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ATTORNEY GENERAL OPINION NO. 88-121

Harold T. Walker
City Attorney
Ninth Floor, Municipal Office Building
One Civic Center Plaza
Kansas City, Kansas 66101

Re: Constitution of the State of Kansas--Miscellaneous--Membership or Non-Membership in Labor Organizations

Synopsis: In our opinion, adoption of the Kansas City Plan, Inc., as an affirmative action program for the city of Kansas City would not violate Article 15, Section 12 of the Kansas Constitution (commonly known as the "right to work amendment") or the Equal Protection Clause of the United States Constitution. Cited herein: Kan. Const., Art. 15, §12; U.S. Const., Amendment Fourteen.

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Dear Mr. Walker:

You request our opinion as to the legality of a contractual agreement between the city of Kansas City, Kansas, and certain parties who have established the Kansas City Plan for inclusion of minorities/women in construction (K.C. Plan, Inc.). Specifically, you ask whether the agreement, which is attached hereto as Exhibit 1, violates Article 15, Section 12 of the Kansas Constitution (commonly known as the right to work amendment) or the Equal Protection Clause of the United States Constitution.

The Kansas City Plan, Inc. is an agreement between the greater Kansas City Building and Construction Trade Council (AFL-CIO), the General Specialty Contractors Association, parties representing those concerned with minority and female community issues, and individual employers signatory to collective bargaining agreements. The basic agreement constitutes an open contract whereby individual employers signatory to collective bargaining agreements with an AFL-CIO recognized bargaining entity may elect in writing to join the parties comprising the plan. The plan is certified by the U.S. Department of Labor as an affirmative action plan, and is administered through a collection of committees comprised of members of the various parties to the agreement. The union, employer's association, individual employers, and coalition have jointly adopted the plan as an affirmative action agreement ostensibly to establish an affirmative action program for increasing minority/female participation in the apprentice programs (and employment) of the building and construction industry of the greater Kansas City area.

Under the Kansas City Plan agreement, no entity would be eligible to perform any city construction work unless it was certified as a participant in the Kansas City Plan, Inc. Thus, by agreeing to this affirmative action plan, the city would require, prior to bidding upon building and construction contracts, that the provider of such services be certified by the plan as in compliance with their standards. As a condition precedent to such certification, paragraph 20 of the agreement prescribes that the Kansas City Plan, Inc. shall not certify any employer who is not signatory to a collective bargaining agreement with the applicable union craft. Thus, while contractors seeking certification would not be required to maintain a "closed shop", they would be required to have a collective bargaining agreement which mandates payment of union wages and benefits.

Article 15, section 12 of the Kansas Constitution (commonly known as the right to work amendment) provides as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of membership or non-membership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of

> membership or non-membership in any labor organization."

While the Kansas Supreme Court has held that the above-quoted constitutional provision prohibits closed shop, union shop, and agency shop provisions, Higgins v. Cardinal Manufacturing Co., 188 Kan. 11 (1961), it has not had an occasion to consider a provision similar to paragraph 20 of the Kansas City Plan Agreement. However, in our judgment such a clause does not run afoul of the right to work amendment. Specifically, no employee of a contractor seeking city business is compelled to join a union, nor is such an employee refused employment on the basis of his or her union status. In our opinion, employees of non-union contractors who are unable to work because their employer is unable to obtain certification are out of work not because they are not union members, but because their employer has not signed a collective bargaining agreement. See Trowle Trades Employees Health and Welfare Trust Fund of Dade County, et al. v. Edward L. Nezelek, Inc., 645 F.2d 322, 327 (5th Cir. 1981).

Your second question is whether a public entity which signs the Kansas City Plan Agreement violates the Equal Protection Clause of the United States Constitution. Specifically, you indicate that the issue is whether the agreement that requires a public entity to deal with only those businesses that are signatory to a collective bargaining agreement denies to the those persons and businesses not signatory to any bargaining agreement (or not signatory to an AFL-CIO bargaining agreement) equal protection of the law.

In response, we first note that two standards have generally been used to determine whether state legislation violates the federal equal protection clause. Ferguson v. Garmon, 643 F.Supp. 335, 338 (D. Kan. 1986) provides:

> "The Equal Protection Clause generally provides that all persons similarly situated should be treated alike. Edwards v. Valdelz, 789 F.2d 1477, 1482 (10th Cir. 1986). (Citing Pyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Traditionally, two standards have been used to determine whether state legislation runs afoul of that clause. The first, and by far the most commonly

> applied, is the rational basis test. Under this test, the court seeks only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. Pyler, 457 U.S. at 216, 102 S.Ct. at 2394.
>
> "The second standard labeled strict scrutiny, is applied when the challenged classification involves a suspect class or impinges upon a fundamental right."

In our judgment, application of the strict scrutiny standard to the features of the Kansas City Plan would not be appropriate. In this regard, a suspect classification is not involved, nor is a fundamental right implicated:

> "We begin with the basic that no person possesses a constitutional right to public employment. NAACP v. Allen, supra, 493 F.2d at 618; Bridgeport, Inc., v. Bridgeport Civil Service Commission, 482 F.2d 1337 (2d Cir. 1973); see San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 29-34, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). ('It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.' Id. at 33, 93 S.Ct. 1297). Thus, operation of the City's affirmative action plan denies no one any specific rights conferred by the Constitution. Nor is it the purpose of affirmative action to require any one who lacks job related qualifications be employed. Plaintiffs in this case do not contend that the City's plan compels hiring or promotion of unqualified individuals, and the four Fire Captains promoted to the position of battalion chief each were on the list of those qualified for that position." Germarn v. Kipp, 429 F.Supp. 1323, 1333 (1977).

In accordance with the foregoing, it is our opinion that the rational basis test is the appropriate standard of review in this instance. Applying said test, it appears that adoption

of the Kansas City Plan bears a fair relationship to a legitimate public purpose, i.e. increasing minority/female participation in the construction industry in Kansas City. The United States Department of Labor has certified the program as an affirmative action plan and participation of local government in such an undertaking would appear to be a reasonable method to achieve the stated objective in light of the various plan procedures designed for recruitment, training and employment of females and minorities. Thus, in our judgment, adoption of the plan would not violate the Equal Protection Clause of the United States Constitution.

In summary, it is our opinion that adoption of the Kansas City Plan, Inc. as an affirmative action program for the city of Kansas City would not violate Article 15, Section 12 of the Kansas Constitution (commonly known as the "right to work amendment") or the Equal Protection Clause of the United States Constitution.

Very truly yours,

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RTS:JLM:TRH:jm