



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 80-63

The Honorable Joseph C. Harder
State Senator, Twenty-Fifth District
143-N, State Capitol
Topeka, Kansas 66612

Re: Schools--Teachers' Contracts--Constitutionality
of Binding Arbitration Provision in Senate Bill
No. 718

Synopsis: Section 8 of 1980 Senate Bill No. 718, providing for the use of binding arbitration as a means of determining disputes in the negotiation of teachers' contracts in local school districts, is not unconstitutional as a violation of Article 6 of the Kansas Constitution, which relates to the respective powers of the Legislature, the State Board of Education and local school boards. It is likewise not unconstitutional as an unlawful delegation of legislative power under Article 2 of the Kansas Constitution, as the power exercised by the board of arbitrators is quasi-judicial rather than legislative in nature. However, as presently written the bill does fail to adequately set forth the considerations the board of arbitrators must weigh in reaching their decision. This infirmity, however, could be corrected by amendment.

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Dear Senator Harder:

As Chairman of the Senate Education Committee, you have asked for our opinion as to the constitutionality of using binding arbitration to resolve disputes in the negotiation of the

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employment contracts of public school teachers. Specifically, you have asked us to review section eight of 1980 Senate Bill No. 718: "An act concerning professional negotiation between boards of education and professional employees thereof; providing for arbitration for resolution of impasse." The section in question calls for the use of a board of arbitrators to select the "last best offer" of either the local school board or the teachers as a means of resolving collective bargaining disputes. The board's decision, while binding, may be appealed in the courts.

Because of the complex nature of the issues implicit in your request, we have found it necessary to seek the assistance of several groups that have been active participants in the development and modification of the Professional Negotiations Act. From separate memorandum filed on behalf of Shawnee Mission Unified School District No. 512, the Kansas Association of School Boards, and the Kansas-National Education Association, we have been able to clarify those issues with which groups representing both school boards and teachers are concerned. In addition, we have analyzed the provisions of Senate Bill No. 718, and have identified the respects in which we believe the bill may be defective.

With the above in mind, the pertinent issues as we see them are twofold:

1. As it stands, the bill would require the submission of those terms of a teacher's employment contract upon which the parties cannot agree to an independent panel of arbitrators appointed by the Secretary of Human Resources for final resolution. Would this infringe upon the constitutionally authorized powers of local school boards or the State Board of Education, and so violate provisions of Article 6 of the Kansas Constitution?

2. Would such a statute violate Article 2, Section 1 of the Kansas Constitution as being either an unlawful delegation of legislative power to an independent board of arbitrators, or, conversely, as a permissible grant of a lesser power without adequate standards for the board to follow?

A general examination of the legislative and judicial events leading to the introduction of Senate Bill No. 718 is helpful in recognizing the complexity of the issues presented here. Since the enactment of the professional negotiations law in

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1970, the subject of collective negotiations for teachers employed by the public school systems has been the subject of considerable controversy and litigation. A brief history of collective negotiations in Kansas is found in Liberal-NEA v. Board of Education, 217 Kan. 219 (1973):

"[W]e should recognize that the unionization of public employees is a recent development in Kansas. The Labor Management Relations Act of 1947 [29 U.S.C.A. §152(2)] specifically excluded from the ambit of its application employees of states and their political subdivisions. The Kansas statutes pertaining to collective bargaining have a history covering many years. In 1943 a comprehensive act governing collective bargaining was enacted. (K.S.A. 44-802 through 44-815). In 1955 the state labor commissioner was authorized to adopt rules and regulations governing the conduct and canvassing of elections for the selection of collective bargaining units. (K.S.A. 44-816.) The current rules and regulations may now be found in K.A.R. 49-6-1 through 49-6-6. In Wichita Public Schools Employees Union v. Smith, 194 Kan. 2, 397 P.2d 357 (1964), this court held that the Kansas statutes pertaining to collective bargaining applied only to private industry and would not be applied to school districts and other political subdivisions of the state until such time as the legislature shows a definite intent to include such political subdivisions. In that case the employees of the board of education of the city of Wichita were denied the right to compel the state labor commissioner to conduct an election to determine a collective bargaining unit for the board of education employees. In 1970 the Kansas legislature enacted K.S.A. 72-5413 through 72-5425 which extended the right to bargain collectively to professional and administrative employees of school boards. A bill which would have given the right to public employees other than teachers passed the house but faltered in the senate. In 1971 the right to bargain collectively was extended to public employees with specified

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exceptions by the public employers-employees relations act, K.S.A. 1972 Supp. 75-4321 through 75-4335." Id. at 224, 225.

Late in 1973, the Kansas Supreme Court examined for the first time the substantive provisions of the Kansas Professional Negotiations Act. In National Education Association v. Board of Education, 212 Kan. 741 (1973), both parties sought "guidance as to their rights and duties under the act." Id. at 745. The Court determined that "the first and most fundamental issue separating the parties is their different view of the underlying objective of negotiations," (Id. at 745) and proceeded to outline the positions of each side. The NEA interpreted the act as a

"'collective bargaining' act, under which the parties are required to reach a binding agreement, while the Board says it is but a 'meet and confer' act, under which its duty is merely to listen to the teachers and then make up its own mind." Id. at 745, 746.

For several reasons, including the definition of professional negotiations, the statutory provision that agreements, when ratified, were binding, the elaborate procedures which dealt with recognition and the option for inclusion of binding arbitration in disputes, the court held that the act was a collective bargaining act.

The Court recognized that the parties could, by agreement, provide for binding arbitration of disputes, for while such agreements would be "in severe derogation of the traditional powers of a board of education . . . the legislature saw fit to authorize them." Id. at 749. In summing up the issue of the duty to negotiate, the Court reached the conclusion that:

"[A] public employer may negotiate and be bound by its agreements relating to terms and conditions of employment.

"The prime subject of most negotiating encounters will suffice to illustrate the point. While public employers have limited resources with which to pay wages and salaries demanded across the bargaining table, they do have some

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flexibility in ordering priorities in their budget. A school board can, for example, pay larger salaries at the expense of supplies or library books. Thus proposals and counter-proposals for a salary schedule played a prominent role in the 'negotiations' in this case. No agreement was reached, but in due course contracts calling for fixed salaries were offered to the district's teachers.

"We note at this point that if the Board's argument were pushed to its limits, it would necessarily follow that such contracts are not binding upon it--they do, after all, purport to limit the Board's prerogative to change its mind on the most vital and fundamental matter entrusted to its custody and control, i.e., the expenditure of the taxpayer's money. The Board, of course, does not so contend, and at least to that extent concedes that it can make agreements on terms and conditions of professional service which will be binding upon it." Id. at 750.

From the above, it is clear that even at this point the court recognized that the collective negotiation process had worked a fundamental change on the traditional powers of a local school board. Whether the extension of the process which is contemplated by Senate Bill No. 718 also affects the constitutional powers of local boards is the question to which we now turn.

Constitutional challenges to the professional negotiations statutes in force in Kansas have in the past focused on the provisions of Article 6 of the Kansas Constitution, which relates to the field of education. Accordingly, potential conflicts which Senate Bill No. 718 might have with this article will be examined at the outset. Article 6, §1 gives the legislature the power to "provide for intellectual, educational, vocational, and scientific improvement by establishing and maintaining public schools, educational institutions and related activities" Kan. Const., Art. 6, §1. Section 2 instructs the legislature to "provide for a state

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board of education which shall have general supervision of public schools, educational institutions and all the educational interests of the state" Kan. Const., Art. 6, §2(a). Section 5 gives to locally-elected boards under the general supervision of the state board of education the duty to maintain, develop and operate local public schools. Kan. Const., Art. 6, §6. This latter language was first explicitly set out following the amendment of Article 6 by the voters in 1966.

One of the first cases to construe several of the provisions of Article 6 as amended was State ex rel. v. Board of Education, 212 Kan. 482 (1973) (Peabody). At issue in Peabody was the validity of a regulation relating to school conduct promulgated by the State Board of Education. The court traced the development and amendment of Article 6, and noted that "the 1966 amendment made significant changes in the area of public schools and educational institutions." Id. at 485. It also found that "a greater sense of obligation on the part of the State to participate in the support of public schools and in the general field of public education seems to be implicit in the language of Article 6, §1." Id. at 485. Further, the court held that:

"The statutes of this state, as well as provisions of the constitution, contemplate that the state board of education shall have authority to supervise the public schools and to adopt regulations for that purpose, while local boards of education are to provide for the government and operation and maintenance of the public schools subject to such supervision." Id. at 482. (Emphasis added.)

Construing the meaning of "general supervision" as used in Article 6, §2(a), the court said:

"As used in article 6, §2(a) of the Kansas Constitution, general supervision means the power to inspect, to superintend, to evaluate, to oversee for direction. As found and employed both in the constitution and in the statutes of this state the term 'general supervision' means something more than to advise and confer with but something less than to control." Id., Syl. 9, 10, at 482, 483.

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The definitions and clarifications of Article 6 established by Peabody have been reiterated by the court in subsequent constitutional challenges to the authority of the State Board of Education. The next such challenge to an action of the Board was addressed by the court in State ex rel. Dix v. State Board of Education, 215 Kan. 551 (1974). In Dix, the State Board of Education, pursuant to statutory authority, ordered changes in the district boundaries of two school districts. The school district from which territory had been removed attacked the transfer statute as unconstitutional and further argued that the state board acted unlawfully, unreasonably, arbitrarily and capriciously. Id. at 553. The court rejected this argument and held:

"Under Art. 6, Sec. 1 and 2 of our constitution the State Board of Education is authorized to perform any duties pertaining to the educational interests of the state which the legislature deems wise and prudent to impose upon the board, and the legislature has authority to delegate to that board the power to perform duties which, in the general classification of powers of government, are legislative in character" Id. at 556. (Emphasis added.)

A similar challenge to that presented in Dix was the focus of a 1978 suit between the Board of Education in Bourbon County, Kansas and the bargaining representatives of teachers in Ft. Scott, a case found at N.E.A. Ft. Scott v. U.S.D. 234, 225 Kan. 607 (1979). Following a deadlock in negotiations, the Teachers Association filed a petition in the district court, seeking a declaration of impasse and an order restraining the school board from issuing unilateral contracts. The school board attacked as unconstitutional the 1977 amendments to the Teachers' Collective Negotiations Act, which among other things added the impasse procedure, defined terms and conditions of professional service, and assigned certain duties to the Secretary of Human Resources. 225 Kan. at 607, 608. The Kansas Supreme Court phrased the issue:

"Do the 1977 amendments to the Teachers' Collective Negotiations Act exceed legislative authority and violate the constitutional provision for a state board

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of education as set forth in Article 6,
section 2(a) of the Kansas Constitution?"
(Emphasis added.) Id. at 608.

The thrust of the school board's position was that by virtue of Article 6, §2 of the Kansas Constitution, the State Board of Education is authorized to have "general supervision of the public schools, including the collective negotiation procedure, and that the provisions of the act assigning negotiation and mediation functions to the Secretary of Human Resources are unconstitutional." Id. at 608. The court rejected this argument, holding that:

"Article 6, section 2 limits the power of the State Board of Education to 'general supervision' of public schools. The legislature is authorized by the constitution to provide for 'related activities.' Art. 6, §1. The subject of teachers' collective negotiations falls within 'related activities' reserved to the legislature." Id. at 612.

In other words, the subject of collective negotiations is an area in which the legislature may act directly, through assigning administrative tasks to the Secretary of Human Resources, and not by the traditional path of delegating legislative power to the State Board, which in turn exercises general supervision over local boards.

How does this fairly brief history of legislation and court interpretation relate to the constitutional propriety of Senate Bill No. 718, §8, as regards Article 6? In determining the constitutional impact of this provision, it must of course be noted that the subject is a novel one in this state. However, it is helpful to use the same guidelines as did the court in Ft. Scott. There, the court began its inquiry by noting that:

"This court need not attempt to search out constitutional authority for enacting a challenged statute, but rather must determine if the legislation so clearly violates a constitutional prohibition as to place it beyond legislative authority. Unified School District No. 255 v. Unified School District No. 254, 204 Kan. 282, Syl. ¶2, 463 P.2d 499 (1969)." 225 Kan. at 609.

and further, that:

"The Teachers' Collective Negotiations Act with which we are presently concerned is solely a creature of the legislature. It is within the authority of the legislature to modify and refine such an act so long as the legislation is in harmony and not in derogation of the constitutional provisions relating to the same subject." Id. at 609, 610. (Emphasis added.)

The court in Ft. Scott then determined that the involvement of the Secretary of Human Resources in the collective negotiation process did not conflict with the general supervision of public schools entrusted to the State Board of Education:

"The State Board of Education continues to have all power and authority it previously had and exercised over the public schools of this state before the Teachers' Collective Negotiations Act was passed in 1970 The authority granted to the secretary in no way conflicts with the basic mission of the State Board of Education. The board's mission is to equalize and promote the quality of education for the students of this state by such things as statewide accreditation and certification of teachers and schools. See K.S.A. 1978 Supp. 72-7513." Id. at 610.

The court did not stop at this point, holding further that:

"The functions of the Secretary of Human Resources under the act are limited and confined to professional negotiations, an area not considered by this court to be within the basic mission of the public schools of this state." Id. at 611. (Emphasis added.)

Does the binding arbitration provision of Senate Bill No. 718 derogate any of the constitutional provisions of Article 6? We think not. It is clear from the Fort Scott decision that the area of professional negotiations is not within the basic mission of either the State Board of Education or the public schools of this state. As such, a provision for binding arbitration interferes with neither the constitutional powers

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of the State Board under Article 6, §2(a), nor those of the local boards under Article 6, §5. In Blaine v. Board of Education, 210 Kan. 560 (1972), the court articulated its interpretation of Article 6, §5:

"The legislature of this state in compliance with the constitutional mandate has established a system of local public schools which are placed under the supervision of locally-elected boards of education. These boards are invested with authority to operate the schools, to provide rules and regulations to govern the learning process, subject, however, to the recommendations of the state board of education and the statutes of this state. (See K.S.A. 1971 Supp. 72-8205.)" Id. at 563, 564.

By finding, as it did in Ft. Scott, that the area of collective negotiations is a "related activity" which has been reserved to the Legislature, pursuant to Art. 6, §1, the Kansas Supreme Court has indicated that this is yet another area which is not subject to the power of local boards. Given the constraints which are placed upon the board of arbitrators by both the proposed bill and by other existing laws (as will be set out below in the second point) the general power of local boards to operate schools and govern the learning process would remain intact, although it may be conceded that the traditional, near-absolute authority held by local boards in the fixing of salaries would be lessened. However, this does not in our opinion constitute a constitutional barrier, but rather a policy consideration with which the legislature itself must deal.

A second potential defect in Senate Bill No. 718 could involve violation of Article 2, section 1 of the Kansas Constitution, in that it would be an unlawful delegation of legislative power to a panel of independent arbitrators selected by the Secretary of Human Resources. The basic purpose of this provision is to insure that persons unaccountable to the voters cannot take actions which usurp the role of the legislature, which alone is vested with, for example, the power to tax. However, while such legislative powers cannot be delegated, other, lesser powers may be. Therefore, to resolve this issue it is first necessary to determine the nature of the power held by the panel of arbitrators.

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In determining the nature of the powers which an administrative agency wields, the Kansas Supreme Court has developed a plethora of different standards over the years. Both the Kansas Association of School Boards and the Shawnee Mission Unified School District have argued in their memorandums that the legislature is without power to give to an independent, non-accountable entity the authority to bind school boards and teachers to definite terms and conditions of employment; in short, to vest legislative power in an administrative board without express constitutional authority to so do. For support, they point to such cases as State ex rel. Donaldson v. Hines, 163 Kan. 300 (1947). In its memorandum, the K-NEA takes the position that the board of arbitrators would operate in an administrative role, with any discretionary decisions limited by the standards set out by the enactment. The case of Missouri Pacific Railroad Co. v. McDonald, 207 Kan. 774 (1971) is offered in support for this position.

However, after examining the provisions of Senate Bill No. 718 and other Kansas case law, it is our opinion that the board of arbitrators would be vested with powers which can best be described as "quasi-judicial" in nature. A detailed explanation of this type of authority which we feel has great relevance here was given in Gawith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169 (1970). There, the court explained:

"In determining whether an administrative agency performs legislative or judicial functions, the courts rely on certain tests; one being whether the court could have been charged in the first instance with the responsibility of making the decisions the administrative body must make, and another being whether the function the administrative agency performs is one that courts historically have been accustomed to perform and had performed prior to the creation of the administrative body.

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist, whereas legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

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"In applying tests to distinguish legislative from judicial powers, courts have recognized that it is the nature of the act performed, rather than the name of the officer or agency which performs it, that determines its character as judicial or otherwise." (Syl. ¶¶1, 2, 3, 4.)

The court reached a similar conclusion in Thompson v. Amis, 208 Kan. 658 (1972):

"The term 'quasi-judicial' is applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a judicial nature." (Syl. ¶6.)

We believe that the above process best describes that envisaged under the proposed legislation. According to §8 of the bill, the Secretary of Human Resources must select up to three persons "from a list maintained by the secretary of qualified and impartial individuals who are representative of the public" to serve on the fact-finding and arbitration board. The board is empowered to make such investigations and inquiries and to hold hearings as it deems necessary, and may administer oaths and affirmations, take testimony, receive evidence, and issue subpoenas in the course of conducting such hearings. In resolving the issues presented by the differing parties, the board is limited to adopting the final position of either side on an issue-by-issue basis, based on its findings of fact. In view of the essentially court-like nature of these duties, it is our opinion that the activities of the board of arbitrators would constitute the exercise of a quasi-judicial power as defined by the Kansas Supreme Court, not as an exercise of legislative authority, and is thereby permitted by Article 2.

However, even though this is the case, it also is necessary that the exercise of such power be clearly defined. The scope of and extent to which the board's quasi-judicial powers may be exercised are measured by the terms and necessary implication of the constitutional or statutory grant of power.

"Administrative determinations must have a basis in law and must be within the granted authority, must accord with the prescribed statutory standards and policy, and generally must represent a reasoned conclusion and not an arbitrary fiat." 11 Am.Jur.2d Administrative Law, §183, p. 986.

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It is our opinion that in this respect Senate Bill No. 718 fails to set adequate standards to guide the arbitrators in their determination of which position to adopt. Although provision is made for judicial review of the decision of the panel, the arbitrators are virtually unrestricted in the way in which they arrive at their determination of which side's position to adopt. Some of the additions which are necessary in our opinion to correct this deficiency include:

1. Listing those considerations the panel must weigh in making its award. For example, an arbitration panel should be required to consider statutory financial limitations on boards of education such as the Kansas Budget Lid (K.S.A. 1979 Supp. 72-7030 et seq.), the Kansas Cash Basis Law (K.S.A. 10-1101 et seq.), and the Kansas Continuing Contract Law (K.S.A. 72-5410 et seq.).

2. Although the obligation of good faith is imposed on the parties to the contract, no such standard is imposed upon the arbitration panel; they are required to be "qualified and impartial individuals who are representative of the public." [Senate Bill No. 718, Sec. 8(a)]. As the measure now stands, there is no definition of these terms or incorporation of other statutory provisions which would aid in interpretation (see K.S.A. 75-4323(c)).

3. Although the size of the arbitration panel is determined by the Secretary of Human Resources and limited to a maximum of three members, there is no standard for determining the size of the panel or any provision for resolution of differences among panel members. Such an omission could conceivably result in a panel of two arbitrators who could disagree about which position to adopt. K.S.A. 1979 Supp. 72-5432(a) could be amended to authorize the Secretary of Human Resources to promulgate standards and guidelines for use by arbitrators.

While these factors would appear to be the most crucial, you may also wish to examine those set out by Charles C. Mulcahey in his article "Ability to Pay: The Public Employee Dilemma," Arbitration Journal, Vol. 31, No. I, p. 90 (March, 1976).

Finally, the delegation of this quasi-judicial authority by the Secretary of Human Resources is not, in our opinion, improper because made to third parties. By virtue of the authority of the secretary, such appointment vests the powers of the secretary

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in the arbitration board members and so makes the members of the panel public employees. (See K.S.A. 75-4323(c), K.S.A. 75-5713(c)). The Kansas Supreme Court recognized the capability of the Department of Human Resources in the area of professional negotiations in Ft. Scott, when it stated:

"The Department of Human Resources was created by the 1976 Executive Reorganization Order No. 14, which was issued by the governor of this state on February 10, 1976 (see L.1979, ch. 354). This order was approved and amended by the legislature, and constitutes K.S.A. 75-5701 et seq. The department is administered under the direction and supervision of the Secretary of Human Resources, and includes a division of employment, a division of workers' compensation, a division of labor-management relations, and various other divisions and departments in the field of labor and management. These include the former Public Employees Relations Board, absorbed by the Department of Human Resources. K.S.A. 75-5713(c) provides:

" 'The powers, duties and functions vested in the public employee relations board by K.S.A. 1975 Supp. 75-4323 relating to appointments and contracts with persons deemed necessary for the performance of its functions and to the establishment of panels of qualified persons to serve as mediators, arbitrators or members of fact-finding boards are hereby specifically transferred to and conferred and imposed upon the secretary of human resources, and said secretary shall be the successor in every way to said powers, duties and functions.'

"It is apparent from the foregoing that the Secretary of Human Resources should have the necessary staff and expertise to fulfill the specialized requirements of overseeing negotiation and mediation between teachers and public school boards When additional concerns in the field of negotiation

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and mediation between teachers and school boards were recognized by the legislature in 1977, the Secretary of Human Resources was the logical person to look to for assistance in the area of mediation."
225 Kan. at 610.

Additionally, it should be noted that the process is under the control of the Secretary of Human Resources, who is appointed by the highest-elected official in the state, and is guided and limited by restrictions imposed by the elected representatives of the people. In this way, arbitration power is not vested in private individuals, a defect which has been recognized as fatal in a similar situation. Fire Fighters Local 412 v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972). See also Quality Oil Co. v. DuPont & Co., 182 Kan. 488, 496 (1958).

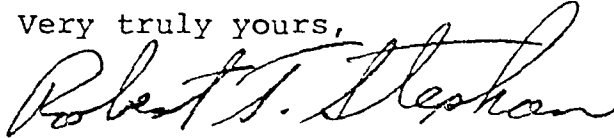
In conclusion, it should be evident from the length of the above discussion that the subject of binding arbitration, at least from a constitutional standpoint, is still relatively unexplored in Kansas. The Kansas Supreme Court has, in the absence of any statutory enactment, of course been unable to examine the question in light of the state's constitution, provisions of which are conceded by all to be unique. Additionally, because of these unique provisions, cases from other jurisdictions, are of only limited value, although they generally tend to uphold clearly-written laws establishing binding arbitration as a means of resolving teacher disputes.

It is our opinion that, given the cases which have in recent years re-examined Kansas constitutional provisions in light of the collective negotiations act, the concept of binding arbitration as embodied in 1980 Senate Bill No. 718, §8, is not violative of the Kansas Constitution, either as an infringement upon the power of the State Board of Education or that of local boards, as set out in Article 6, or as an unlawful delegation of legislative power under Article 2. While there do appear to be certain deficiencies in the standards which the board of arbitrators must consider in arriving at their decision, these flaws do not appear to be fatal and may be corrected by amendment. Again, it should be emphasized that the decision whether to employ binding arbitration as a tool in the resolving of disputes in teacher contract negotiations is a policy determination for the legislature alone to make.

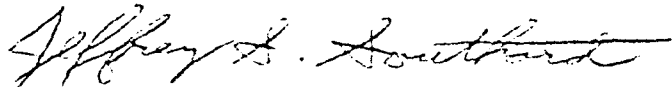
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This opinion has dealt with only the constitutional aspects of Senate Bill No. 718, and does not presume to have weighed the many other considerations which must also enter into the resolution of this topic.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

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