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May 7, 1986

ATTORNEY GENERAL OPINION NO. 86- 69

The Honorable Roy M. Ehrlich
State Senator, 35th District
Route 1, Box 92
Hoisington, Kansas 67554

Re: Schools -- Capital Outlay Levy, Funds and Bonds --
Procedure, Protest, Petition and Election; Effect
of Substitute Resolution

Synopsis: A board of education may pass a substitute capital
outlay levy resolution during the forty-day time
period following the last publication of a
resolution. Once a valid petition has been filed
with the county election officer challenging a
capital outlay levy resolution, a substitute
resolution may not be passed as an election must
occur on the challenged resolution. Cited herein:
K.S.A. 1985 Supp. 25-3602; K.S.A. 72-8801; Kan.
Const., Art. 6, §5.

* * *

Dear Senator Ehrlich:

As State Senator for the Thirty-Fifth District, you request
our opinion concerning resolutions passed by the Board of
Education (Board) of Unified School District No. 428 pursuant
to K.S.A. 72-8801 for a capital outlay mill levy.
Specifically, your question is:

"Can a school board who has passed a capital outlay mill levy resolution, (pursuant to K.S.A. 72-8801 et seq.) thereafter, but within the forty (40) day period provided for in the statute for the public to petition a public vote as to whether the tax levy shall be authorized, pass a substitute or superseding resolution"

You inform us that on December 9, 1985, the Board passed a resolution providing for a capital outlay levy of four mills for five years. Thereafter the Board held a special meeting on January 15, 1986, to reconsider its action and passed a resolution calling for a three mill, one year capital outlay levy. This second resolution was published in a local newspaper according to law on January 23 and January 30, 1986. You state that a group of patrons of the district circulated a petition pursuant to K.S.A. 72-8801 to require an election to determine if the tax levy should be authorized. The petition was submitted to the county election officer on March 10, 1986, forty days after last publication. You also inform us that on March 3, 1986, the Board passed a third resolution providing for a capital outlay levy of four mills for five years.

This situation in U.S.D. No. 428 was recently the subject of Attorney General Opinion No. 86-51 in which we were asked whether the petition submitted to the county clerk was legally sufficient. We opined that the petition did not meet the requirements of K.S.A. 1985 Supp. 25-3602 as the petition did not contain the recital above the spaces for signature as specified in the statute. In addition, we stated that a petition which refers to a resolution different than the one it opposes can have no effect on a later resolution. In other words, the petition, which specifically refers to the January 15th resolution, cannot be used to challenge the resolution passed on March 3rd.

The question now submitted for our opinion is whether the Board can pass a substitute capital outlay resolution during the forty day time period that a petition may be submitted challenging the mill levy proposed by a preceding resolution. The persons who circulated the petition and their attorney maintain that a substitute or superseding resolution is

legally invalid as it "cuts off" the public's right to petition a public vote.

Article 6, §5 of the Kansas Constitution provides that "[l]ocal public schools . . . shall be maintained, developed and operated by locally elected boards" Boards of education are vested with authority to operate public schools in accordance with the statutes of this state. Blaine v. Board of Education, 210 Kan. 560, 564 (1972). Pursuant to K.S.A. 72-8801, a board of education may pass a resolution authorizing a capital outlay levy for a period not exceeding five years in an amount not to exceed four mills. No levy can be made unless the resolution is in the form specified by the statute. The resolution must be published once a week for two consecutive weeks. Then, if "no petition . . . is filed . . . the board of education may make the tax levy specified in the resolution." K.S.A. 72-8801. (Emphasis added.)

K.S.A. 72-8801 also provides that the voters in the school district may petition to require the capital outlay levy question to be submitted to the voters of the district for approval. The procedure is outlined in the mandatory resolution contained in the statute:

"The tax levy authorized by this resolution may be made, unless a petition in opposition to the same, signed by not less than 10% of the qualified electors of the school district, is filed with the county election officer of the home county of the school district within 40 days after the last publication of this resolution. In the event a petition is filed the county election officer shall submit the question of whether the tax levy shall be authorized to the electors in the school district at an election called for the purpose or at the next general election, as is specified by the board of education of the above school district." (Emphasis added.)

Thus, an election on a capital outlay resolution is not authorized until a petition is filed with the county election officer.

The persons who circulated the petition in question claim that the Board should not be able to pass a substitute resolution because their contractual and constitutional rights to petition their government are violated. There is no law which prohibits a Board from passing a substitute capital outlay resolution. Once a petition challenging a resolution is filed, however, an election must be called on that question.

"When a valid petition is presented to the authority authorized to call the election, it is mandatory under most statutes for that authority to order an election." 26 Am.Jur.2d Elections §188.

See K.S.A. 72-8801. Therefore, a Board may pass a substitute capital outlay resolution during the forty day time period following the last publication of the first resolution. Once a valid petition is filed, however, the Board may not pass a substitute or superseding resolution as an election must be held on the challenged resolution. While the people have a right to petition the government (Kansas Constitution, Bill of Rights §3), there is no right to an election on a proposed capital outlay mill levy until the statutory filing requirement has been met.

Passage of a substitute resolution by the Board before a petition concerning the first resolution is filed does not violate the right to petition, it prevents an election on the first resolution. The voters then have the right to petition for an election on the substitute resolution. Theoretically, board members could pass numerous substitute resolutions to prevent a vote on a proposed mill levy. As a practical matter, however, board members would not continue such tactics as revenues sought by the board would be delayed indefinitely. In addition, school board members are elected representatives of the people whose continuation in office is subject to the powers of the ballot box.

We determined in Attorney General Opinion No. 86-51 that the petition filed with the county election officer cannot be used to challenge the resolution passed by the Board on March 3, 1986. In order to bring this proposed mill levy to a vote, a new petition must be filed within forty days after the last publication of the substitute resolution. It is noted that the substitute resolution passed by the Board on March 3 was published as passing on March 4. This does not make the

resolution invalid as it is in substantial compliance with the requirements of K.S.A. 72-8801.

In summary, it is our opinion that a board of education may pass a substitute capital outlay levy resolution during the forty-day time period following the last publication of a resolution. Once a petition has been filed with the county election officer challenging a capital outlay levy resolution, a substitute resolution may not be passed as an election must occur on the challenged resolution.

Very truly yours,



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