STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

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ATTORNEY GENERAL OPINION NO. 82- 167

Mr. Robert J. Watson
City Attorney
Legal Department of Kansas City, Kansas
9th Floor
Municipal Office Building
One Civic Center Plaza
Kansas City, Kansas 66101

Re: Civil Procedure - - Attachment and Garnishment - - Application to Mutual Indebtedness of Employer and Employee

Cities, First Class - - Public Utilities - - Right of Set-Off Where BPU and Employee Mutually Indebted

Synopsis: Neither attachment nor garnishment of wages held by the Board of Public Utilities, and due its employees, is available to the Board for the purpose of recovering unpaid utility bills due the Board from those employees, because it is impermissible for an aggrieved party to attach or garnish wages it holds for its own employees.

A fundamental right of every creditor is that of set-off. The Board of Public Utilities is, therefore, entitled to exercise the right of set-off as a remedy to recover unpaid utility bills from the sums it owes employees in the form of wages. Since "state action" exists, such right must be exercised in accordance with the dictates of the "due process clause" of the Fourteenth Amendment to the United States Constitution. Cited herein: K.S.A. 60-701, K.S.A. 1981 Supp. 60-703, 60-706, K.S.A. 60-714, K.S.A. 1981 Supp. 75-6201, U.S. Const., Amend. XIV.

* * *

Dear Mr. Watson:

You have requested our opinion regarding several questions dealing with the collection of debts (unpaid utility bills) from employees and former employees of the Board of Public Utilities of Kansas City, Kansas (BPU).

The first question you pose is whether the BPU, which holds wages due its employees, may proceed to garnish those wages after judgment has been obtained against such employees for unpaid utility bills. As you noted in your letter, the Kansas garnishment statutes (K.S.A. 60-701 et seq.) do not speak to this situation. However, early Kansas case law clearly states that "the plaintiff cannot summon himself as garnishee."

First National Bank v. Elliott, 62 Kan. 764, 766 (1901). Thus where an employee or former employee is indebted to the BPU and the BPU holds wages which it owes such an employee or former employee, the postjudgment remedy of garnishment is impermissible.

Your second question is whether prejudgment attachment of an employee's wages is permissible under K.S.A. 1981 Supp. 60-703. That statute provides:

> "The order of attachment shall be issued by a judge of the district court upon the filing of a petition stating the claim and the filing of an affidavit, or an affidavit and bond as required in this article, except that no order of attachment shall be issued before judgment on plaintiff's claim where the property of the defendant to be attached is in the possession of a third party and is in the form of earnings due and owing to the defendant. The filing of an affidavit stating one or more grounds of attachment is required in every case. A bond is required in every case except in actions instituted on behalf of the state of Kansas or a county of the state. The order of attachment may be issued and executed on Sunday or on a legal holiday if the affidavit states that the party seeking the attachment will lose the benefit thereof unless the writ be issued or served on such day. The provisions of this section shall not be applicable to garnishments authorized pursuant to K.S.A. 1979 Supp. 60-1607." (Emphasis added)

The emphasized portion of the foregoing statute establishes that an attachment order will not issue before judgment on plaintiff's claim where the property in question, first, "is in the possession of a third party" and, second, "is in the form of earnings due and owing the defendant." You state that it is your belief that such attachment should be allowed, because the property would not be in the hands of a third party, but in the hands of the BPU. Since the remedy of attachment is provided for by statute, the question presented is basically one of statutory interpretation, and in our judgment, the language of the statute does not contemplate the attachment of the defendant's property unless that property is in the hands of either the defendant or a third party. Certainly, the BPU, which would be the plaintiff in such an action, would be neither a defendant nor a third party. A contrary construction would allow the plaintiff to garnish itself, which as previously noted is impermissible.

The "attachment order" made a part of K.S.A. 1981 Supp. 60-706 provides in part:

> "If the real or personal property sought to be attached by you is in the hands of some person other than the defendant, you shall serve a copy of this order on such third party and declare to such party that you attach the same and that such third party is made a garnishee in accordance with the following directions to such third party:
>
> "'If the officer serving this order of attachment upon you declares to you that the officer attaches any funds or property in your hands, you are hereby made a garnishee in the above entitled matter.
>
> "'You are hereby ordered as a garnishee to file with the clerk of the above named court, within twenty (20) days after service of this order upon you, your answer under oath stating whether you are at the time of the service of this order upon you, your answer under oath stating whether you are at the time of the service of this order upon you, and also whether at any time thereafter but before you file your answer, indebted to the defendant, or have in your possession or control any property belonging to the defendant, and stating the amount of any such indebtedness and description of any such property. You are hereby further ordered to withhold the payment of any such indebtedness, or the delivery away from yourself of any such property, until further order of the court.'" (Emphasis added.)

A further examination of the attachment and garnishment statutes, in light of the questions posed, discloses a distinction between "garnishment" and "attachment." K.S.A. 60-714 states that garnishment is either "a form of or an aid to attachment" or "in lieu of execution." The distinction is commented upon in 7 C.J.S. Attachment §2, as follows:

> "Generally speaking, garnishment is but a form of attachment looking to the impounding of debts due a defendant in a civil action for the recovery of money, pending the rendering of final judgment therein, in effect the same as physical property capable of delivery is seized to that end by ordinary attachment. However, attachment and garnishment differ in charecter in that attachment is directed against property of the principal defendant which is in his possession or under his control, while the object of garnishment is to reach an indebtedness due to the principal defendant by a third person, or property in the possession or control of a third person, which belongs to the principal defendant." (Footnotes omitted.)

While K.S.A. 60-701 et seq. somewhat obliterate the distinction enunciated in this encyclopedic commentary, it is still relevant in the instant situation. Although we do agree that the BPU is not a third party as recognized in the attachment and garnishment statutes of this state, we cannot agree that because the earnings of an employee are in the hands of the BPU, rather than a third party, attachment would be permissible. Here, the BPU, in attempting to attach wages not yet paid to an employee, would not be attaching funds in the hands of the "principal defendant." Rather, it would be "attaching" or, more specifically, "garnishing" funds in its own hands. Consequently, as previously stated, the BPU, as plaintiff, shall neither "garnish" nor "attach" property in its possession.

You also have inquired regarding the BPU's right to offset the indebtedness in light of Baker v. McCarl, 24 F. 2d 897 (1928), which you state prescribes as a "general rule" that "a debt due the employer from another transaction between the parties may not be withheld from the compensation due the employee for the performance of services." A series of cases at about that time in the federal courts, involving similar factual circumstances, reached the same conclusion. See Dillon v. Groos, 299 F. 851 (1924), McCarl v. Cox, 8 F. 2d 669 (1925), Alexander v. Mare, 5 F. 2d 965 (1925), Smith v. Jackson, 246 U.S. 388, 385 S. Ct. 353, 62L. Ed. 785. We view those as very specialized cases, all of which preceded United States v. Munsey Trust, 332 U.S. 234, 91 L. Ed. 2022 (1946), the most widely-cited case addressing the right of set-off, which states, in part:

> "The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.' Gratiot v. United States, 15 Pet (US) 336, 370, 10 L.Ed. 759, 771; McKnight v. United States, 98 US 179, 186, 25 L.Ed. 115, 116." 91 L. Ed. at 2027.

Predicated on this case and others which have followed it, we believe the result sought by the BPU can be achieved by the application of the common law right of set-off. This remedy has been considered "a fundamental right of any creditor." 20 Am. Jur. 2d, Counterclaim, Recoupment, Etc., §7. As noted in Attorney General Opinion No. 80-244, "the doctrine of set-off is normally considered within the context of judicial proceedings to resolve the respective demands of mutually indebted parties." Id. at 2. Even so, the opinion further points out that "set-off has long been utilized outside of a judicial setting." Id. In Gratiot v. U.S., 40 U.S. (15 Pet.) 336, 10 L.Ed. 759 (1839), the court first expounded upon the theory that the government, as a creditor, was entitled to this self-help procedure. The right of set-off and its applicability has more recently been recognized where governmental bodies are concerned in Atwater v. Roudebush, 452 F. Supp. 622, 626 (1976). The right of set-off is reviewed in detail in the foregoing opinion, as it applies to employees of the State of Kansas, and a copy of that opinion is enclosed for your consideration. It concluded that a fundamental right of every creditor, including governmental entities, is that of set-off.

In concluding, we note that the Kansas Supreme Court found a "Board of Public Utilities to be an administrative agency of the city charged with the duty of managing, operating, maintaining and controlling the water and electric light plants of the city." Board of Public Utilities v. City of Kansas City, 227 Kan. 194, 198 (1980). As a result, we believe the exercise of the BPU's right of set-off would constitute "state action and deprivation of an individual interest of sufficient substance to warrant constitutional protection." Wertz v. Southern Cloud Unified School District, 218 Kan. 25 (1975). Accordingly, we call to your attention that Opinion No. 80-244 addresses the extensive procedural safeguards that would need to be employed by the BPU to ensure that the Fourteenth Amendment to the United States Constitution is not violated by application of the right of set-off. Since that opinion was written, the legislature has enacted specific legislation providing for set-off against debtors of the state (K.S.A. 1981 Supp. 75-6201 et seq.).

Although neither these statutes nor the regulations adopted thereunder are specifically applicable to the BPU as an administrative agency of the city, we commend them to your attention as being instructive, particularly in complying with the procedural safeguards of the Fourteenth Amendment.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Carl M. Anderson

Carl M. Anderson
Assistant Attorney General

RTS:WRA:CMA:dml