



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

December 21, 1976

ATTORNEY GENERAL OPINION NO. 76-373

Mr. Joseph S. Payne
Chief Referee
Office of Appeals
Department of Human Resources
503 Kansas Avenue
Topeka, Kansas 66603

Re: Attorneys--Administrative Hearings--Local Counsel

Synopsis: K.A.R. 48-3-2 which permits attorneys at law who are admitted in other jurisdictions to appear in administrative proceedings before the Division of Employment Security does not relieve such attorneys from the requirement of K.S.A. 7-104 that they associate for that purpose with local counsel.

* * *

Dear Mr. Payne:

You advise that in hearings under the Kansas Employment Security law, referees have encountered the question whether compliance with K.S.A. 7-104 is obviated by the administrative regulation no. 48-3-2. The latter provides in pertinent part thus:

"Any individual may appear for himself in any proceeding before a referee, special examiner, or the Board of Review. Any partnership may be represented by any of its members or a duly authorized representative. Any corporation or association may be represented by an officer or duly authorized agent."

Mr. Joseph S. Payne
Page Two
December 21, 1976

K.S.A. 7-104 provides in pertinent part as follows:

"Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, . . . upon it being made to appear by a written showing filed therein, that he or she has associated and personally appearing with him or her in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record in this state. . . . No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this section" [Emphasis supplied.]

Under the regulation, and the practice of referees administering the Employment Security Law, a corporation or association may be represented by an officer thereof, or a duly authorized agent, who is not required to be an attorney.

You advise that a St. Louis firm, which is not a law firm, provides employer representation in such hearings in a multi-state area. From time to time, the firm appears on behalf of the employers it represents through persons who are not attorneys, as the rule permits. When such lay persons appear, they are not required to associate with local counsel because K.S.A. 7-104 applies only to attorneys who are admitted to practice in the courts of other states, and not to persons other than attorneys. However, in this particular instance, the St. Louis firm has retained a Kansas City, Missouri, attorney, who seeks to appear in its behalf, and that of the employer it represents, without associating with local counsel.

Mr. Joseph S. Payne
Page Three
December 21, 1976

It is urged, apparently, that the Missouri attorney appears as the duly authorized agent of the employer and its St. Louis representative, as permitted by the regulation, and that he or she does not appear in a professional capacity of an attorney. Thus, it is presumably argued that appearance in the former capacity obviates compliance with K.S.A. 7-107, which applies only to persons appearing as attorneys.

It is, of course, all too obvious that the Secretary of Human Resources or the Director of the Division of Employment may not by administrative regulation nullify the effect of duly enacted legislation. The regulation must be construed so as to reconcile any possible conflict with applicable statutory provisions. In my judgment, construing the regulation together with K.S.A. 7-104, it permits any attorney who is admitted to practice before the highest court of any other jurisdiction to appear in behalf of his or her client in a professional capacity before a referee, special examiner or the Board of Review, provided that such attorney complies with any other statutory prerequisites for such appearance, including association with local counsel which is required by K.S.A. 7-104.

The St. Louis firm has chose to retain a Missouri attorney to represent its interests in certain matters within the purview of your agency, presumptively because of his or her professional expertise and qualifications. That attorney appears before your agency in a professional capacity, presumptively. The attorney is thus subject to K.S.A. 7-104, and cannot avoid its terms by claiming to be only a "duly authorized agent," who, under the regulation, may represent a party in lieu of an attorney. Being an attorney, and appearing in a professional capacity, he is subject to K.S.A. 7-104, and cannot avoid its terms by relying on the perhaps anomalous result that under the regulation, lay persons may appear in behalf of parties, and need not, because they are not attorneys, be associated with local counsel.

If the attorney in question is not appearing in a professional capacity, the burden is on that person to establish that fact. A surely persuasive fact bearing in this determination is whether the fee for his or her services is that customarily charged for his or her professional services. Another probative circumstance would be whether the attorney engages in like representation elsewhere in a lay rather than a professional capacity, e.g., because of some special training or expertise in employment matters which he or she has acquired prior to or independently of his or her legal education. Obviously, we cannot

Mr. Joseph S. Payne
Page Four
December 21, 1976

resolve factual matters which are in question purely as matters of law. However, on the face of the matter, in my judgment, the attorney in question is subject to K.S.A. 7-104, unless and until it is established by clear and convincing evidence that he or she does not appear in a professional capacity.

At this time, I do not recommend any amendment of the regulation merely to respond to the factual situation described above.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj