

STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

June 10, 1975

Opinion No. 75-241

Mr. Calvin A. Strowig
Vice-Chairman
Governmental Ethics Commission
109 West Ninth
Topeka, Kansas 66612

Dear Mr. Strowig:

K.S.A. 1974 Supp. 75-2935(1) provides in pertinent part thus:

"The unclassified service comprises positions held by *state officers or employees* who are:

* * *

(m) all attorneys for *boards, commissions and departments.*" [Emphasis supplied.]

First, you inquire whether the Kansas Turnpike Authority is a "department" as that term is used above. The words "boards, commissions, and departments," should not, in our view, be construed in a technical or formal fashion. These terms are used in our judgment to include attorneys serving as officers or employees of state agencies, boards, commissions, departments, and any other entity which is an instrumentality of the state, within the unclassified service. The Authority is created as a "body politic and corporate and constituted to be a "public instrumentality" of the state, and the exercise of its powers are deemed to entail an "essential governmental function." In *Hosterman v. Kansas Turnpike Authority*, 183 Kan. 590, 331 P.2d 323 (1958), the court stated that the Authority

"is an arm or agency of the state, created by the legislature to perform an essential governmental function for the people of the state."
183 Kan. at 592.

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Thus, in our view, the Authority constitutes a "department" of the state, and we so conclude for the purposes of this opinion only.

The question then arises whether the general counsel for the Authority, who is a private practitioner under contract to the Authority, is a state officer or employee. In our view, the general counsel for the Authority is no more an officer of the state than is the general manager of the Authority, held in *Kirchner v. Kansas Turnpike Authority*, 336 F.2d 222 (10th Cir. 1964), not to be an "officer." Similarly, the general counsel is not an employee, but is an independent contractor with the Authority. Thus, he is neither a state officer nor a state employee, and thus is not within K.S.A. 1974 Supp. 75-2935(1).

You ask, next, whether he is otherwise a state officer or employee in the classified service, unclassified service, or classified exempt service of the Kansas civil service. Concluding as we have that the general counsel is neither an officer nor an employee, we conclude that he is not in any of these three branches of the civil service. The civil service act, by definition, includes only officers and employees of the State of Kansas, and those persons specifically enumerated by statute. Finding no special statutory classification which includes the general counsel for the Authority in the unclassified service, and concluding that the general counsel is neither an officer nor an employee of the Authority, we cannot but conclude that that position does not fall within the civil service act.

You also inquire whether private attorneys who are appointed by the Insurance Commissioner to represent the Workmen's Compensation Fund are "attorneys for boards, commissions and departments" as that phrase is used in K.S.A. 1974 Supp. 75-2935(1)(m). K.S.A. 1974 Supp. 44-566a(c) states in pertinent part thus:

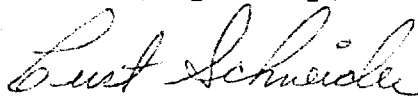
"Whenever the workmen's compensation fund may be made liable for the payment of any amounts in proceedings under the workmen's compensation act, the commissioner of insurance, in his capacity as administrator of such fund, shall be impleaded in such proceedings and shall represent and defend the workmen's compensation

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fund. The commissioner of insurance shall be deemed impleaded in any such proceedings whenever written notice of the proceedings set forth the nature of the liability asserted against the workmen's compensation fund, is given to the commissioner of insurance."

Attorneys appointed by the commissioner of insurance to represent the fund are, once again, not officers of the State of Kansas, and exercise no portion of the sovereign power. Similarly, they are not, in the ordinary course, deemed to be employees by any of the standard and conventional tests for characterization of employee and independent contractor relationships under the law of agency. Once again, if they are neither officers nor employees of the State, they do not fall within the civil service of the state. Accordingly, we conclude, likewise, that such attorneys are not in the unclassified service of the state, and are not, indeed, in any of the branches of the state civil service.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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