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January 2, 1980

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ATTORNEY GENERAL OPINION NO. 80- 2

Peter K. Curran
Petefish, Curran & Immel
Lawrence National Bank Building
643 Massachusetts
Lawrence, Kansas 66044

Re: Schools--Teachers' Contracts--Due Process
Procedure; Compensation of Hearing Committee
Members

Synopsis: A member of a hearing committee established pursuant to K.S.A. 1979 Supp. 72-5436 et seq. may not receive per diem compensation, as that term is defined in K.S.A. 75-3223, and may receive a subsistence allowance as provided for by K.S.A. 75-3223(b) only if the requirements of K.S.A. 1979 Supp. 75-3207(b) are met; i.e., the official travel must not be completed on the same day it is begun. Such a member may also receive mileage and other expenses as provided by K.S.A. 75-3223(c) and (d). Additionally, a school district may not make payments to hearing committee members other than those authorized by statute.

* * *

Dear Mr. Curran:

On behalf of Unified School District No. 497, you have requested our opinion on the duty of a school district to pay the expenses of a member of a hearing committee appointed pursuant to K.S.A. 1979 Supp. 72-5436 et seq. Specifically, you inquire under what circumstances a district is required to pay compensation, subsistence allowance, and other expenses, and whether a district may make payments beyond those authorized by statute.

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K.S.A. 1979 Supp. 72-5436 et seq. set forth a procedure whereby a teacher whose contract of employment has been terminated or is not renewed may be assured of due process. As part of this procedure, a hearing committee may be empaneled at the request of the teacher, pursuant to K.S.A. 1979 Supp. 72-5438. The committee consists of three members, each of whom is entitled to reimbursement of certain expenses. This is provided for by K.S.A. 1979 Supp. 72-5440(b), which states:

"Each member of the hearing committee shall be paid subsistence allowances, mileage and other expenses, as provided in K.S.A. 1976 Supp. 75-3223, and amendments thereto. The costs for the services of members of the hearing committee shall be borne equally by the parties."
(Emphasis added.)

Your inquiry concerns the precise nature of these expenses.

We would initially note that K.S.A. 75-3223, to which one is referred by K.S.A. 1979 Supp. 72-5440(b), draws a clear distinction between the payment of "compensation" in subsection (a), "subsistence allowances" in subsection (b), "mileage" in subsection (c) and "other expenses" in subsection (d). The first of these terms is held to include the payment of per diem compensation of \$35 for each day of actual attendance at board meetings, while the second involves charges for meals and lodging (K.S.A. 1979 Supp. 75-3207) and is set by K.S.A. 1979 Supp. 75-3207a at a maximum rate of \$32 per calendar day. Furthermore, such allowances are limited by K.S.A. 1979 Supp. 75-3207(b) as follows:

"In all cases of official travel inside or outside of the state which is subject to the provisions of this section, where the official traveler leaves his or her official station or domicile and returns on the same day without incurring lodging expense no subsistence allowance will be paid. No subsistence allowance shall be allowed for expenses incurred within thirty (30) miles of an employee's official station."
(Emphasis added.)

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From the above, we would conclude that the payment of per diem compensation is not authorized under K.S.A. 1979 Supp. 72-5440(b), in that that term is conspicuously omitted, while the other three terms defined in K.S.A. 75-3223 are included. Had the legislature wished to provide for payment of compensation, 72-5440(b) could have been so drafted, but it was not. For an example of where this was done, see K.S.A. 1979 Supp. 74-1405, regarding the payment of "compensation, subsistence allowances, mileage and other expenses" for Kansas dental board members. Additionally, we note that K.S.A. 1975 Supp. 72-5440 provided that each member of the hearing committee be paid "compensation for such member's services in an amount agreed upon by the parties, but in no event shall such amount exceed seventy-five dollars (\$75.00) per day." That language was stricken from the Act in the 1976 amendment thereto (L. 1976, ch. 315, §5). Thus, it appears to be the clear intent of the legislature that the hearing committee members not be paid any compensation.

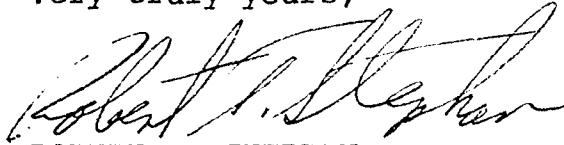
Furthermore, it is also clear that the payment of subsistence allowances may be paid only when the requirements of K.S.A. 1979 Supp. 75-3207(b) are met, i.e., actual lodging expenses must be incurred. Mileage may of course be paid regardless of whether lodging expenses are incurred, as may those actual and necessary expenses included in the term "other expenses" found in K.S.A. 75-3223(d).

You also have inquired whether a school district may make payments other than those authorized by statute. It is the general rule, as exemplified by the holding in Wichita Public Schools Employees Union v. Smith, 194 Kan. 2 (1964), that "school districts and other subdivisions of the state have only such powers as are conferred upon them by statute, specifically or by clear implication, and that any reasonable doubt as to the existence of such power should be resolved against its existence." (Smith, supra, at p. 4.) "A school district has only such power and authority as is granted by the legislature and its power to contract, including contracts for employment, is only such as is conferred either expressly or by necessary implication." (Smith, supra, at 4.) There is no statutory authority for payment of compensation to hearing committee members. Absent such statutory authority, or clear statutory implication, the school districts have no power to make such compensation, either on their own or by agreement with the teachers.

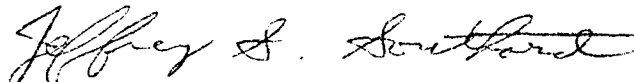
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In conclusion, a member of a hearing committee established pursuant to K.S.A. 1979 Supp. 72-5436 et seq., may not receive per diem compensation, as that term is defined in K.S.A. 75-3223, and may receive a subsistence allowance, as provided for by K.S.A. 75-3223(b), only if the requirements of K.S.A. 1979 Supp. 75-3207(b) are met; i.e., the official travel must not be completed on the same day it is begun and actual lodging expenses are incurred. Such a member may also receive mileage and other expenses as provided by K.S.A. 75-3223(c) and (d). Additionally, a school district may not make payments to hearing committee members other than those authorized by statute.

Very truly yours,



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