sup>41</sup> K.S.A. 2015 Supp. 75-5708(b).

<sup>42</sup> K.S.A. 2015 Supp. 44-551.

<sup>43</sup> K.S.A. 2015 Supp. 44-555c(a) (“There is hereby established the workers compensation appeals board.”)

<sup>44</sup> K.S.A. 2015 Supp. 44-709(f)(1) (“There is hereby created an employment security board of review . . .”)

<sup>45</sup> K.S.A. 2015 Supp. 44-551(j)(1).

<sup>46</sup> K.S.A. 2015 Supp. 44-555c(a), (e).

<sup>47</sup> K.S.A. 2015 Supp. 44-709(f)(1).

<sup>48</sup> K.S.A. 2015 Supp. 44-709(f)(3).

<sup>49</sup> Attorney General Opinion No. 1983-133.

<sup>50</sup> Attorney General Opinion No. 2002-28.

<sup>51</sup> *Id.*

After reviewing the statutory provisions regarding the powers of ALJs, appeals board members and review board members, we believe that these positions possess the characteristics described in *Durflinger*, including the exercise of sovereign powers. Consequently, the nominees are public officers and not employees. We therefore do not believe that ALJs, appeals board members and review board members are personnel within the meaning of the KOMA.

In conclusion, if the nominating committee is an agency of the state subject to the KOMA, then it may not recess into closed or executive session to interview and/or discuss the applicants for ALJs, appeals board members or review board members.

Sincerely,

Derek Schmidt  
Attorney General

Cheryl L. Whelan  
Assistant Attorney General

DS:AA:CW:sb