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March 19, 1980

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ATTORNEY GENERAL OPINION NO. 80- 73

Mr. Fletcher Bell
Commissioner of Insurance
Chairman, Committee on Surety Bonds and Insurance
First Floor, State Office Building
Topeka, Kansas 66612

Re: Forestry, Fish and Game--Safety and Handling
of Firearms--Kansas Tort Claims Act and
Liability Insurance

Synopsis: Hunter Safety Course instructors acting on behalf of the State of Kansas, Fish and Game Commission while conducting an approved course of firearm safety are "employees" within the meaning of the Kansas Tort Claims Act. The Committee on Surety Bonds and Insurance may purchase liability insurance to cover such instructors while acting on behalf of the State of Kansas. Cited herein: K.S.A. 32-401, 32-402 and 32-403, K.S.A. 1979 Supp. 32-404, 75-4114, 75-6102 and 75-6103 and L. 1979, ch. 33, §34.

* * *

Dear Commissioner Bell:

You request our opinion concerning whether persons conducting hunter safety courses, pursuant to K.S.A. 32-401 et seq. (as amended) are subject to the Kansas Tort Claims Act. You state that the Committee on Surety Bonds and Insurance recently received a request to purchase liability insurance for the protection of the persons engaged in conducting hunter safety courses. You note that pursuant to K.S.A. 1979 Supp. 32-404, the Committee is specifically charged by the legislature to

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purchase "within the limitations of appropriations made therefor," liability insurance deemed necessary for the protection of instructors engaged in conducting safety courses.

You indicate that, at the present time, approximately three thousand (3,000) instructors are conducting such courses and they are generally volunteers who donate their time and are not reimbursed for expenses. You also indicate that employees of the Fish and Game Commission and the local law enforcement agencies occasionally act as instructors.

With regard to the above circumstances, you specifically request our opinion as to:

- (1) "Whether or not, and to what extent hunter safety course instructors are liable in accordance with the Kansas Tort Claims Act"; and
- (2) "Whether or not appropriations have been properly made for the purchase of liability insurance."

As to your first question, a brief summary of the statutory authority for hunter safety courses is helpful. The Kansas Legislature, pursuant to K.S.A. 32-401, requires that certain, specified persons possess a certificate of competency and safety in the handling of firearms before they may lawfully hunt in Kansas. Under K.S.A. 32-402 and 32-403 the Kansas Fish and Game Commission is authorized to prescribe and coordinate a statewide course of instruction and designate persons to issue certificates of competency and safety. K.S.A. 32-403(a) specifies that the commission "may cooperate with local subdivisions of government, or with any reputable organization having as one of its objectives the promotion of safety and competency in the handling of firearms, conservation, and hunting ethics." Also K.S.A. 32-403(b) specifies that:

"such commission may, using commission personnel or other persons, conduct such courses in hunting safety and issue such certificates only on a temporary basis, at times and in areas where other competent agencies are unable to or unwilling to meet the demand for instruction."

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We emphasize that the hunter safety course is part of a state program specifically authorized by statute and coordinated by a state agency. Whether the Kansas Tort Claims Act contemplates state liability for tortious acts of all such instructors depends upon whether they are within the definition of "employee" set forth in the act. K.S.A. 1979 Supp. 75-6103 states in pertinent part:

"Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."
(Emphasis added.)

The definitional section of the act, K.S.A. 1979 Supp. 75-6102, states in pertinent part:

"As used in K.S.A. 1979 Supp. 75-6106 to 75-6116, inclusive, unless the context clearly requires otherwise, the following words and phrases shall have the meanings respectively ascribed to them herein:

"(a) 'State' means the state of Kansas or any office, department, agency, authority, bureau, commission, board, institution, hospital, college, university or other instrumentality thereof

"(b) 'Municipality' means any county, township, city, school district or other political or taxing subdivision of the state.

"(c) 'Governmental entity' means and includes state and municipality as herein-before defined.

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"(d) 'Employee' means any officer, employee or servant or any member of a board, commission or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." (Emphasis added.)

The Fish and Game Commission, a state agency, is clearly a governmental entity as defined by the Kansas Tort Claims Act and therefore, pursuant to K.S.A. 1979 Supp. 75-6103 of that act, is liable for tortious conduct of its employees while acting within the scope of their employment. We wish to emphasize that the relevant statutory definition of "employee" includes "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." In examining the nature of such persons' relationship with the Commission, we observe the agency's extensive control over the hunter safety course program. Examples of control over instructors and courses of instruction exercised by the Commission include:

1. The Coordinator (a state official) approves all hunter safety course instructor applications.
2. Approved instructors are issued a Course Instructor's I.D., signed by the Fish and Game Director.
3. Course instructors are subject to evaluation by the Commission and, based on objective criteria, are subject to loss of their Instructor's I.D. card if deemed no longer qualified.
4. Regular Fish and Game Hunter Safety Course workshops and seminars are scheduled to train instructors.
5. Regular Fish and Game Hunter Safety Course newsletters are sent to instructors to keep them informed of Commission policy and any new developments in course-related activity.
6. Course manuals are provided to both instructors and students by the commission, and Instructors are required to follow the manuals during the course of instruction.
7. Instructors are subject to any directives issued by the Fish and Game Hunter Safety Course Coordinator at all times.

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We are of the opinion that private persons who act as hunter safety course instructors, even though also employees of local subdivisions of government or of "reputable organizations" which "cooperate" with the Commission pursuant to K.S.A. 32-403(a), are "employees" of a government entity as defined by the Tort Claims Act because they are "persons acting on behalf or in service of" the Kansas Fish and Game Commission. See K.S.A. 1979 Supp. 75-6102(d).

With regard to your second question, it is our opinion that appropriations for liability insurance have been properly made in this case. By "properly made," we assume you are referring to whether the 1979 Fish and Game Commission appropriation statute was worded in such a way that liability insurance coverage for hunter safety instructors could properly be purchased by the Committee on Surety Bonds and Insurance.

Since passage of the Kansas Tort Claims Act, state agencies are dependent upon the State Committee on Surety Bonds and Insurance to purchase liability insurance for such agencies. The Committee derives such authority pursuant to the terms of K.S.A. 75-4114 which provides as follows:

"The committee, in addition to the coverages specified in K.S.A. 75-4109, may, within the limitations of appropriations made by the legislature therefor, purchase such liability insurance as they deem necessary for the protection of the state and its officers, employees and agents against any liability for injuries or damages resulting from any tortious conduct of such officers, employees or agents arising from the course of their employment or from any liability for injuries or damages resulting from conduct or decisions of such officers, employees or agents in carrying out the official duties of their offices pursuant to existing law, rule or regulation or court order."
(Emphasis added.)

It is clear from the foregoing that the Committee has authority independent of the terms of the Tort Claims Act to purchase liability insurance for the Fish and Game Commission. We are aware that the 1979 Kansas Legislature did not provide line

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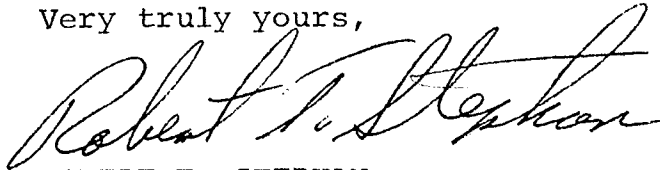
item appropriations for such liability insurance in the Kansas Fish and Game Commission appropriation statute. See 1979 Session Laws, Chapter 33, Section 34, which states:

"On July 1, 1979, the expenditure limitation established by section 4(a) of 1979 House Bill No. 2345 on the salaries and wages and for other operating expenditures account of the forestry, fish and game commission fee fund is hereby increased from \$6,612,231 to \$6,619,231."
(Emphasis added.)

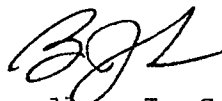
We note, however, that the Attorney General has previously opined that "an appropriation for multiple purposes within the same general category is constitutionally permissible." Attorney General Opinion No. 79-107 citing State ex rel. Anderson v. Fadely, 180 Kan. 652, 661 (1957). It is our opinion that the phrase "other operating expenditures" is a general category within which an appropriation for multiple purposes is constitutionally permissible and would in this case include expenditures for liability insurance for hunter safety course instructors.

In conclusion, it is our opinion that hunter safety course instructors acting on behalf of the Fish and Game Commission are subject to the Kansas Tort Claims Act. It is also our opinion that appropriations to effectuate the purpose of K.S.A. 1979 Supp. 32-404 were properly made. Therefore the Committee on Surety Bonds and Insurance is free to carry out the legislative directive to "purchase such liability insurance as it deems necessary for the protection of the persons engaged in conducting an approved course of instruction in [firearms] safety."
(Emphasis added.) K.S.A. 1979 Supp. 32-404.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General